

Preliminary Reference and the Hungarian Constitutional Court: A Context of Non-Reference

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“Participation is not an end in itself; it must promote human rights, welfare and security.”¹

A. Introduction: The Context of Non-Reference

Jiri Zemanek, Professor at Charles University, Prague, asks what conclusions may be drawn from the current state of acceptance of the European Union (EU) law doctrine by the constitutional courts of the new Member States for their performance in the agenda of preliminary rulings. What can they learn from the experience of the old Member States? Should they follow the practice of the Austrian *Verfassungsgerichtshof* (Constitutional Court), which referred its first question in 1999, four years after its accession, and later repeated it several times? Or should they follow the most active Belgian Cour Constitutionnelle?² Should Hungary follow the practice of the Italian Constitutional Court, Lithuania, France, Spain, or Germany? Having reviewed the case law of the Hungarian Constitutional Court and the scholarly analysis in search of the “missing links,”³ this study wishes to contribute to the diverse range of ideas concerning European “rule of law” integration and constitutional court contributions to it.

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¹ Verfassungsgerichtshof [VfGH] [Constitutional Court], July 14, 2014, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSLG] No. 145/2010 (Austria).

² Jiri Zedeneck, *The Constitutional Courts in the New Member States and the Uniform Application of European Law*; Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?*, Tilburg Institute for Comparative and Transnational Law Working Paper (TICOM) 1 (2009).

³ See articles in Part Four of this *Special Issue*.

Hungary acceded to the EU in 2004.⁴ At the time of its accession, the goal was clearly to achieve perfect coherence between Hungarian law and EU law.⁵ As a starting point, the Parliament amended the Constitution and added a new Article 2/A.⁶ The jurisprudence of the Constitutional Court that will be elaborated later on in this article was mostly based on this provision.

Article 2/A. of the former Constitution stated that:

By virtue of treaty, the Republic of Hungary, for the purposes of its participation as a Member State in the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as the “European Union”); these powers may be exercised independently or through the institutions of the European Union.⁷

The new Fundamental Law, which has been in effect since 1 January 2012, states in Section E paragraph (1) that “Hungary shall contribute to the creation of European unity, in pursuit of the greatest freedom, well-being and security for the peoples of Europe.” Paragraph (2) adds that:

[b]y virtue of treaty, Hungary, for the purposes of its participation as a Member State in the European Union, may exercise certain powers granted by the Fundamental Law jointly with other Member States, through the institutions of the European Union, to the extent necessary in connection with the rights and obligations conferred by the founding treaties.

⁴ In this article, I will use the terms “Community law” and “EU law” according to their chronology. I use the term EU law for general assessments as well.

⁵ For more information about this, see EURÓPAI KÖZJOG ÉS POLITIKA [European Public Law and Policy] 775–89 (Tamás Kende & Tamás Szűcs eds., 2006).

⁶ It is disputed whether constitutional amendment was an ultimate necessity for accession. See, e.g., László Kecskés, *Az EU-Csatlakozás magyar alkotmányjogi problémái* [Constitutional Law Issues of Hungary's Accession to the EU], 51 *MAGYAR TUDOMÁNY* 1081–82 (2006).

⁷ See KENDE & SZŰCS, *supra* note 5, at 769–775 (regarding the interpretation of Article 2/A of the Constitution).

Paragraph (3) states that “[t]he law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in paragraph (2).” And paragraph (4) of this Section stipulates that “[t]he authorisation to recognise the binding nature of an international agreement referred to in paragraph (2) shall require a two-thirds majority of the votes of the Members of Parliament.”⁸

Initiating a preliminary ruling procedure is a possibility, if not an obligation, for the courts of Member States that is aimed at developing the unified interpretation and enforcement of EU law. Judges are free to decide on whether an autonomous and uniform interpretation by the European Court of Justice (CJEU) is necessary to decide the case. Taking all preliminary references, it is rare that courts question the validity of a piece of legislation; most of the references, rather, ask for the interpretation of EU law.⁹ In Hungary, of the 77 preliminary references up until 2013, only 15 were initiated by the *Curia* (the Supreme Court), more than 4/5 were referred by lower courts (from the middle level of the judicial hierarchy), and no references were made by the Constitutional Court.¹⁰ But can the Hungarian Constitutional Court be considered at all a court of referral under Article 267 of the Treaty on the Functioning of the European Union (TFEU)? If yes, is it to be considered a court of last instance? Can the Hungarian Constitutional Court be in a situation in which the need to apply and thus interpret EU law emerges and becomes relevant for the purpose of deciding the case? If yes, what are these cases?

In this article, I will describe how the Constitutional Court, by interpreting the Constitution and the Fundamental Law, has refrained from determining the specific consequences of EU accession for the relationship between the constitution and EU law. I explain that the Constitutional Court has neither elaborated comprehensively its views on its proper role in achieving the constitutional aim of contribution to the European rule of law integration. I argue that there was, and there certainly will be, case and controversy when it becomes necessary for the Constitutional Court to take a stand on this matter of principle. When the occasions of decision occur, the institution of the preliminary reference may be of help for the Constitutional Court in finding a cooperative solution that is acceptable both for

⁸ See Alkotmánybíróság (AB) [Constitutional Court] AK.2012.11.22 (Hung.). The Constitutional court, conducting an abstract interpretation procedure, determined what treaties may fall within the scope of Section E of the Fundamental Law.

⁹ Of the courts of the Member States joining the Union in 2004, only one reference from Malta in 2012 (C-221/09, *AJD Tuna*, 2011 E.C.R. I-01655) claimed the invalidity of an EU regulation. In this case the CJEU could not identify any points where invalidity could occur. See Réka Somssich, *Előzetes döntéshozatali eljárások a számok tükrében—a 2004 óta csatlakozott országok bíróságai által kezdeményezett előzetes döntéshozatali eljárások 10 évvel a csatlakozás után* [The Practice of Referring Cases in Member States Joining the Union in 2004 in the Last 10 Years], in *A MAGYAR BÍRÓSÁGI GYAKORLAT AZ ELŐZETES DÖNTÉSHOZATALI ELJÁRÁSOK KEZDEMÉNYEZÉSÉNEK TÜKRÉBEN* 31, 42 (András Osztovits ed., 2014).

¹⁰ *Id.* at 33. It is also found at the webpage of the Curia (the supreme court of Hungary).

observing the Hungarian constitutional identity and promoting common constitutional goals as Member States of the Union.

My aims are at once descriptive, analytical, and critical. With regard to Hungarian constitutional adjudication several claims are worth discussing. How should the Hungarian Constitutional Court act in case of a claim of unconstitutionality against a certain piece of EU law (1) or Hungarian law that is based on an EU secondary legislation (2)? Why does it not violate the Fundamental Law if a Hungarian piece of legislation is against EU law (3)? What if a new Treaty provision on the extension of EU competence raises the constitutional issue on the extent of sovereignty transfer (4)? As the editors have taken on the challenge of analyzing the role of the preliminary reference procedure in the law of constitutional courts, I will refrain from giving a general overview of all relevant Hungarian Constitutional Court cases on the relationship between Hungarian law and EU law.¹¹ I will focus, rather, on how the preliminary reference procedure may or may not play a role in the aforementioned cases.

B. The Constitution and the Fundamental Law as the Starting Point

The oft-criticized EU clause (Article 2/A.) of the former Constitution¹² textually did not much help the Constitutional Court in answering constitutional issues raised by petitions, because this clause focused on the criteria of accession rather than on the consequences of it. Although the Constitutional Court theoretically did not limit the scope of its examination under Article 2/A to issues with direct impact on the original transfer of sovereignty,¹³ in effect it took a cautious approach in further interpretation.¹⁴

¹¹ For the latest analyses of all relevant decisions of the Hungarian Constitutional Court in English, see Flora Fazekas, *EU Law and Hungarian Constitutional Court*, in *EUROPEAN UNION LAW IN HUNGARY: INSTITUTIONS, PROCESSES AND THE LAW* 32–73 (Márton Varju & Ernő Várnay eds., 2014). I will on many occasions use these short analyses in chapter B to highlight the essence of relevant jurisprudence.

¹² For a summary, see IMRE VÖRÖS, CSOPORTKÉP LAOCOONNAL: A MAGYAR JOG ÉS AZ ALKOTMÁNYBÍRÓSÁG VIVÓDÁSA AZ EURÓPAI JOGGAL [Laocoon Group Photo: The Hungarian Law and Constitutional Adjudication in the Light of European Law] 95–111 (2012).

¹³ Prior to the accession the Constitutional Court analyzed the possibility of limiting sovereignty in the following decisions. See AB AK.1999.11.26; AB AK.2011.2.28; AB AK.2001.1154; AB AK 1998.6.25.

¹⁴ See András Sajó, *Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Shying Away from EU Supremacy*, 3 *ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN* 351–70 (2004); Renáta Uitz, *EU Law and the Hungarian Constitutional Court: Lessons of the First Post-Accession Encounter*, in *APRÈS ENLARGEMENT. LEGAL AND POLITICAL RESPONSES IN CENTRAL AND EASTERN EUROPE* 41–63 (Wojczech Sadurski et al. eds., 2006). In a large number of countries whose relevant constitutional rules are similar, constitutional courts adopted decisions discussing these issues much more exhaustively, e.g. Germany, Italy, Spain, or the Czech Republic. A comparative analysis is given by FLÓRA FAZEKAS, *A MAGYAR ALKOTMÁNYBÍRÓSÁG VISZONYA A KÖZÖSSÉGI JOG ELSŐBBSÉGÉHEZ EGYES TAGÁLLAMI ALKOTMÁNYBÍRÓSÁGI FELFOGÁSOK TÜKRÉBEN* [The Approach of the Hungarian Constitutional Court to the Supremacy of Community Law Compared to the Various Approaches of Other Member States' Constitutional Courts] 175–81 (2009).

Article 6 paragraph 4 of the former Constitution declared that “[t]he Republic of Hungary shall contribute to the creation of European unity, in pursuit of the greatest freedom, well-being and security for the peoples of Europe.”

The corresponding provisions of the new Fundamental Law are clearly intended to be of consolidating nature, as beyond some linguistic fine-tuning, only one new rule is added to the previous Constitution version: that EU law may set generally applicable rules of conduct. The fact that the EU may adopt such rules was already recognized, in any case, by ordinary court practice:

Article 2/A paragraph (1) of the Constitution, by limiting the exclusive power of legislation, allows Community law adopted pursuant to the founding treaties of the European Union to grant rights to and impose obligations on persons under the sovereignty of a Member State without a separate legal act of the Member State.¹⁵

The above-mentioned supplementary sentence of the Fundamental Law therefore expressed an already acknowledged characteristics of EU law at a constitutional level in domestic law. Although the Constitutional Court in a 2012 decision¹⁶ stated that it regards the new Section E of the Fundamental Law as almost identical to the provision of the previous constitution, and thus the former case law remained relevant after 2012, it is open to debate whether the Constitutional Court may still reinterpret in future jurisprudence its competences with regard to the application of EU law and harmonization issues referring to the new Fundamental Law.

According to the official reasoning of Section E of the Fundamental Law, the EU has an independent legal system established by international treaties, and under EU law it is possible to define rights and obligations directly for persons and entities, and some rules are directly applicable in the territory of the Member States. As Hungary’s EU membership has a significant impact on the order and framework of the exercise of public power in Hungary, and as EU law very much determines the rights and obligations of Hungarian persons and legal entities, it is necessary for the Fundamental Law to provide a specific authorisation for exercising powers within the framework of the EU (under organizing principles affecting the entire Fundamental Law). This rule allows Hungary to exercise some of its powers through the institutions of the EU as a Member State. The relevant specific powers must be identified by an international treaty, but the extent of the exercise

¹⁵ Legfelsőbb Bíróság (LB) [Supreme Court] BH 2006.422. Translated by the author.

¹⁶ AB AK 2012.8.22.

of powers through the institutions of the EU may not exceed the extent necessary with regard to the international treaty, and may not involve more powers than those of the Hungarian state under the Fundamental Law.¹⁷

C. The Constitutional Court as a Court of Referral

Referring questions for a preliminary ruling cautiously might not have been in the center of scholarly debates prior to 2012, because it was not clear either from the regulation and the case law of the Constitutional Court or from the interpretation of the CJEU if the Hungarian Constitutional Court could at all, at that time, be considered a court or tribunal within the meaning of Article 267 TFEU.¹⁸ However, the Hungarian Fundamental Law has, in Article 24, significantly modified the competences of the Constitutional Court.¹⁹ I argue that having regard to its new competences, the Court qualifies as a court of referral under Article 267 TFEU.

Among several changes, the new Fundamental Law introduced three types of constitutional complaint and abolished the former *actio popularis*. The lively system of *actio popularis* had entailed the possibility that anyone could turn to the Constitutional Court claiming that a law, legal provision, or a regulation was contrary to a constitutional provision. The petitioner could also request the annulment of that piece of law in this abstract ex post facto review procedure. A constitutional complaint under the former jurisdiction was to be lodged only in the case of a violation of rights caused by the application of an unconstitutional norm.

The aims of the new constitutional complaint mechanisms with the introduction of the German type constitutional complaint is to review not only the constitutionality of a norm applied in a given court case but also to protect against all violations of rights caused by ordinary court decisions. Furthermore, the new complaint system claims to provide individual remedy against unconstitutional law in cases where no other judicial remedy is available.

A new cardinal act governs the Constitutional Court.²⁰ Under the new legislation, the primary competence of the Constitutional Court has shifted from the *ex-post facto* abstract review of laws to the adjudication of constitutional complaints, granting remedies in

¹⁷ Translated by the author.

¹⁸ See FAZEKAS, *supra* note 14, at 75.

¹⁹ For the elevated importance of the competence of constitutional courts to refer a case to the CJEU, see Martinico, *supra* note 2, at 4–6.

²⁰ Act CLI of 2011 on the Constitutional Court.

concrete cases when fundamental rights of individuals or legal entities are violated.²¹ Under the new regulation, petitioners can highlight whether, in a particular case, the application or non-application of EU law, or the incorrect interpretation of EU law, has caused the violation of their constitutional rights. They may further claim that the EU law applied in their case violates their constitutional rights. It is also possible to argue that a Hungarian piece of legislation founded on EU law (e.g., implementing a directive) violates their constitutional rights. The petitioner may claim that the CJEU is the court of last instance in her case therefore her right to effective remedy is violated by the decision of the non-referring domestic court.

As similar questions might be addressed to the Hungarian Constitutional Court after the new Fundamental Law has entered into force, the Court has definitely diminished the chance of avoiding situations where considering the referral is unavoidable. On the other side, taking into account the new competence of the Constitutional Court, the CJEU, following its case law, could hardly refuse the acknowledgment of the Constitutional Court as court of referral.

D. The Basic Findings of the Constitutional Court Decisions Regarding its Task in EU-Related Constitutional Matters

I. Implemented Secondary Legislation and the Role of the Constitutional Court

Following the accession, Decision 17/2004 (V. 24.) CC²² was the first occasion when the Constitutional Court had the opportunity to elaborate on how and to what extent it is possible to review the constitutionality of a norm based on EU secondary legislation, namely on a directive. When regulating agricultural surplus stocks a contradiction arose between the Constitution and the Hungarian legislation implementing the EU Commission Regulation. The Constitutional Court conducted a standard *ex post facto* review of constitutionality and did not take into consideration that the Hungarian legislative measure was partly based on obligatory standards imposed by the Commission Regulation. The review procedure against the Act of 2004 on agricultural surplus stocks was initiated by the President of the Republic. The domestic act ordered that the owners of agricultural surplus stocks had to pay a certain fee if they had an impermissible quantity of products on the date of the accession. Because, due to several amendments, the exact content of the EU requirement was unclear up until a few months before Hungary's accession, the lack of due time for preparation of the targeted owners was partly caused by the Commission Regulation itself.

One of the claims of the President was that the Hungarian law had a retroactive effect that violated the principle of legal certainty. The Constitutional Court in this case, however, did

²¹ Available at www.mkab.hu/statisztika/2014.

²² AB AK 2004.24.17.

not take into consideration the relevant Commission Regulation and skipped the problem of the relation between the two legal regimes and its role in handling conflicts. The Court noted that the relevant rules of EU law became mandatory with the date of the accession, but claimed that the petitioner required the examination of the Hungarian legislation. In the light of this observation, the Court conducted the standard review and declared several dispositions of the Hungarian regulation to be unconstitutional.

This decision became a precedent for further cases in which the Hungarian legislation transposed EU law. This tendency in the practice of the Constitutional Court might be called the indirect constitutional review of Commission Regulations, as in cases of unconstitutionality the EU law in fact does not apply in Hungary.²³ Had the Constitutional Court acknowledged that the Hungarian law to be judged was related to EU law, it should have considered supremacy and the relevant CJEU case law, as well as the question of whether it should turn to the CJEU for a preliminary ruling. This, however, would have led to applying special procedures and special assessments of what constitutionality as such is in a case of a piece of Hungarian legislation based on EU law. At the time of the decision, the Constitutional Court was certainly not prepared to bring a determined decision concerning the constitutional implications of EU membership in this regard.²⁴

It was only in 2008, four years after the accession, that reflections on the role of the CJEU first appeared in the case law of the Constitutional Court.²⁵ The first decision dealt with the division of competences between the Constitutional Court and the CJEU.²⁶ The petitioner argued that the obligation that a referring Hungarian court has to notify the minister of justice as well when referring the question to the CJEU breached the Constitution's Europe-clause, because it was inconsistent with ex Article 234 EC treaty (now Article 267 TFEU). The Hungarian Constitutional Court denied its competence to rule on the matter, and continued, "according to the rules of the Community, a decision on the compatibility of the domestic act under review with Community law falls within the competence of EU institutions and as the last instance the European Court of Justice."²⁷ The Court referred to

²³ See Fazekas, *supra* note 11, at 53.

²⁴ *Id.*

²⁵ See the case law in more detail in Marton Varju & Flora Fazekas, *The Reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary*, 48 COMMON MKT. L. REV. 1945–84 (2011). A good counter-example for the standpoint of the Hungarian Constitutional Court is of the Austrian Constitutional Court. The 2012 decision of the Austrian Constitutional Court is available in English at http://www.vfgh.gv.at/cms/vfghsite/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtcharta_englis_h_u466-11.pdf.

²⁶ AB AK 2008.61. For the critical analysis of the decision and other relevant decisions, see MÁRTA DEZSÓ & ATTILA VINCZE, *MAGYAR ALKOTMÁNYOSSÁG AZ EURÓPAI INTEGRÁCIÓBAN [Constitutionality in Hungary Within the Framework of European Integration (2012)]*.

²⁷ AB AK 2007.281; AB AK 2005.770.

the infringement procedure and the preliminary ruling procedure and acknowledged the competence of the European Commission and the CJEU, even in matters of possible conflict between the two legal orders, the non-conformity of Hungarian law with EU law.

Controversially enough, the Constitutional Court mentioned in the same lines that EU law (i.e., ex Article 234 EC Treaty and the relevant case law of the CJEU) leaves the definition of the relevant domestic procedural rules on preliminary references with the Member States, with the reservation that domestic rules cannot exclude the possibility of preliminary reference.²⁸ After these considerations, the Court however surprisingly concluded within its own competence that the Hungarian procedural rules on preliminary references were not contrary to EU law in its view.²⁹

The application of the doctrine of *acte claire* was first raised in the case on the agricultural CAP Single Payment Scheme in a dissenting opinion. The procedure in 2010 was also initiated by the President of the Republic, who claimed that the Hungarian Act on Single Payment Scheme for Direct Support Payments under the Common Agricultural Policy (CAP) was unconstitutional. The President of the Republic claimed that the domestic act did not guarantee an adequate period of preparation. Agricultural land owners who had leased their land evidently could not take into consideration the new regulation on the support of certain agricultural activities and domestic lands.

In its Decision 142/2010 (VII. 12.) CC,³⁰ just as in the case on agricultural surplus stocks, the Constitutional Court argued that the review may concentrate only on the domestic piece of legislation. This interpretation allowed the Constitutional Court to consider the petition of the President of the Republic on its merits. The Court applied again a standard review of constitutionality; it annulled the relevant provisions of the domestic act. The majority opinion of the Constitutional Court did not assess the constitutionality of the contested EU Regulation, openly did not interpret it, and therefore did not discuss the benefits of a preliminary ruling. The Constitutional Court furthermore did not reflect on the jurisprudence of other member states and the ECJ itself, finding the examined piece of legislation to be unambiguous.³¹

The dissenting opinion, however, argued that the majority ruling implicitly engaged in the interpretation of the relevant EU Regulation. It held that it was unacceptable that the Court had failed to consider if it was necessary to ask for a preliminary ruling concerning the interpretation of the Regulation. Logically, as the dissenting opinion emphasized, the

²⁸ The Court referred to Case C-166/73, Rheinmühlen, 1974 E.C.R. 33.

²⁹ See the critical analyses of this case and of other relevant case law in detail in FAZEKAS, *supra* note 14, at 32–73.

³⁰ AB AK 2010.12.142.

³¹ See FAZEKAS, *supra* note 14, at 75.

Constitutional Court is not capable of judging the margin of appreciation of the Hungarian legislator with regard to the interpretation and due implementation of the Regulation, if it does not engage in the interpretation of the Regulation. The dissenting opinion argued that the Court implicitly indeed recognized the *acte clair* principle in this case, because otherwise it had been its duty to ask for the preliminary ruling of the CJEU.³²

In 2008, the EUIN Agreement decision³³ interpreted EU law without referring either to clear frameworks of interpretation and the position of EU law or to the task of the Constitutional Court related to EU law. The Agreement between the EU, Iceland, and Norway on extending the scope of application of the surrender procedure according to the European Arrest Warrant (the so-called EUIN Agreement) was brought before the Court by the President of the Republic. He claimed that the exemption made by the Agreement was incompatible with the principle of *nullum crimen sine lege* (Article 57(4)). The Hungarian Constitutional Court stated that EU rules on the expedited preliminary ruling procedure guarantee that the court that is entitled to issue and receive a European Arrest Warrant obtains authentic interpretation of the European Arrest Warrant Framework Decision within a reasonable time from the CJEU. It follows from the words of the Constitutional Court that it is a constitutional obligation of ordinary courts that they turn to the CJEU if a dispute concerning the interpretation and application, and potentially the validity, of EU law is placed before them. Furthermore, they are bound by the interpretation of the CJEU.³⁴ But what about the Constitutional Court itself?

The Hungarian Constitutional Court, when deciding the case, did not take into consideration the fact that the CJEU had declared the European Arrest Warrant Framework Decision compatible with the principle of *nullum crimen sine lege*. It emphasized, furthermore, that its decision did not affect the EUIN Agreement itself. However, as the EUIN Agreement is strictly linked to the European Arrest Warrant Framework Decision, the decision suggests that there are constitutional rules in domestic law that cannot be violated by the EU when legislating or concluding international agreements.³⁵

Decision 744/B/2004³⁶ was about the 2004 Act on Firearms and Ammunition based on the 1991 EU Directive on the control of the acquisition and possession of weapons. The Hungarian Constitutional Court examined the domestic act in an ex post facto review

³² Dissenting opinion of Judge Laszló Kiss, I Chapter.

³³ AB AK 2008.12.32.

³⁴ See the analyses of the decision in Péter Kovács, *A la recherche du bon chemin... - ou l'affaire du mandat d'arrêt européen devant la Cour constitutionnelle*, in *LA FRANCE, L'EUROPE ET LE MONDE* 363–79 (Jean-Denis Mouton ed., 2008).

³⁵ See Fazekas, *supra* note 11, at 56.

³⁶ AB AK 2004.744.

procedure and found that it was constitutional as it was proportionate with the aims of the domestic regulation. Although the Court again did not deal with the original EU Directive, it implicitly suggested that the aims and means of the EU regulation were in harmony with the protection provided by the Hungarian Constitution.

In sum, in cases where the review of constitutionality aimed at examining the Hungarian implementing legislation, the Constitutional Court refrained from taking into consideration the influencing nature of EU legislation. In the course of the standard review of constitutionality, the Constitutional Court with more or less intensity noted the underlying EU legislation, but this did not determine the decision of the Court about the constitutionality of the examined Hungarian law.³⁷ The Court did not consider asking for a preliminary ruling, because the sole discussion of the relevant EU secondary law did not influence the decision, meaning that there was no overwhelming need to have an autonomous interpretation of the original EU norm. However, this justification, as I will discuss in part C, is not quite convincing if we take into account the fact that the Constitutional Court in many cases should have separated the essential and mandatory content of EU law and other parts of the domestic legislation where domestic legislative organs had a margin of appreciation in implementation.

II. The Constitutional Review of EU Law (Especially Secondary Law with Direct Effect) and the Exclusion of the Role of the Constitutional Court

Regarding the lack of competence to review the constitutionality of EU law, the Constitutional Court formulated its strong position quite early on. In the Lisbon decision 143/2010 (VII. 4.) AB, which will be analyzed in more detail below, the Court acknowledged that the Act on the Constitutional Court does not regulate its competences relative to EU law. As I will describe in part III, an exception is the *a priori* review of EU Founding Treaties and their amendments which can fall under review through the promulgating act. The Constitutional Court in line with the interpretation of the CJEU holds that the CJEU has exclusive competence to decide about secondary legislation.

Interestingly, the Constitutional Court has never developed arguments concerning possible exceptions that may authorize the review in case of potentially *ultra vires* EU legislation or EU law possibly infringing certain fundamental constitutional provisions.³⁸ The only reference to the constitutional boundaries of EU law is found in the Lisbon Decision. It holds that European integration cannot result in the breach of the principles of democracy, a state based on the rule of law, and popular democracy.

³⁷ A late exception could be AB AK 2012.4.32 (regarding the constitutionality of student contracts where the Constitutional Court made efforts to reach a consistent interpretation of EU law and domestic measures).

³⁸ See Fazekas, *supra* note 11, at 59.

The Constitutional Court never went further than this, although the transfer of competence (Section E paragraph 2) is to be interpreted as a domestic constitutional limitation on the law-making powers of the EU. Section E paragraph 3 of the Fundamental Law declares that EU law may stipulate generally binding rules of conduct that are subjected to the conditions set out in paragraph (2). The Constitutional Court has never claimed so far the competence to review if a secondary EU legislation violates Treaty provisions and is therefore contrary to Section E) of the Fundamental Law. In this case preliminary reference on invalidity would be unavoidable.

III. Treaties and the Role of the Constitutional Court

Decision 143/2010 (VII. 14.) CC³⁹ offers the most comprehensive interpretation of the extent of the transfer of sovereignty and the role of the Constitutional Court in reviewing the constitutionality of the division of competence between Hungary and the EU. The petitioner requested the *a posteriori* examination of the unconstitutionality and also the annulment of the Act of Parliament implementing the Treaty of Lisbon. In the petitioner's opinion, certain rules of the Treaty of Lisbon restricted Hungary's sovereignty to an extent that, if their binding nature was recognized, the Republic of Hungary "would no longer qualify as an independent state governed under the rule of law."

The Constitutional Court conducted a substantive constitutionality review, the final conclusion of which was that the Act of Parliament promulgating the Treaty of Lisbon was not unconstitutional because the constitutions of Member States could still exercise control over the operation of the EU. The principles of subsidiarity and proportionality would remain valid, and they ensure that the parliaments of Member States would still have the power to review draft legislation. Also, Member States would have the right to initiate an action for annulment, citizens could turn to the institutions of the EU through a Citizens' Initiative, and the Charter of Fundamental Rights, which safeguards basic rights, now has the same value as the treaties.⁴⁰

Undoubtedly, the Constitutional Court made efforts to establish a constitutionality standard, but similarly to Germany's ruling on the Treaty of Lisbon, it could have discussed in much more detail whether the Hungarian state indeed confers, under Article 2/A of the Constitution, the power on the EU to establish new EU competences.⁴¹

³⁹ AB AK.2010.14.143.

⁴⁰ Section IV.2.5 of the Decision.

⁴¹ László Blutman, *Reagálás az első szám vitaindítójára - A Magyar Lisszabon-határozat: Befejezetlen szimfónia Luxemburgi hangnemben* [Reaction to the First Issue's Article That Sparked a Debate—the Hungarian Lisbon Ruling: Unfinished Symphony with a Luxembourgish Tone] 2 SZEMLE ALKOTMÁNYBÍRÓSÁGI 90, 98–99 (2010).

The Constitutional Court declared that

if the Constitutional Court found an Act of Parliament implementing such a treaty (i.e. a treaty amending the founding and amending treaties of the European Union) unconstitutional, the decision of the Constitutional Court establishing unconstitutionality may not have an effect on the Republic of Hungary's duties as a Member State of the European Union. The result of the Constitutional Court's decision is that the legislator must create a situation in which the Republic of Hungary is able to fully comply with its duties under EU law without violating the Constitution.

Although the Constitutional Court found that the final interpretation of the Founding Treaties and secondary legislation belonged to the competence of the CJEU, this did not prevent the Hungarian Constitutional Court from referring to certain provisions of the Lisbon Treaty connected to the case without providing or requiring their autonomous interpretation. In the Lisbon decision, this approach led to a rather superficial overview of the Lisbon Treaty's provisions on withdrawal from the EU, on the subsidiarity control mechanism, on the European Citizens' Initiative or on the Charter of Fundamental Rights. The Court did not consider the duty to refer these contested questions to the CJEU for autonomous interpretation first⁴² before applying them as reasoning to the constitutional decision.⁴³

In Decision 22/2012 (V.8.) CC, the Constitutional Court held, in a procedure aimed at the abstract interpretation of Section E paragraph (2) and (4) of the Fundamental Law, that:

the votes of two-thirds of the Members of the Parliament is required for the consent to be bound by an international treaty aimed at modifying or amending the rights and obligations originating from the founding treaties, provided that the treaty is aimed at jointly exercising further competences originating from the Fundamental Law. An international treaty can be, in particular, regarded as such, if Hungary is a party to it

⁴² It is worth mentioning that no other constitutional court asked for a preliminary ruling in the case of assessing the constitutionality of the Lisbon Treaty.

⁴³ The English language press release on the Lisbon Decision contains a reference to the fact that the Court used the theory of *acte clair*, but the decision itself did not contain this reference. Available at http://alkotmanybirosag.hu/letoltesek/en_0143_2010.pdf.

as the Member State of the European Union together with other Member States, and the treaty regulates subjects contained in the founding treaties, or it is aimed at implementing or supervising the founding treaties. The votes of two-thirds of the Members of the Parliament are not required for the consent to be bound by an international treaty, if the treaty would not result in exercising, jointly with the institutions of the European Union or with other member states, new competences originating from the Fundamental Law.⁴⁴

Although in this procedure related to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union the dilemma of asking for a preliminary ruling was not (and could not be) raised, the decision reinforces the former standpoint of the Constitutional Court, namely that it does not hold it necessary to engage in constrained interpretation, in interaction with the CJEU in these matters.

IV. Collision of EU law and Hungarian Law at Non-Constitutional Level and Consistent Interpretation—The Role of the Constitutional Court

The final group of cases in my assessment concerns the review of the constitutionality of certain Hungarian acts that are claimed to be incompatible with EU law. The Constitutional Court declared that it does not have the competence to review whether Hungarian sub-constitutional legal acts are incompatible with EU law. Nor does the Constitutional Court check the adequacy of the transposition of EU secondary legislation. The Constitutional Court argues that Article 2/A of the Constitution and consequently Section E of the Fundamental Law does not require that the Hungarian legislation be in full conformity with EU law. This is why the Constitutional Court, in applying the constitution, cannot say that a Hungarian legal instrument that is contradictory to compulsory EU legislation is unconstitutional.⁴⁵

However, a concurring opinion attached to Decision 72/2006 (XII. 15.) CC claimed that the Court should have determined the constitutional requirements that must be enforced even in those cases where, as a general rule, the Constitutional Court does not have competence. The concurring judge suggested that when the violation of constitutional rights is at stake, the Court should review whether the legislator violated an obligation flowing from EU law. The non-compliance of Hungarian legislation with EU law in other

⁴⁴ The official translation is found at the homepage of the Constitutional Court, available at http://www.mkab.hu/letoltesek/en_0022_2012.pdf.

⁴⁵ AB AK 2006.28.66; AB AK 2008.16.87; *see also* AB AK 2005.61; AB AK 2005.770; AB AK 2011.5.29; AB AK 2005.1053; AB AK 2006.16.72. Cases collected by FAZEKAS, *supra* note 14, at 64.

cases cannot belong to the competence of the Constitutional Court, because the analyses of non-compliance in all cases necessitate the interpretation of EU law which falls within the competence of the CJEU. This argument, laid out in the concurring opinion, has never appeared in a majority decision of the Constitutional Court.

The fact that the Constitutional Court's jurisprudence is strict about refusing this competence, relying on the textual interpretation of the constitution, leads to uncertainties in some court cases. These concern the applicable law and, in some cases, might harm parties when the EU law is more favorable for them, or when the non-compliance causes a violation of their rights such as the right to non-discrimination.⁴⁶

A decision of 2008 seemed to represent a slightly different stance regarding the possibility of transforming the question of non-conformity into a constitutional issue. The petitioner required the constitutional review of certain rules of the act on the preservation of nature. The provisions were based on the *Convention* on International Trade in Endangered Species of Wild Fauna and Flora Agreement (CITES) and an EU Regulation. The act regulated the keeping of birds taken from the wild and those born in captivity and used for falconry. The petitioners claimed that the uniform regulation of these activities breached the principle of equal treatment and the right to property.⁴⁷ Although the first question to assess was the constitutionality of the implementing Hungarian legislation, after deciding that the act was in conformity with the Constitution, the Constitutional Court examined the compatibility of the Hungarian provisions with EU law too. It declared the domestic measures to be in conformity with EU law.

The conduct of the Constitutional Court here does not amount to a radical change in the jurisprudence, as it did not say that in case of non-conformity of the Hungarian act with EU law a breach of the Constitution could be established. Rather, the Court turned to EU law, to the 1979 Directive, to find the meaning of 'falconry' in the Hungarian act and then to decide about constitutionality. The Court in this case ruled on the constitutionality of a Hungarian norm, relying in its interpretation on EU law. However, the Constitutional Court did not have problems with the interpretation of EU law and thus did not consider turning to the CJEU for a preliminary ruling.

Decision 32/2012 (VII. 3.) CC on the constitutionality of student contracts is also worthy of mention. The petitioner argued, among other claims, that the Hungarian legislation was incompatible with EU law. This argument was not rejected automatically by the Constitutional Court, on the basis that the Court does not deal with the pure contradiction

⁴⁶ See FAZEKAS, *supra* note 14, at 65.

⁴⁷ AB AK 2003.485.

of Hungarian law and the EU law. Rather, the Court referred to the obligation of consistent interpretation with EU law and examined the contradictions.⁴⁸

In sum, whilst the jurisprudence of the Constitutional Court on this issue is quite strict on the surface, it is not always consistent. The approach may change as well, because the composition of the Constitutional Court has changed significantly over the years.⁴⁹ If the Constitutional Court engages in harmonious (consistent) interpretation, asking for preliminary rulings will be unavoidable in certain cases. It will become necessary to distinguish and identify the cases of *acte clair* and *acte éclairé* and to recognize the cases in which it is necessary to ask the CJEU for a preliminary ruling.

E. In Search of the “Missing Link”

I. Theoretical Considerations About the Possible Task of the Constitutional Court in Harmonising EU Law and Domestic Law While Protecting the National Constitution

In the following part of the article, I will consider the critique presented in the Hungarian legal literature concerning the constitutional relationship of the two legal regimes and the task of the Constitutional Court in determining this without cooperating with the CJEU. Hungarian authors have often dealt, in particular, with the interpretation of the transfer of sovereignty.

As indicated above, we know very little from the jurisprudence of the Hungarian Constitutional Court about the assessment of the accession clause of the Constitution and the almost identical provision of the Fundamental Law, and thus about the extent of the transfer of competence and finally, *in abstracto*, about the task of the Constitutional Court regarding the clarification of the relationship between Hungarian law and EU law. According to Sadurski, an important foreign analyst of Hungarian legal practice, the Hungarian Constitutional Court, in a manner similar to the German Federal Constitutional Court, appears to be adopting a stand of protecting the primacy of the national Constitution.⁵⁰ The paradox is that the Constitutional Courts of Member States have developed their position on this on the basis of an assumption that Member States are sovereign while the EU acquires sovereignty for itself through its *sui generis* legal system.

⁴⁸ See Fazekas, *supra* note 11, at 69.

⁴⁹ I refer not only to the significant change in the composition of the Court (every new member of the Court can be linked to the governing FIDESZ party due to the election procedure) but also to the fact that the number of the members of the Constitutional Court was increased from 11 to 15.

⁵⁰ WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN CENTRAL-EASTERN EUROPE 146 (2005).

The accession clause in Hungary allows a separate body of law to enter Hungarian law. Although the so-called EU clause in the Fundamental Law allows the “joint exercising of powers,” which emphasizes the limits on the transfer of powers and, at the same time, stresses the normative nature of cooperation, the “influx” of EU law is controversial. Although Section E of the Fundamental Law should grant precedence of application to EU law in the case of a conflict between the legal regimes, the case law of the Constitutional Court remains controversial.⁵¹

For the purposes of doctrinal clarity in Hungarian constitutional law, it would be useful to develop a core-sovereignty test that defines the Fundamental Law’s inviolable essential content that is to be preserved from the legal effects of EU membership.⁵² This definition of counter-limits could set the ultimate boundaries of the transfer of sovereignty, and it would also define the relationship between the CJEU and Hungarian Constitutional Court on specific issues. It would also help in the context of deciding when to issue a preliminary reference and when to decide solely at a domestic level.

It is well known that in EU law, the division of powers between Member States and the EU is not regulated by a single rule but instead by countless rules scattered in the *acquis* determining what the EU institutions are authorized to do. The ultimate limits of this competence must, therefore, be fixed in domestic law through interpretation of national constitutions, no matter which national state organ is responsible for the task in question. The EU is authorized to take advantage of loopholes in the founding treaties,⁵³ but under EU law it must also respect the constitutional identity of the Member State (Article 4 (2) TFEU).⁵⁴

According to this train of thought, a persistent conflict is that while the basic doctrine of the accession clause of the Fundamental Law states that the state will only yield power to the EU “to the extent necessary,” in connection with the rights and obligations conferred by the founding treaties, EU law states that it is up to the CJEU to determine what this “necessary extent” means, because, to determine this, the objectives of EU law need to be interpreted.⁵⁵ In sum, according to EU law, it could be necessary in certain cases to refer

⁵¹ Imre Vörös, *Európai jog-magyar jog: konkurencia vagy koegzisztencia?* [EU Law and Hungarian Law: Competition or Coexistence?], 66 JOGTUDOMÁNYI KÖZLÖNY 373, 396–99 (2011).

⁵² *Id.* at 399.

⁵³ ANDRÁS JAKAB, *A MAGYAR JOGRENSZER SZERKEZETE* [The Structure of the Hungarian Legal System] 236 (2007).

⁵⁴ The new challenge is the application of Art. 4(2) TFEU concerning the respect of the constitutional identity of Member States. See, e.g., Giuseppe Martinico, *What Lies Behind Article 4.2 TEU?*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 93–108 (Salz Arnaiz & C. Alcoberro Livina eds., 2013). The development of this discourse will certainly have an effect related to the role of constitutional courts.

⁵⁵ JAKAB, *supra* note 53, at 249.

the question on the competence-competence issue to the CJEU; from the point of view of domestic law, however, it falls within the competence of the Member State to define the transfer of competence by the interpretation of the domestic constitution and without asking for a preliminary ruling.

The obligation of acting jointly, however, might also mean that EU law may not separate itself from the law of Hungary; therefore, according to the principles of democratic legitimation and authorization, the ultimate source of the EU *acquis* is the Member State's constitution. For these reasons, the Member State's constitution must be relied on regarding regulatory issues that may not be given up to the EU, on the basis of the remaining essential sovereignty.⁵⁶

Following this line of argument, one cannot claim that the Constitutional Court should have issued a question to the CJEU, or should have asked for autonomous interpretation such as in the above-mentioned case about the assessment of the Act on implementing the Lisbon Treaty. One can argue that the Hungarian Constitutional Court reserved for itself the right to decide on the meaning of the Lisbon Treaty and the Charter of Fundamental Rights and the sovereignty transfer necessary to accept it. The Constitutional Court just reaffirmed the position of not interpreting EU Treaties solely with the interpretative tools and context developed in EU law, but using also its proper Hungarian constitutional assessment when it comes to deciding on the possible transfer of sovereignty by the Fundamental Law. This position, however, ignores the fact that EU Treaties, when accepted by the Member States, will be ultimately interpreted by the CJEU, and that secondary norms will be adopted within the framework of the Treaties as interpreted by the CJEU.

Regarding the other main issue here, the review of constitutionality of Hungarian law based on EU law, many authors argue that the Hungarian Constitutional Court could examine whether the disputed Hungarian law actually transposes the content of an EU Directive (in this case, no constitutionality review would be possible) or includes rules when the Directive intentionally allows the legislator of the Member State to determine the regulation. In the latter case, actual review of constitutionality would be allowed, but in addition to tests of fundamental rights or other standard tests of the Hungarian Constitutional Court, the interests of the EU and the objectives of the EU regulation would need to be taken into account.⁵⁷ Following this opinion, in principle it would become possible for the Constitutional Court to find, for example, that the EU level of fundamental rights protection is insufficient, leading it to annul the implementing legislation. However,

⁵⁶ Pál Sonnevend, *Alapvető jogaink a csatlakozás után* [Our Fundamental Rights after the Accession], 7 FUNDAMENTUM 27–37 (2003).

⁵⁷ Ernő Várnay, *Az Alkotmánybíróság és az Európai Unió joga* [The Constitutional Court and the Law of the European Union], 62 JOGTUDOMÁNYI KÖZLÖNY 428, 432 (2007).

the method of review may not be the same in these cases concerning the constitutionality/fundamental rights test, because the obligation of cooperation imposed on Member States must be taken into account. This obligation may be fulfilled because of Section E of the Fundamental Law. Cooperation becomes possible either by adopting the French solution (which is that the Constitutional Court only offers remedies if the violation of a fundamental right is exceptionally serious), or by following the German approach (which is of only dealing with cases if it can be established that the protection of fundamental rights under EU law is reduced).⁵⁸ Following this line of argument even further, there are cases in which it is necessary that the Constitutional Court refers the case to the CJEU and asks for the autonomous interpretation of the EU legislation, regarding its purposes, core content, and objectives.

Others argue that even less than this could be supervised by the Hungarian Constitutional Court in the case of Hungarian norms based on EU law. For example, it could intervene only if rules on the limits of the transfer of competence or rules representing the essential provisions of the constitution were violated.⁵⁹

In sum, the Hungarian legal scholarship is quite unanimous in accepting the case law of the Constitutional Court that EU secondary law as such cannot be examined by the Constitutional Court from the point of view of domestic constitutionality, meaning that the question of preliminary references does not arise in these cases (1). However, when it comes to Treaties (2), or even the review of Hungarian law implementing EU law (3), many authors claim that it would be necessary for the Constitutional Court to identify EU law elements and EU law influence and to refer the question to the CJEU if necessary to discover the autonomous interpretation. Coherent interpretation would also be necessary in order to protect the aims and duties formulated in Section E of the Fundamental Law, and this would not be possible without cooperating with the EU and asking for a preliminary ruling when necessary (4). The context of non-reference is defined by uncertainty, and the missing link here could be a clear doctrine similar to the doctrines developed by some other Member States.

II. The Reality: The Application of Preliminary Reference by Ordinary Courts

What must have become clear for ordinary courts on the basis of the relevant decisions of the Constitutional Court is that a Hungarian law violating EU law is not to be considered unconstitutional automatically. The task of resolving any conflict between a Hungarian piece of legislation and EU law will still be reserved for ordinary courts. The task of ensuring uniformity was carried out by the Supreme Court after accession.

⁵⁸ *Id.* at 432.

⁵⁹ Nóra Chronowski and Zoltán Nemessányi, *Alkotmánybíróság-Európai Bíróság: felületi feszültség* [Constitutional Court vs. the European Court of Justice: Surface Tension], 4 EURÓPAI JOG 19, 27 (2004).

Closely connected to constitutional rights or principles, Hungarian courts mostly refer cases to the CJEU in matters of administrative law, though the subject-matters are very divergent. Courts have even also asked for the interpretation of provisions of the Charter of Fundamental Rights, although without any success.⁶⁰ When compared with the other Member States which joined the EU in 2004, the Hungarian courts have been quite active in asking the CJEU for interpretations of EU law.⁶¹

In Hungary, ordinary courts are responsible for the efficient enforcement of claims made under EU law, the *ex officio* application of EU law if necessary, the interpretation of national law in conformity with EU law, disregarding national law if it violates law, and requests for preliminary rulings from the CJEU if necessary or obligatory. These duties derive from the “loyalty clause” in Article 4(3) of the Treaty on European Union (TEU) and the CJEU’s related case law, the requirement of uniform and efficient application, and the primacy of EU law.⁶² Ordinary courts apply the *acquis* more or less in line with the set of requirements imposed by the CJEU, which is practically why it is possible that the task of the Constitutional Court is less emphasized in Hungary’s everyday legal practice.

F. Competition or Cooperation?—A Necessarily *Ad Interim* Conclusion

In contrast with international law, which is treated uniquely in Hungary, the legislator has not developed special procedures or methods for assessing the constitutionality of Hungarian laws based on EU law or EU law applicable in Hungary. As Section E of the Fundamental Law acknowledges, EU law may set generally applicable rules of conduct in Hungary. Irrespective of whether they are implemented in Hungarian law, they form part of the rules of conduct.

I argued that it is problematic how the Hungarian Constitutional Court differentiates between implemented and non-implemented EU secondary law with regard to the possibility of constitutionality review. As I demonstrated above, the Constitutional Court has, so far, taken quite strongly the position that it does not have the competence to review the constitutionality of EU norms themselves, not even when they are directly applicable in Hungary. However, it struck down Hungarian legislation that was based on EU law without examining whether the Hungarian legislator had any discretion in deciding on the content of the exact provisions or whether it was strictly bound by EU law.

⁶⁰ Most cases are connected with the effectiveness of the decision-making process and fair procedure and fair treatment from the officer’s side. Zsófia Varga, *Az alapjogi Charta a magyar bíróságok előtt*. The Charter of Fundamental Rights before the Hungarian Courts] 68 JOGUDOMÁNYI KÖZLÖNY 553–62 (2013)

⁶¹ SOMSSICH, *supra* note 9, at 31.

⁶² FAZEKAS, *supra* note 14, at 349.

The Constitutional Court, following its previous case law, carries out a standard substantive constitutionality review in cases of petitions aimed at the constitutionality review of Hungarian laws based directly or indirectly on EU law. This might result in an open confrontation of domestic law, domestic institutions, and EU law and EU institutions. (This would also be the case if the Constitutional Court claimed that it had competence to review compulsory rules of conduct imposed by EU legislation directly if they violate the essential principles of the Fundamental Law, the constitutional identity, and established the unconstitutionality of a directly applicable legal instrument.)

I argued that even in the case of acceptable theoretical foundations for such positions in domestic law, without cooperating with the CJEU on matters affecting the application of EU law, the conduct of the national constitutional court might produce different sets of applicable rules or interpretations in Hungary than in other Member States. This obviously violates several EU principles. Why not instead seek cooperative solutions that are acceptable for both the EU and the national constitutional court? The institution of preliminary reference could also be very useful for the sake of preserving national constitutional identity by convincing the CJEU to favor one interpretation to the other. Dialogue in case of conflict might develop solutions favorable for both the Member State and for its Union.

The theoretical possibility that the Hungarian Constitutional Court engages in a dialogue with the CJEU in the near future is not excluded. Having regard to the fact that the text and the context of the new Fundamental Law in Hungary are similar but not identical to the former Constitution regarding the integration clause (Article E) and other relevant provisions, it is possible that in the event of a competent petition, the Constitutional Court would reconsider the position it developed in Decision 22/2012 (V. 8.) AB and reflect on some basic questions of interpretation.

In borderline cases, the preliminary reference procedure gives the opportunity to the CJEU to decide on the interpretation and scope of EU law. In case the CJEU determines which parts of the norm under constitutionality review must be bound strictly by the secondary legislation as interpreted by the CJEU, and what the issues are where the Member States have discretionary powers, the Hungarian Constitutional Court becomes competent to decide on how to rule on the constitutionality of the different provisions of the examined piece of law.

I argued that the Hungarian Constitutional Court, with its new competences and constitutional complaint mechanisms, definitely qualifies as a court of reference under Article 267 TFEU. Two *sui generis* legal regimes, EU law and the law of a Member State, will have to resolve legal disputes in a coordinated manner, with respect for each other and with regard to common goals and values.

European Integration Through Preliminary Rulings? The Case of the Bulgarian Constitutional Court

By Mihail Vatsov *

*In memory of Dr Peter J van Krieken (1949-2015)—
a great lecturer and supervisor and a kindhearted
man with an intriguing personality and sagacious mind*

A. Introduction

The preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU)¹ is instrumental for the so-called “judicial dialogue” within the European Union (EU). The goals of the preliminary reference procedure are to ensure the uniform interpretation and application of EU law and to contribute to the harmonious development of the law throughout the EU.² It was through the preliminary reference procedure to the Court of Justice of the European Union (CJEU) that the principles of direct effect and supremacy were developed.³ It took many years before the first request by a Constitutional Court was sent to the CJEU. So far, the Constitutional Courts of Belgium,⁴ Austria,⁵ Lithuania,⁶ Italy,⁷ Spain,⁸ France,⁹ Germany,¹⁰ and most recently Slovenia,¹¹ have

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¹ Treaty on the Functioning of the European Union, 30 March 2010, OJ C83/47, 2010.

² European Court of Justice, *The Future of the Judicial System of the European Union* (Luxembourg, 1999) 21–22.

³ PAUL CRAIG & GRÁINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 442 (2011).

⁴ *Cour d’Arbitrage*, 19 February 1997, no. 6/97.

⁵ *Verfassungsgerichtshof*, 10 March 1999, B 2251/97, B 2594/97.

⁶ Lietuvos Respublikos Konstitucinis Teismas, 8 May 2007, Case No. 47/04.

⁷ *Corte Costituzionale*, sentenza no. 102/2008 and ordinanza no. 103/2008. For a discussion on this first reference, see Filippo Fontanelli & Giuseppe Martinico, *Between Procedural Impermeability and Constitutional Openness*:

sent requests for preliminary rulings to the CJEU.¹² By far the most active of these in sending requests has been the Belgian Court.¹³ The Portuguese Constitutional Court has indicated that it can request preliminary rulings from the CJEU but is yet to do so.¹⁴ In the other Member States (MS) with Constitutional Courts, references have not been sent yet, although worthy occasions in terms of EU-law-related cases have occurred, as also observed in various contributions in this special issue.¹⁵ These MSs include Bulgaria.

The Bulgarian Constitutional Court (BCC) is also part of another group. It is one of the post-socialist-rule Constitutional Courts established in Eastern Europe in pursuit of democratic governance and the rule of law. Established in 1991 by the new Constitution of the Republic of Bulgaria (CRB),¹⁶ it was, as one commentator put it, “among the most radical

The Italian Constitutional Court and Preliminary References to the European Court of Justice, 16 EUR. L. J. 345 (2010). Recently the *Corte Costituzionale* sent a request for the first time arising from *incidenter* proceedings—*Corte Costituzionale*, ordinanza no. 207/2013.

⁸ *Tribunal Constitucional*, 9 June 2011, Order ATC 86/2011.

⁹ Admittedly, not a Constitutional Court as such but it can be equated to one—*Conseil Constitutionnel*, Décision n° 2013–314P QPC 4 April 2013.

¹⁰ Press release no. 9/2014 of 7 February 2014, Principal Proceedings ESM/ECB: Pronouncement of the Judgment and Referral for a Preliminary Ruling to the Court of Justice of the European Union, *available at* <http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html>.

¹¹ *Ustavnega sodišča št. U-I-295/13* from 6 November 2014. For a short note, see S. Bardutzky, The first preliminary reference to the Court of Justice of the EU by the Slovenian Constitutional Court: the case of the Commission’s Banking Communication, *available at* <http://eurocrisislaw.eu.eu/news/the-first-preliminary-reference-to-the-court-of-justice-of-the-eu-by-the-slovenian-constitutional-court-the-case-of-the-commissions-banking-communication/>.

¹² Giuseppe Martinico, *A (Dis-) Order of Disagreements: Exploring the nature of constitutional conflicts in EU law*, 3 SANT’ ANNA LEGAL STUDIES, RESEARCH PAPER 10 (2013).

¹³ Giuseppe Martinico, *Preliminary reference and Constitutional Courts: Are you in the mood for dialogue?*, 10 TILBURG INSTITUTE OF COMPARATIVE AND TRANSNATIONAL LAW, WORKING PAPER 5 (2009).

¹⁴ *Tribunal Constitucional Portugal*, Sentencia 163/1990, 23 May 1990; Ricardo Alonso García, *Los Tribunales Constitucionales y el Control del Derecho Interno Conectado con el Comunitario*, 2 REVISTA DE CIENCIAS JURÍDICAS Y SOCIALES 153, 168 (2005); *see also* Catarina Sarmento e Castro & Filipa Vicente Silva, *Cooperation of Constitutional Courts in Europe—Current Situation and Perspectives*, NATIONAL REPORT ON THE PORTUGUESE CONSTITUTIONAL COURT, XVI CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS 21 (2014).

¹⁵ *See, e.g.*, Hungarian Constitutional Court, Decision 17/2004 (V. 25) AB; *Ústavný súd Slovenskej republiky*, Decision PI US 8/04–202, 18 October 2005; *Curtea Constituțională a României*, Decizia no.1258, 8 October 2009. Such cases from the BCC are considered in Section C of this paper.

¹⁶ Constitution of the Republic of Bulgaria, promulgated SG 56 of 13 July 1991, entered into force 13 July 1991 [hereinafter *Bulgarian Constitution*].

innovations¹⁷ introduced by that Constitution. It was the first time that a judicial institution could review the constitutionality of laws and give authoritative interpretations on the constitutional provisions in Bulgaria.¹⁸ Since the Turnovo Constitution's creation (1879)¹⁹ of a unicameral National Assembly,²⁰ until 1991 it was only the National Assembly that had the power to decide on the constitutionality of laws.²¹ The BCC, as a major institutional development in the newly democratic Bulgaria, required additional safeguards due to the volatile political environment prevalent in the early 1990s.²² These safeguards were included in the form of constitutional provisions. Today, however, they may have unwanted side effects that will be examined here.

Why has the preliminary reference tool evaded the BCC's attention? This Article attempts to answer this question by looking at various possible reasons for this oversight. It will start by looking at EU law, and continue by thoroughly examining the constitutional framework within which the BCC operates. It will show how, since Bulgaria joined the EU, the BCC has utilized this framework without using the preliminary reference tool.

Section 2 starts with a consideration of EU law. In particular, the Article will discuss whether the BCC is a court or tribunal in the sense of Article 267 TFEU, taking into consideration the different constitutional bases which trigger the BCC's powers. Section 3 will continue with the CRB provisions relating to the issue of preliminary references. It will be divided into two main parts. The first part will examine whether there is a general constitutional obstacle to the BCC requesting a preliminary ruling from the CJEU. Article 149 CRB will be central in this part as it contains the BCC's powers as well as a limitation clause on the increase or decrease of these powers. The second part will focus on the BCC's jurisprudence with EU law relevance. These cases will be divided into two categories according to the constitutional bases of the cases. The analysis will examine the BCC's varying attitude towards EU law issues. The analysis will consider whether these cases presented worthy occasions for the BCC to request a preliminary ruling from the CJEU. In

¹⁷ Venelin I. Ganev, *The Bulgarian Constitutional Court, 1991-1997: A Success Story in Context*, 55 EUR.-ASIA STUDS. 597, 598 (2003).

¹⁸ Емилия Друмева, Конституционно право 561 (2013) [Translated by the author: Emilia Drumeva, *Constitutional Law*]; HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 168 (2002).

¹⁹ Constitution of the Principality of Bulgaria, adopted 16 April 1879, art 49.

²⁰ SCHWARTZ, *supra* note 18, at 165.

²¹ DRUMEVA, *supra* note 18. Certain powers of the Council of State during its short existence under the "regime of credentials" (1881-1883) have been considered as an insignificant exception to this tradition.

²² On the political environment, see SCHWARTZ, *supra* note 18, at 167.

other words, did the BCC need an interpretation of EU law by the CJEU to decide on the particular cases before it?

B. EU Law as the Looking Glass

According to settled case law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question of EU law,²³ the CJEU takes into account a number of factors.²⁴ These factors are whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent.²⁵ Furthermore, while an *inter partes* hearing as such is not indispensable for making a reference,²⁶ it is required that there is a case pending before the national court and that the court is “called upon to give judgment in proceedings intended to lead to a decision of a judicial nature”.²⁷ The BCC’s fulfillment of the factors for requesting a preliminary ruling has been discussed to some extent in the Bulgarian legal literature, and the general consensus is that they have been fulfilled.²⁸

This section aims to build on the existing Bulgarian literature. The BCC was established by the provisions in Chapter Eight of the CRB and its activities are further elaborated in the Law on the Constitutional Court (LCC).²⁹ Thus, it is established by law. It is also permanent as none of the provisions suggest an end date or end goal after the achievement of which it is to be dissolved. The BCC also has compulsory jurisdiction for resolving the constitutional issues enumerated in Article 149(1) CRB, and its decisions are binding. In making its decisions the BCC applies the CRB, international law, when applicable, and, on rare occasions, laws, such as the Election Code in deciding on the lawfulness of elections. Thus, it applies rules of law. The BCC is also independent from the legislator, the executive,

²³ Case C–246/80, *Broeckmeulen v Huisarts Registratie Commissie*, 1981 E.C.R. 2311.

²⁴ Case C–222/13, *TDC A/S v Erhvervsstyrelsen*, 2014 E.C.R. I–00000 (27).

²⁵ Case 61/65, *Vaassen-Göbbels*, 1966 E.C.R. 26, para. 273; Case C–54/96, *Dorsch Consult*, 1997 E.C.R. I–4961, para. 23; Joined Cases C–110/98 to C–147/98, *Gabalfrisa and Others*, 2000 E.C.R. I–1577, para. 33; Case C–178/99, *Salzmann*, 2001 E.C.R. I–4421, para. 13; Case C–182/00, *Lutz and Others*, 2002 E.C.R. I–547, para. 12; Case C–195/06, *Österreichischer Rundfunk*, 2007 E.C.R. I–8817, para. 19.

²⁶ Case C–18/93, *Corsica Ferries*, 1994 E.C.R. I–1783, para.12; Case C–210/06, *Cartesio Oktató és Szolgáltató bt*, 2008 E.C.R. I–9641, para. 56.

²⁷ Case C–96/04, *Criminal proceedings against Standesamt Stadt Niebüll*, 2006 E.C.R. I–3561, para. 13.

²⁸ *See, e.g.*, Александър Корнезов, Преосмисляне на контрола за конституционност в светлината на правото на Европейския съюз [Alexander Kornezov, Rethinking of the constitutional review in light of the law of the European Union], 2 *Правна мисъл* 58 (2007).

²⁹ Law on the Constitutional Court SG 67 of 16 August 1991 as last amended SG 50 of 3 July 2012.

and the judiciary, and operates pursuant to the relevant provisions in the CRB and the LCC.³⁰

The controversial factor is whether the BCC's procedure is *inter partes*. In discussing the *inter partes* factor a note should be taken of the different types of proceedings available at the BCC. They can mainly be divided into two: direct (*principaliter*) proceedings and indirect (*incidenter*) proceedings, to use the notions from the Italian constitutional jurisprudence. The legal bases for initiating such proceedings in Bulgaria are contained in Article 149 CRB, which is discussed in the next section.

Principaliter proceedings are direct proceedings where a Constitutional Court is the only instance considering the case.³¹ Such are the proceedings initiated by State (regional or central) organs challenging particular national provisions.³² The power of the BCC to give binding interpretations of the CRB under Article 149(1)(1) CRB is a type of *principaliter* proceedings which can be seen as problematic,³³ because in such proceedings (1) there are no applicants or respondents in the traditional sense, (2) nor are the proceedings adversarial in nature, (3) nor are they connected to adversarial proceedings as are the *incidenter* proceedings.³⁴ This is due to the aim of the proceeding, which is to determine the precise meaning of a constitutional provision.³⁵ This type of *principaliter* proceedings may pose a particular problem, because even if the BCC accepts EU law as constitutional parameter, the CJEU may reject the hypothetical request (although unlikely). According to the CJEU, the preliminary reference procedure is to be used to give guidance in particular cases with particular problems and is to be connected to a genuine dispute,³⁶ which is at odds with the procedure in Article 149(1)(1) CRB.

Incidenter proceedings are indirect proceedings where judges make a reference to the Constitutional Court if there is a doubt about the constitutionality of a national law provision.³⁷ The legal base for *incidenter* proceedings in Bulgaria can be found in Article 150(2) CRB, which states: "Should it find a discrepancy between law and the Constitution,

³⁰ *Id.* at Article 1.

³¹ Fontanelli & Martinico, *supra* note 7, at 354–56.

³² See, e.g., *Corte Costituzionale*, sentenza no. 102/2008.

³³ Kornezov, *supra* note 28, at 61.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See generally Case C–104/79, *Foglia v Novello*, 1980 E.C.R. I–745.

³⁷ Fontanelli & Martinico, *supra* note 7, at 355.

the Supreme Court of Cassation or the Supreme Administrative Court shall suspend the proceedings on a case and shall refer the matter to the Constitutional Court.”

As such it is only the highest courts that can initiate *incidenter* proceedings in Bulgaria. As it will be seen from the discussion *infra* none of the cases before the BCC that touched upon EU law issues were *incidenter* proceedings.³⁸ This has prevented the BCC from pronouncing on the relevance of EU law in such proceedings. Until the BCC states its stance on the issue, it will be another possible limitation on its power to request preliminary rulings. At this juncture it should be mentioned that this limitation would stem from the BCC's view rather than from EU law, since the *inter partes* nature of the proceedings is not an indispensable factor. EU law requires that there is a case pending before the BCC and that the BCC is “called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.” This can be said to be fulfilled by the BCC but a debate *in abstracto* on this point can be continued indefinitely and it will only be resolved by a request for a preliminary ruling. If the BCC is not sure if it satisfies the criteria for a court or tribunal, there is only one way for it to find out the answer.

Having examined Article 267 TFEU and how it applies to the BCC, one further principle of EU law needs to be recalled to wrap up the EU law section of this Article: the principle of primacy.³⁹ According to this principle, national law cannot obstruct the right under EU law to request a preliminary ruling.⁴⁰ The primacy principle extends to constitutional provisions as well, as the CJEU has been reiterating since the 1970s.⁴¹ The operation of the principle of primacy in the present case would mean that even if the BCC considered that the CRB limited its right to send a request (on which the BCC has not commented), the BCC should nevertheless not feel constrained.

However, it should be noted that when the BCC discussed the issue of the status of EU law in Decision 3 of 2004,⁴² it did not say unequivocally that EU law has primacy over all constitutional provisions; that is, it is not clear if the BCC accepted a limitless primacy of EU law over the CRB. What the BCC alluded to was that the extent to which EU law has primacy over the CRB is the extent to which the CRB itself allows it, which is a reminder of the famous *controlimiti* doctrine. This view is the only way in which one can reconcile the primacy of EU law with the constitutional provisions in Articles 4 and 5 CRB. When read

³⁸ In general such proceedings are quite rare.

³⁹ Case C-26/62, *Van Gend en Loos*, 1962 E.C.R. 1; Case C-6/64, *Costa v. ENEL*, 1964 E.C.R. 585; Case C-106/77 *Simmenthal*, 1978 E.C.R. 629.

⁴⁰ See generally Case C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratstelle für Getreide*, 1974 E.C.R. 33.

⁴¹ Case C-11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, para. 3; Case C-409/06, *Winner Wetten*, 2010 E.C.R. I-8015, para. 61; Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 2013 E.C.R. I-00000, para. 59.

⁴² Decision no. 3 of 5 July 2004 in Case no. 3 of 2004, SG 61 of 13 July 2004.

together, these Articles state that Bulgaria is governed in accordance with its Constitution—the supreme law that cannot be contradicted. Support for this view can be found in the discussion of Article 1(2) CRB which states that the “entire power of the state shall derive from the people [and the] people shall exercise this power directly and through the bodies established by this Constitution.” According to the BCC, it follows from this provision that:

the people may if it so wishes to delegate part of its sovereign rights in accordance with the requirements of an international agreement to which Bulgaria is a party through the National Assembly it has elected. The Bulgarian membership in the European Union starts after the ratification by the National Assembly of the Accession Treaty. This ratification is the expression of the will of the people.⁴³

Thus, the BCC may accept that it has the right to request a preliminary ruling under EU law if it considers that requesting preliminary rulings is within the ambit of the changed powers introduced by the “European” constitutional amendments.

With this clarification in mind, the discussion will now examine whether there are constitutional obstacles preventing the BCC from requesting preliminary rulings from the CJEU or, in other words, whether the “European” constitutional amendments have affected the BCC’s functioning in such a way as to include the preliminary reference procedure in its “toolset.”

C. Bulgarian Constitutional Law as the Looking Glass

The BCC has not yet explicitly considered the issue of whether or not it can send requests for preliminary rulings to the CJEU in its case law, unlike the Constitutional Courts of other EU MSs.⁴⁴ Thus, until the BCC clarifies this point, divergent views can be sustained in the literature as regards the interpretation of the relevant constitutional provisions. This section will put forward one such view and will aim to fuel a debate in the literature on the point—a debate which is, regrettably, largely undeveloped. The discussion will begin with the powers of the BCC and will examine whether there are constitutional obstacles to the BCC’s requesting a preliminary ruling in general. Then, the discussion will turn to consider whether there exist particular constitutional obstacles, focusing on the different constitutional bases for initiating proceedings at the BCC. The analysis will look at how the

⁴³ *Id.* (Author’s translation).

⁴⁴ *See, e.g.*, the Portuguese Constitutional Court, *supra* note 14.

BCC dealt with the cases containing EU law issues and how it treats the cases depending on the different constitutional base.

1. Looking for General Constitutional Obstacles

Article 149 CRB lists the powers of the BCC⁴⁵ which lie at the heart of this section and a partial quotation of it is in order here. Under Article 149 CRB:

- (1) The Constitutional Court shall:
 1. provide binding interpretations of the Constitution;
 2. rule on challenges to the constitutionality of the laws and other acts passed by the National Assembly and the acts of the President;
 - [...]
 4. rule on the compatibility between the Constitution and the international instruments concluded by the Republic of Bulgaria prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law and the international instruments to which Bulgaria is a party;
 5. rule on challenges to the constitutionality of political parties and associations;
 - [...]
 7. rule on challenges to the legality of an election of a Member of the National Assembly;
 - [...]
- (2) No authority of the Constitutional Court shall be vested or suspended by law.

The discussion will start with Article 149(2) CRB. It is a limitation clause which would be central to any arguments stating that the BCC generally lacks the power or authority under the CRB to request preliminary rulings. Considering that in the CRB there is no mention of requesting a preliminary ruling from the CJEU, the first question that arises is whether this is an issue of interpretation or an issue of dealing with a *lacuna* in the constitutional regime. The two are different legal concepts and there are different tools used to deal with them. With interpretation, one interprets an existing rule, while with filling-in of *lacunae*, one presupposes a lack of a rule. The issue gets even more complicated considering that

⁴⁵ According to the BCC, Art. 149(1) does not exhaustively list the BCC's powers as other provisions contain a reference to the BCC and bestow upon it certain powers. See Decision no. 4 of 2011 in Case no. 4 of 2011, SG 36 of 10 May 2011. However, Art. 149(1) does provide a summary of its powers.

there are diverging views in the Bulgarian legal literature as to what constitutes a *lacuna*.⁴⁶ The next two subsections will examine the problem from the perspective of, first, a *lacuna* and, second, interpretation.

II. Finding a Lacuna

According to the BCC, when it interprets the CRB provisions it is not acting as a “positive legislator”⁴⁷ and it cannot develop or otherwise append the CRB.⁴⁸ This is because the National Assembly (and by extension the Grand National Assembly) is the sole legislator and the BCC cannot limit this sovereign function of the National Assembly. The power to interpret is aimed at revealing the meaning of the constitutional provisions and their relationship with other provisions as well as constitutional principles.⁴⁹

However, it has been commented in the literature that sometimes the BCC was not so much purely interpreting but rather further developing the meaning of the CRB in situations where it is silent.⁵⁰ Examples of such occasions are (1) when the BCC ruled on the legal consequence of declaring a law unconstitutional,⁵¹ and (2) when the BCC ruled on whether it has the power to declare an international agreement unconstitutional.⁵² In the first case, the BCC stated that when it is declaring a law unconstitutional, its Decision is ‘resurrecting’ the previous applicable provisions that were abrogated by the so-declared unconstitutional law. In the second case, the BCC has the power to declare an international agreement unconstitutional through the ratification law even though the CRB states that it can do so before the ratification. This case is further elaborated below.

Accordingly, in the case of requesting a preliminary ruling at this juncture there are two possibilities. First, the BCC can declare that requesting a preliminary ruling by the BCC from the CJEU is a *lacuna* in the constitutional regime which can only be filled in by the National Assembly through a constitutional amendment. Second, the BCC can view the issue as one

⁴⁶ For an overview of the diverging views, see Krassen Stoichev, *The issue of legal gaps in the jurisprudence of the Constitutional Court of the Republic of Bulgaria*, REPORT FOR THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS, 1–3, http://www.confconstco.org/reports/rep-xiv/report_Bulgaria_en.pdf.

⁴⁷ Determination no. 1 of 26 January 2006 in Case no. 10 of 2005.

⁴⁸ Determination no. 4 of 14 August 2007 in Case no. 9 of 2007; Determination of 17 May 2004 in Case no. 3 of 2004.

⁴⁹ Stoichev, *supra* note 46, at 8.

⁵⁰ *Id.*

⁵¹ Decision no. 22 of 1995 in Case no. 25 of 1995, SG 105 of 1 December 1995.

⁵² Decision no. 9 of 1999 in Case no. 8 of 1999, SG 57 of 25 June 1999.

of interpretation, on which contingency the discussion continues in the following subsections.

III. Finding an Interpretation

If deciding whether the BCC can request a preliminary ruling from the CJEU is a matter of interpretation, then the question is which constitutional provision(s) must be interpreted. It should, in the opinion of the author, be Article 149 CRB in the light of Articles 4(3) and 85(1)(9) CRB. In particular, the question is whether Article 149(2) CRB prevents the BCC from requesting a preliminary ruling from the CJEU. The BCC uses a wide variety of interpretative methods⁵³ without an expressed preference or hierarchy between them. The usual practice seems to be a case-by-case evaluation of the type of ambiguity of the provision that is to be interpreted resulting in the choice of the starting point and the method of interpretation. This section will follow the BCC's example and will aim to mirror its approach in similar cases. In the present case, Article 149(2) CRB states that the BCC's authority shall not be vested or suspended by law. The notions "authority," "vested or suspended," and "by law" lack definitive clarity and need to be explained in order to examine whether the BCC is prevented from requesting preliminary rulings from the CJEU.

Before looking at these particular notions, it would be helpful to start with the context of Article 149(2) CRB. It was drafted in 1991, when the CRB was created, and was designed to protect the newly-formed institution by 'sealing in time' its powers. Article 149(2) CRB is unique and unparalleled by the provisions on the other Bulgarian constitutional organs. There are only two explicitly listed matters concerning the BCC that are to be established by a law: the rotation order for renewing the judges and the organization and the manner of proceeding.⁵⁴ Accordingly, the purpose of Article 149(2) CRB was to provide stability and security for the work of this revolutionary institution in Bulgarian history, without exceptions and in a rather positivist way. Furthermore, the CRB was not drafted with EU membership in mind as it was in the case of Greece, for example.⁵⁵ It cannot be maintained that the purpose of the provision was only to prevent political manipulations of the BCC by the National Assembly. This was indeed the main idea but the purpose of the provision is not limited to that goal. It was to preclude any changes in the powers, not only the 'bad' ones but also the 'good' ones, until the adoption of a proper constitutional amendment.

On the rare occasions that the BCC has mentioned Article 149(2) it has not gone into further detail of its meaning and significance. However, a look at the preparatory works of

⁵³ Such are logical, teleological, textual, historical, consistent interpretation, use of preparatory works etc.

⁵⁴ Bulgarian Constitution, Arts. 147(2) and 152.

⁵⁵ Monica Claes, *Constitutionalizing Europe at its Source: 'The 'European Clauses' in the National Constitutions: Evolution and Typology*, 24 Y.B. EUR. L. 81, 92 (2005).

the Grand National Assembly, which drafted and approved this provision, can provide further insight. During the discussion on giving the BCC the power to constitutionally review political parties in the CRB, the limitation clause was referred to. It was suggested that it would be enough for this power to be included in the law on the BCC. However, as Yanaki Stoilov observed, if this power was not included in the CRB it would be unacceptable including it in the law.⁵⁶ According to him, “[u]nlike any other institution, it should be clear, powers of the Constitutional Court can be given only by the Constitution and this is not by accident, because otherwise there are no guarantees that through usual law-making its role would not be *de facto* diminished.”⁵⁷ Eventually, this power found its way into the CRB. Accordingly, from the very beginning there was an understanding that the BCC’s powers should be listed in the CRB and a positivist approach should be taken. However, the question then arises, what is a power of the BCC?

1. Authority

In the CRB the word translated as “authority” is *правомощия*, which can also be translated as “powers.” It is the plural form of a combination of two words: *право*, which means right, and *мощ*, which means power. Thus, it literally means “rightful power” and as such, the words “authority” and “power” will be used interchangeably when referring to Article 149 CRB. The BCC has been ambivalent on the difference between a separate power and an emanation/consequence of using its powers. This ambivalence is exemplified in the BCC’s ruling on the consequences of declaring a law unconstitutional. Instead of viewing the “resurrection” of provisions, previously abrogated by the National Assembly, as a separate power, it considered it just a legal consequence of declaring a law unconstitutional. Another example is the BCC’s self-empowerment to constitutionally review international agreements after their ratification.

The ambivalence increased with the BCC’s pronouncements in its cases relating to the EP elections in Bulgaria. In the *Elections Code* case,⁵⁸ the BCC considered that reviewing the lawfulness of the election of a MEP from Bulgaria was not a separate power but an extension of its already existing power in Article 149(1)(7) CRB to review the lawfulness of the ordinary elections for national representatives. A continuation of the discussion of the *Elections Code* case can be found in the *EP Elections* case.⁵⁹ In that case, the BCC dismissed a request for initiating proceedings which requested the BCC to declare the MEP elections of May 2014 unlawful. The BCC’s justification was that it did not have *the power* to declare the whole of the elections unlawful but only the election of a particular MEP. Interestingly,

⁵⁶ VII Grand National Assembly, Stenographical Records 1990-1991, 165th Session, Sofia, 25 June 1991, 53.

⁵⁷ *Id.* (Author’s translation).

⁵⁸ Decision no. 4 of 2011 in Case no. 4 of 2011, SG 36 of 10 May 2011.

⁵⁹ Determination no. 3 of 17 July 2014 in Case no. 11 of 2014, SG 61 of 25 June 2014.

the BCC's dismissal was based on an omission/limitation contained in the Elections Code and not in the CRB and which did not apply to the ordinary elections of national representatives.

If the BCC has the power to review the lawfulness of the election of a particular MEP, because the MEP is effectively a national representative, one would expect this extension to apply to all aspects of the powers relating to the national representatives. By dismissing the request in the *EP Elections* case the BCC put a caveat to Article 149(2) CRB and somewhat clarified the meaning of authority. Article 42 CRB states that the organization and the procedure for holding elections, including EP elections, will be regulated by a law. Article 66 CRB states that the lawfulness of an election may be challenged before the BCC under a procedure established by law. As such, the power to review the lawfulness of elections is constitutionally entrenched but is to be molded by the legislator with laws. Thus, even if *de facto* it would be up to the National Assembly to extend the power of review to the whole of the EP elections in Bulgaria, it will not violate Article 149(2) CRB because this is a legislative discretion the CRB allows. Therefore, a new/separate power of the BCC introduced by law would be a power that has no relation to an already existing power or to discretion the CRB allows.

In this context, the power to request a preliminary ruling may be argued to be either a new power or a further development/extension of the already existing powers of the BCC. The choice whether it is one or the other is crucial. In the academic literature, the mention of Article 149(1)(4) CRB in the *Taxes on bailiffs and notaries* case⁶⁰ has been read to be the constitutional gateway for cooperation with the EU judiciary.⁶¹ This view of a former BCC judge would suggest that requesting a preliminary ruling from the CJEU is not a new power in and of itself but that it further develops the power of the BCC to review the *conventionalité* of the laws. In other words, the preliminary reference procedure could be viewed as a new tool helping the BCC in exercising its role of upholding the CRB in cases when EU law is involved and the BCC needs assistance to interpret the latter. This is certainly one way to look at it, but the question remains of whether the BCC will endorse this approach or will consider the request of preliminary ruling a separate power for which the constitutional basis is lacking?

Even if the consistency approach is taken, a constitutional basis will be needed to explain the development of the existing powers. In search of such basis, the BCC's analysis in the

⁶⁰ Decision no. 1 of 2008 in Case no. 10 of 2007, SG 27 of 11 March 2008.

⁶¹ Емилия Друмева, *Преюридикално запитване и от българския Конституционен съд*, in *Класически и съвременни тенденции в конституционния контрол: Сборник статии от международна конференция, посветена на 20-годишнината на Конституционния съд на Република България 172(2012)* (Translated by the Author, Emilia Drumeva, *Preliminary ruling from the Bulgarian Constitutional Court as well?*, in *CLASSICAL AND MODERN TRENDS IN CONSTITUTIONAL REVIEW: COMPENDIUM OF ARTICLES FROM THE INTERNATIONAL CONFERENCE DEDICATED TO THE 20TH ANNIVERSARY OF THE BULGARIAN CONSTITUTIONAL COURT*).

Elections Code case can be used. In that case, the BCC's power to review the legality of the election of a Bulgarian MEP was not explicitly listed in the CRB and it was only added in an amendment of the Elections Code. This Elections Code provision was constitutionally challenged; more precisely, it was argued to be violating Article 149(2) CRB.⁶² The BCC acknowledged the importance of the omission and noted that Article 149(1)(7) CRB, which provides the power to review the lawfulness of the elections of national representatives, had not been amended since its drafting in 1991. However, the BCC took into consideration the 'European' amendments of the CRB. It noted that (1) the EP elections in Bulgaria were included in the CRB and as such have constitutional basis and that (2) by looking at the debates concerning the adoption of the law on the election of Bulgarian MEPs, it could be concluded that the legislature clearly considered the Bulgarian MEPs to be national representatives. Thus, an expansive reading of Article 149(1)(7) CRB was needed. For further support, the BCC relied on Articles 9 and 14(2) of the Treaty on the European Union (TEU)⁶³ which, if read together, state that the EP is composed of representatives of the EU citizens. Accordingly, the BCC found support in another constitutional provision, which was amended for the purposes of the EU accession, in order to make up for the omission of the constitutional legislator.

The BCC's reasoning in the *Elections Code* case builds on two previous cases. In particular, in Decision 3 of 2003, the BCC stated that the "future integration of Bulgaria in NATO and the EU will lead to the introduction of new functions to some of the already existing main constitutional organs".⁶⁴ *The BCC found it permissible for the National Assembly to adopt constitutional amendments that add new activities to the already existing constitutional organs, as long as the form of government is preserved. This was confirmed in the central Decision dealing with Bulgaria's integration in the EU.⁶⁵ With these two Decisions, the BCC agreed that new tasks or activities can be given to the constitutional organs through a constitutional amendment by the National Assembly if the principles on which the State is built are protected and the balance between the institutions is preserved. Although the BCC did not specifically focus on its own powers, with the *Elections Code* case the BCC implicitly agrees that its powers can also be modified and it did not find the form of government to be disrupted. The same should, it is suggested here, apply to the BCC's powers in terms of requesting preliminary rulings from the CJEU.*

⁶² Request for initiating proceedings from a group of national representatives of the 41st National Assembly, 7 February 2011, available in Bulgarian at <http://constcourt.bg/contentframe/contentid/554>. The request was supported by the Institute for Modern Politics but was argued against by the Council of Ministers, the Supreme Bar Council and the "Bulgarian Lawyers for Human Rights" Foundation.

⁶³ Treaty on European Union, 9 May 2008, OJ EU C115/13, 2008.

⁶⁴ Decision no. 3 of 2003 in Case no. 22 of 2002, SG 36 of 18 April 2003. Author's translation.

⁶⁵ Decision no. 3 of 5 July 2004 in Case no. 3 of 2004, SG 61 of 13 July 2004.

Using the analysis in these three cases it would seem that to view the request for a preliminary ruling as an extension of the BCC's ordinary review powers one should consider the "European" amendment of Article 4 CRB. Article 4(3) CRB states that: "[the] Republic of Bulgaria shall participate in the construction and development of the European Union." This is a very vague provision and a lot can be read into it. The mechanism of preliminary rulings can be seen as a tool for the construction and development of the EU through its objective of ensuring the uniform interpretation of EU law. Article 4(3) CRB can thus be seen as the needed supporting constitutional basis for the BCC's power to request preliminary rulings. Support for this view can also be found in the literature.⁶⁶ Be that as it may, it should still be examined what are the other legal questions if requesting a preliminary ruling is considered to be a new power altogether. The first such legal question is whether a new power is "vested or suspended."

2. *Vested or Suspended*

In the CRB the words translated as "vested or suspended" are *дават или отнемат*, which can be translated more directly as "given or taken." As already observed in the previous subsection, the BCC's case law suggests that, when talking about authority, one should understand it as a complete whole—as a completely separate/new authority. Following this reasoning, if requesting a preliminary ruling is seen as a separate power—not connected to the already existing BCC powers, as proposed that it should be above—it would be considered that the BCC was vested with a new power. In such a case, if it is considered to be done by law, which will be examined *infra*, a constitutional obstacle would be present. At this point of the analysis, however, one other question needs to be examined. In particular, it must be examined whether requesting preliminary rulings suspends BCC powers. In other words, are powers taken from the BCC through the institution of preliminary rulings? This examination will be conducted with respect to the BCC's powers to review the *constitutionnalité* and *conventionalité* of laws.

When Bulgaria joined the EU the BCC lost its "monopoly" on the control over Bulgarian legislation.⁶⁷ Even if the BCC found a provision to be constitutional, the validity of that provision can still be questioned for its compatibility with EU law. To take it even further, even if the BCC has found a provision to be compatible with EU law, which it can do through its *contrôle de conventionalité* powers (examined *infra*), an ordinary court may still request a preliminary ruling from the CJEU where the CJEU can give an interpretation of EU law which in turn could require that the provision not be applied. Before Bulgaria joined the EU, if the BCC ruled a provision constitutional or compatible with the international obligations of Bulgaria, that would be the end of it. Today, this is not the case and as such the BCC has lost part of its powers to review laws in Bulgaria. The BCC shares its previous

⁶⁶ DRUMEVA, *supra* note 61, at 170.

⁶⁷ Kornezov, *supra* note 28, at 51–52.

monopoly with the CJEU, even if one could argue that in theory the two courts have different roles and that the two roles do not overlap. The question at this point, however, is whether losing some part of a power (as opposed to abrogating the whole power) is problematic?

Article 85(1)(9) CRB explicitly states that the National Assembly shall ratify or denounce international agreements which *inter alia* “confer to the European Union powers ensuing from this Constitution”. As such, it is constitutionally allowed to confer powers on the EU. Furthermore, as already observed, the more direct translation of “vested or suspended” is given or taken and it logically and grammatically refers to the whole of a power. If it is considered that a power of the BCC can be extended, as happened with the EP elections, why should it not be possible to accept that a part of power can be lost as well? The counterargument here could be the following. Even if only a part of a power is lost, the whole power can be considered lost altogether if the part that is lost is considerable or contains the essence of the particular power without which the power is present solely on paper and is no longer real. However, has this really happened in the case of preliminary rulings? The part of the power to review the laws has not been lost completely but rather a certain part of it has been reformed. First, it is only when the BCC has to deal with EU law that this loss can be identified. Second, in such cases the BCC is not always obliged to request a preliminary ruling,⁶⁸ and when it actually is obliged to do so it will receive the interpretation of the EU law provision in question and will still be the one deciding the case before it.

Although these two points can be met with a fair share of counterarguments from the perspective of the wide scope of EU law and the CJEU’s instructive voice in its case law, this is still the theoretical framework. Therefore, it can be concluded that requesting a preliminary ruling does not suspend the BCC’s powers in the way Article 149(2) CRB prohibits. However, again, if this is not accepted and requesting a preliminary ruling is considered a new power altogether or that it suspends the powers of the BCC to such an extent that it actually negates them, then it should be examined whether this has happened through “law.”

3. By Law

The word translated as “law” is *закон*. This has a narrower meaning than law in general, corresponding more precisely to the notion of Statute or Act of Parliament. Below the CRB, *закон* is the highest norm that is produced at the national level.⁶⁹ The fact that the lower kinds of norms are not reproduced in Article 149(2) CRB is not a problem—if a change of

⁶⁸ See *infra* note 74.

⁶⁹ Codes are different type of normative acts but the rules applicable to the laws also apply to codes. See Law on Normative Acts SG 27 of 3 April 1973 as last amended SG 46 of 12 June 2007, Art. 4(2).

the BCC powers cannot happen through *закон*, it cannot happen through a lower norm either. Naturally, due to its different character, the *закон* amending the CRB is excluded from the meaning of *закон* in Article 149(2) CRB. Having said that, what about international agreements which stand above the *закон* and below the CRB in the hierarchy of norms as per Article 5(4) CRB? Also, what about the *закон* which ratifies an international agreement as per Article 85 CRB? In the present case, one has to consider the law ratifying the treaty of accession of Bulgaria to the EU⁷⁰ (Accession Treaty) and the TFEU.

These questions have not been answered directly by the BCC and one has to look at the more general case law of the BCC in order to find some answers. Decision 9 of 1999⁷¹ is relevant here. In this Decision, the BCC discussed the constitutional review of international agreements. It stated that the duly ratified and promulgated international agreements “can acquire the status and force of laws [that is *закон*]” and “[as with] all the laws in the state, these ratified international treaties should be subject to constitutional control under Article 149(1)(2) of the Constitution.”⁷² It continued by saying that “... the ratification act incorporates the international agreement and together they must be considered as one complete act, which can be challenged for unconstitutionality in its entirety. In that respect it is maintained that the eventual unconstitutionality of the international agreement makes its act of ratification also unconstitutional.”⁷³

As the BCC’s case law stands today, this analysis would also apply to the EU Treaties, as the BCC has repeatedly held that they are international agreements in the sense on Article 5(4) CRB.⁷⁴

Accordingly, if the case law of the BCC is read together, although the power to request a preliminary ruling actually stems from the TFEU, which is not a law (*закон*), it is through the *закон* ratifying the Accession Treaty or any future amendments thereof that the TFEU started producing effects in the Bulgarian legal order. Following this reading the omission of the expression ‘international agreements’ in Article 149(2) CRB is not a *lacuna*. It is not a

⁷⁰ Treaty between the [...] (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, 25 April 2005, O.J. L157/11, 2005 [hereinafter Accession Treaty].

⁷¹ Decision no. 9 of 1999 in Case no. 8 of 1999, SG 57 of 25 June 1999.

⁷² Translation by Evgeni Tanchev & Jenia Peteva, *The Impact of EU Accession on the Legal Orders of Bulgaria, in THE IMPACT OF EU ACCESSION ON THE LEGAL ORDERS OF NEW EU MEMBER STATES AND (PRE-) CANDIDATE COUNTRIES: HOPES AND FEARS* 36–37 (Alfred E. Kellerman *et al.* eds., 2006).

⁷³ Decision no. 9 of 1999 in Case no. 8 of 1999, SG 57 of 25 June 1999 (Author’s translation).

⁷⁴ See, e.g., Decision no. 1 of 2014 in Case no. 22 of 2013, SG 10 of 4 February 2014; Decision no. 3 of 5 July 2004 in Case no. 3 of 2004, SG 61 of 13 July 2004.

lacuna because the constitutional legislator kept in mind Article 85 CRB and considered that international agreements that could possibly change the powers of the BCC cannot produce effects in the Bulgarian legal order without being ratified with *закон*. Naturally, this legal construction follows the BCC's case law and its treatment of the EU Treaties as international agreements. The BCC is yet to clarify the relationship between this legal construction and the understanding of the primacy of EU law, which it has put forward in its case law. Among other necessary clarifications, the BCC should clarify whether requesting a preliminary ruling from the CJEU is constitutionally based on the "European" constitutional amendments.

IV. Interim Appraisal

From the discussion in this section it can be seen that the BCC has numerous clarifications to give as regards its stance on requesting preliminary rulings from the CJEU. First, it should say whether it considers the omission in the constitutional amendments of including the power to request preliminary rulings from the CJEU to be a *lacuna* which can only be filled through a constitutional amendment. Second, if the BCC considers that an answer can be given through interpretation, it should state whether it considers requesting a preliminary ruling to be a power/authority in the sense of Article 149(2) CRB or just an extension of one of its already existing powers. Third, if the BCC considers requesting a preliminary ruling to be such a power/authority, it should explain whether it considers the power to be vested by law or whether it suspends another power. Fourth, it should be explained whether the EU treaties and the law ratifying the Accession Treaty operate differently in the Bulgarian legal order than other international agreements to which Bulgaria is a party and the respective ratification laws. In particular, do they operate in such a way that the BCC can have some of its powers vested directly in Article 267 TFEU pursuant to the "European" amendments of the CRB?

A possible answer is that the BCC should find this a matter of interpretation and should see requesting preliminary rulings from the CJEU as a slight reform to its already existing powers. The constitutional basis for such a reform is Article 4(3) CRB, according to which Bulgaria shall participate in the EU's construction and development. On the contingency that the BCC finds that there is no *general* constitutional obstacle, the discussion now turns to examine whether there are *particular* constitutional obstacles.

V. Looking for Particular Constitutional Obstacles

This section focuses on the different procedures for seizing the BCC. One issue to be examined is whether the BCC's rationale for avoiding the use of the preliminary reference tool can be traced to the particular characteristics of the procedures hitherto initiated. This will be done by considering the BCC's attitude towards the EU law issues in its jurisprudence since Bulgaria joined the EU. Another issue to be considered is whether one

of the three case-law-based exceptions to requesting preliminary rulings apply—the doctrines of *acte clair* and *acte éclairé* as well as the genuine dispute requirement.⁷⁵

As explained above, the procedures for seizing the BCC can more generally be divided into two: direct and indirect (*principaliter* and *incidenter*). All of the BCC's cases touching upon EU law that have been decided since the beginning of 2007 are *principaliter*. Thus, the BCC's attitude towards the *incidenter* proceedings when it comes to requesting preliminary rulings is still undetermined. Nevertheless, it is clear that since all of the proceedings were *principaliter*, the BCC was always a court "against whose decision there is no judicial remedy under national law." Therefore, the BCC could not have relied on the discretionary exception included in the text of Article 267 TFEU. Turning to the *principaliter* proceedings, there are two main types which are of interest for this Article: the power to review (1) the *constitutionnalité* of laws and (2) the *conventionnalité* of the laws. The following subsections will reflect this division, while occasional references will be made to cases under other procedures.

1. Review of Constitutionnalité

The competence to review the constitutionality (also known as *contrôle de constitutionnalité*) of laws and international agreements can be found in Article 149(1)(2) CRB. This was the basis for the predominance of the cases to be discussed, which, together with the recently submitted ones, provide a thought-provoking line of case law.

1.1 Taxes on Bailiffs and Notaries Case

The *Taxes on bailiffs and notaries* case⁷⁶ was the first case where, after Bulgaria joined the EU, arguments based on EU law were presented before the BCC. The BCC was seized to review the *constitutionnalité* of an amendment to the Law on Value Added Tax (VAT) by virtue of which the services of lawyers, private bailiffs, and notaries were subjected to a VAT. The arguments supporting the amendment were based *inter alia* on EU law. It was argued that the VAT Law was harmonized with Directive 2006/112⁷⁷ and that, citing the CJEU's case law,⁷⁸ these professions were economic activities subject to VAT. The BCC declared the VAT Law's provisions to be in compliance with the CRB without considering the arguments based on EU law. This was because the BCC was asked only to review the

⁷⁵ Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. I-3415; *Foglia*, Case C-104/79.

⁷⁶ Decision no. 1 of 2008 in Case no. 10 of 2007, SG 27 of 11 March 2008.

⁷⁷ Council Directive (EC) 2006/112 on the common system of value added tax, 2006, O.J. L347/1.

⁷⁸ Case C-235/85, Commission v. Netherlands, 1987 E.C.R. 1471; Case C-202/90, Ayuntamiento de Sevilla v. Recaudadores de Tributos de las Zonas primera y segunda, 1991 E.C.R. I-4247.

constitutionnalité and not the *conventionalité* of the provisions of the VAT Law. In particular, the BCC held that:

Without being limited by the invoked constitutional bases (Article 22 of the LNA), considering the arguments and opinions put forward as regards the contradiction or incompatibility of the law with the legal acts of the EU or the practice of the CJEU, the Constitutional Court finds it necessary to clarify that the latter two do not form a base for declaring the unconstitutionality of a law under Article 149(1)(2). According to subparagraph 4 of the same provision, the Court can rule on the compatibility of a law with the international agreements to which Bulgaria is party, when seized under it.⁷⁹

In the literature, this stance has been criticized as being too formalistic,⁸⁰ but it has also been defended as being a careful and responsible use of constitutional powers.⁸¹ With this Decision, the BCC effectively rejects EU law as a parameter for constitutionality review. Upholding this stance in the future would hold the BCC a captive of the legal base choices. Judge Yankov made a few very important remarks in that regard in his Concurring Opinion in the *Taxes on bailiffs and notaries* case:

It has been more than a year since Bulgaria joined the EU. The present Decision is a necessary occasion for the Constitutional Court to take a clear stance as regards its general competence in light of the legal regulation in our country and to note *the impossibility to intervene in the areas regulated by the accession treaty* – an argument stemming from Article 5 of the EC Treaty. From that point of view, in my opinion, it is compulsory for the Decision to start with a discussion of Community law, simply because it is the *applicable law*. It is an autonomous order which is integrated directly into the legal systems of the Member States. The

⁷⁹ Decision no. 1 of 2008 in Case no. 10 of 2007, SG 27 of 11 March 2008 (Author's translation).

⁸⁰ Александър Корнезов, *Практиката на конституционния съд в светлината на общностното право (2007–2008)*, 2 *Общество и право* 11 (2009) [Translated by the Author: Alexander Kornezov, *The practice of the Constitutional Court in light of the Community law (2007–2008)*].

⁸¹ DRUMÉVA, *supra* note 61, at 173.

requirements of Article 5(4) of the Constitution are not applicable to it.

[...]

In conclusion, in a case like the present one, although it may sound absurd at first sight, the Constitution is not applicable with the exception of Article 85(9). Otherwise, a law may be repealed for contradiction with the Constitution, while it is consistent with Community law. This will have the paradoxical result of suspending the Community law. In common tongue, this means that the attitude has not faded – to live as in the west, but to rule as in the east.⁸²

Unfortunately, in this opinion, Judge Yankov found himself in a minority at the BCC.

1.2 Right to Exit the State Case

A few years later, in the *Right to exit the State* case,⁸³ the BCC was seized for a second time to deal with EU law related cases under Article 149(1)(2) CRB. The challenged provisions were from the Law on Bulgarian Identification Documents (BID). In particular, former Article 75(5) and (6) was challenged for unjustifiably restricting the right of individuals to freely exit the State, by going beyond the exhaustively listed grounds—“national security, public health, and the rights and freedoms of other citizens.”⁸⁴ The restriction, basically, applied to individuals having huge debts and not servicing them. These provisions were, to an extent, responding to the regrettable practice of individuals taking loans under false pretexts, by defrauding guarantors, with the intention of renegeing on the loans and fleeing Bulgaria.

The BCC discussed in detail the constitutional right to exit the State and its possible restrictions. It found Article 75(5) and (6) to be unconstitutional, mainly due to its disproportionality to the legitimate aim to be achieved. The relevance of this case, for EU law and the free movement of persons, is obvious. However, the BCC did not apply EU law, due to the case’s review base. Nevertheless, in a single paragraph at the very end of the Decision, the BCC mentioned EU law. It stated:

⁸² Concurring Opinion of Judge Rumén Yankov in Case no. 10 of 2007, SG 27 of 11 March 2008. Author’s translation.

⁸³ Decision no. 2 of 2011 in Case no. 2 of 2011, SG 32 of 19 April 2011.

⁸⁴ Bulgarian Constitution at Art. 35(1).

Declaring Article 75(5) and (6) of the Law on BID unconstitutional, will create favorable conditions for the more complete and precise transposition of Article 27 of Directive 2004/38, which limits the grounds for restricting the free movement of EU citizens and their families within the EU, only to public policy, public security and public health, without taking into account the rights and freedoms of others. Additionally, it expressly prohibits the introduction of such restrictions in order to achieve economic goals.⁸⁵

From this passage, it can be seen that, despite considering EU law irrelevant for deciding the case, the BCC could not have simply ignored it. Whether the CJEU would completely agree with the way in which the BCC used Directive 2004/38 will not be discussed here. More interestingly for the purposes of this Article is that there was another, simultaneous, proceeding concerning Article 75(6) before the Supreme Administrative Court (SAC) of Bulgaria.

The Decision of the SAC⁸⁶ was rendered a little over a week before the BCC's Decision. In the SAC proceedings, however, the question dealt only with whether an order for enforcing an administrative measure based on Article 75(6) of the Law on BID should be annulled due to contradiction with Directive 2004/38. The SAC decided on the case without making a reference for a preliminary ruling and discussed the relevant EU law on its own. The Separate Opinions in the case stated that the SAC was not competent to answer the question referred by the president of the SAC and that it should have been answered by the CJEU. In particular, the CJEU should have been asked to interpret Article 27 of Directive 2004/38 and to say whether administrative measures restricting the freedom of movement of individuals reneging on huge debts fall within the exceptions included in that Article. This would have been the correct and most sensible approach in order to preserve the unity of EU law and to assess the legality of Article 75(5) and (6) of the Law on BID. Not only the SAC but the BCC as well should have requested an interpretation by the CJEU.

1.3 Elections Code Case

In the *Elections Code* case,⁸⁷ the BCC was asked to review the *constitutionnalité* and the *conventionnalité* of the provisions of the Elections Code of Bulgaria. EU law was not listed as

⁸⁵ Decision no. 2 of 2011 in Case no. 2 of 2011, SG 32 of 19 April 2011 (Author's translation).

⁸⁶ Interpretative Decision no. 2 of 22 March 2011.

⁸⁷ Decision no. 4 of 2011 in Case no. 4 of 2011, SG 36 of 10 May 2011.

part of the international provisions with which incompatibility was argued, but the case is important as it dealt with, *inter alia*, elections for the European Parliament (EP). The challenged provisions with EU law relevance that will be discussed here regulated the criteria that individuals had to fulfill when voting for, *inter alia*, MEPs (active right to vote) and when running for MEPs (passive right to vote). The provisions required a certain length of residence in the EU before the right could be exercised.

The BCC found this requirement to be constitutional as long as the required residence period was not too long. It held that the periods of twelve months and two years were too long as regards the active right and the passive right, respectively. The BCC found these periods to violate Article 10 CRB, which provides that elections and referendums shall be based on “universal, equal and direct suffrage,” as well as the constitutional principle of proportionality in restricting the exercise of basic rights, such as the right to vote. The BCC continued and, interestingly, also referred briefly to the Venice Commission’s Code of Good Practices in Electoral Matters⁸⁸ as well as the free movement of persons as one of the EU fundamental freedoms. The BCC used the Venice Commission report as its standard-setter of which period is to be considered too long (the standard set there is a “few months”), and held that this standard had been adopted by EU law with respect to MEP elections. As regards the free movement of persons, the BCC only stated in one sentence, as a complementary reason, that the periods in question did not respect that freedom. It did not elaborate any further on this EU law issue.

Another challenged provision related to the requirement that the Bulgarian MEP candidates must not be nationals of a non-EU State. The BCC was divided on this, with six votes “for” and “against,” and as a matter of procedure the request for review was rejected. Yet another challenged provision required a deposit of 10,000 leva (about € 5,000) from a political party or an initiative committee when participating in, *inter alia*, EP elections. The deposit was to be returned if the party or the independent MEP candidate acquired at least two percent of the votes or for initiative committees one-quarter of the votes in the regional voting quota.

The BCC found the financial deposit requirement to be constitutional but held that the two percent requirement was too high and that it contradicted the principle of political pluralism. It could be said that considering the CJEU’s decision in *Spain v. UK*,⁸⁹ the BCC felt that this matter was well within Bulgaria’s discretion and thus did not consider it necessary to ask for the CJEU’s interpretation. The next provision that was challenged concerned the

⁸⁸ European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report (CDL-AD (2002) 23) 15.

⁸⁹ Case C-145/04, *Spain v. UK*, 2006 E.C.R. I-7917, para. 79.

adding of the power of the BCC to review the legality of elections for the MEPs in Bulgaria, which was discussed above.⁹⁰

This case received an interesting continuation with the *EP elections* case, which was also discussed above. The *EP elections* case was submitted under Article 149(1)(7) CRB, which provides for examining the legality of elections for national representatives. The BCC dismissed the request for initiating proceedings because it considered that it did not have the power to declare the EP elections in Bulgaria unlawful as a whole, although it did have such a power for the ordinary elections under the Elections Code. Bearing in mind the principle of equivalence under EU law, one could wonder how the CJEU would have answered if it had been asked by the BCC whether the legislator's omission prevented the BCC from reviewing the legality of the EP elections, considering the BCC's power to review the legality of ordinary national elections.

1.4 Moratorium on Land Acquisition Case

The *Moratorium on land acquisition* case⁹¹ is probably one of the most clear-cut cases relating to EU law.

However, while straightforward from the legal point of view, politically it is quite controversial. The case starts with the extremely sensitive and politicized issue of land acquisition in Bulgaria. In the Accession Treaty, Bulgaria secured a seven-year transitional period before removing the restriction on the free movement of capital—the ban on land acquisition by foreigners.⁹² At the end of October 2013, when huge protests against the ruling coalition were raging in Bulgaria, the opposition 'seized the moment' and made a populist move to 'save' the Bulgarian land from foreigners, somehow pushing through a Decision extending the moratorium.⁹³ This Decision was swiftly referred to the BCC.⁹⁴ It was more than clear for everyone who had read the CRB and knew what EU law stands for that the Decision would not withstand the review by the BCC. It is untenable to consciously maintain that the purpose of the Decision was to produce something more than political controversy during a very sensitive period. Having explained the context of the case, it is now pertinent to look at its legal significance.

⁹⁰ See, *supra* note 58 and accompanying text.

⁹¹ Decision no. 1 of 2014 in Case no. 22 of 2013, SG 10 of 4 February 2014.

⁹² Accession Treaty, Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, Part Five, Annex VI, 3 Free Movement of Capital at 108.

⁹³ Decision of the National Assembly for imposition of a moratorium on the acquisition of the right of property over land on the territory of the Republic of Bulgaria by foreigners and foreign legal persons until 1 January 2020, SG 93 of 25 October 2013.

⁹⁴ Determination of 14 November 2013 in Case no. 22 of 2013.

Although seized to review the *constitutionnalité* of the National Assembly Decision, the BCC considered the relevant EU law provisions extensively. The BCC was not, however, departing from its previous case law, because Article 22 CRB, which deals with the right of land acquisition, explicitly includes EU law as a “constitutional parameter.” It states in the relevant part that:

(1) Foreigners and foreign legal persons may acquire property over land under the conditions ensuing from Bulgaria's accession to the European Union, or by virtue of an international treaty that has been ratified, published and entered into force for the Republic of Bulgaria, as well as through inheritance by operation of the law.

Thus, the BCC was obliged to consider the provisions of the Accession Treaty and the EU Treaties. As the provisions were clear, the *acte clair* doctrine was implicitly relied on and reference to the CJEU was redundant. The BCC found the National Assembly to have acted *ultra vires* and to have violated several constitutional provisions. The BCC even referred to the fact that during the debates at the National Assembly, the unconstitutionality of the moratorium was pointed out but the Decision was nevertheless adopted.

1.5 Export of Pharmaceuticals Case

One of the cases currently pending before the BCC is the *Export of pharmaceuticals case*,⁹⁵ in which a constitutional review is requested of a provision in the Law on the pharmaceutical products in human medicine. The challenged provision introduced an obligation on wholesale traders of pharmaceutical products to notify the Bulgarian Drug Agency when exporting particular pharmaceuticals from Bulgaria.

It is argued that an unlawful approval regime exists because an export may be rejected and that this contradicts a purely notification-based regime. The basis for this is argued to be the included possibility for tacit consent to the exportation unless the director of the agency objects within a thirty-day period. The challenged provision is argued to violate certain constitutional provisions as well as Article 35 TFEU.

Curiously, the basis for *conventionalité* review is not relied on in the request to the BCC. If the BCC follows its previous case law, it will again not discuss the EU law arguments, no matter how well founded they are. It will be interesting to see whether the BCC changes its view in this case.

⁹⁵ Determination of 20 May 2014 in Case no. 5 of 2014.

1.6 Data protection Case

Another interesting case, which is also pending, is the *Data protection case*,⁹⁶ where once again only constitutional review is being requested of several provisions of the Law on Electronic Communications (LEC). According to the request, the challenged provisions amended the Law on the electronic communications, with a view to transposing Directive 2006/24—the infamous Data Retention Directive. The request refers to the CJEU judgment which invalidated the Directive last year.⁹⁷ Besides the arguments that the LEC violates the constitutional rights to private life and to free and secret correspondence, the request makes another interesting argument: the challenged provisions breach EU law and thus Article 5(4) CRB, which states that international agreements enjoy primacy over the internal legislation. It will be interesting to see what the BCC does with this case, not only because it will be one of the “Data Retention cases” but also because, if the BCC agrees with the argument, it may accept EU law as a constitutional parameter through a constitutional provision.

1.7 Waste Management II Case

In the *Waste Management II case*,⁹⁸ the BCC was seized to review both the *constitutionnalité* and the *conventionnalité* of certain provisions. As in the *Waste Management case* above, the challenged provisions were in the LWM. The part of the case dealing with the review of *conventionnalité* in the light of EU law is included in the next subsection. A multitude of provisions were challenged, but the discussion here will focus only on those where EU law violations were argued by the designated interested parties. The arguments were centered on Article 39(3) LWM, which required that ferrous and non-ferrous waste be collected only at the designated municipal sites and that its collection/disposal be non-remunerated. It was also argued that Article 39(3) LWM presents (1) an impediment to achieving the environmental objectives contained in a number of Directives on waste and waste collection, and (2) a violation of an underlying principle of the waste Directives, the freedom of all interested parties to participate in waste management without barriers to trade.

On the first point, it was argued that, unlike other waste, ferrous and non-ferrous waste has an economic value, and that non-remunerated collection/disposal would decrease the incentive for citizens to collect and dispose of such waste, which would in turn impede achievement of the relevant EU environmental objectives. On the second point, reference

⁹⁶ Determination of 12 June 2014 in Case no. 8 of 2014.

⁹⁷ Joined Cases C–293/12 and C–594/12, *Digital Rights Ireland and Seitlinger and Others*, 2014 E.C.R. I–00000.

⁹⁸ Decision no. 11 of 2014 in Case no. 2 of 2013, SG 61 of 25 July 2014.

was made to a number of provisions in various Directives setting out the free involvement of economic operators. The BCC ignored the EU law arguments on both points and found Article 39(3) to be unconstitutional only in the part requiring non-remunerated collection/disposal. However, the BCC added that the limitation effectively removed the economic incentive for the owners of ferrous and non-ferrous waste to comply with their duty to protect the environment. On the second point, the BCC held that the site designation did not limit the type of entities that may operate there and as such did not violate the constitutional provision which requires equal conditions for conducting economic activity. In this case, the BCC showed variable selectivity towards EU law arguments but invariably refused to openly consider them.

1.8 Renewable Energy Case

One of the most recent cases with EU law relevance is the *Renewable energy* case,⁹⁹ where once again only the constitutionality of certain provisions was challenged. The provisions were included in the miscellaneous section of the Law on the State Budget for 2014 and were meant to amend a number of provisions in the Law on the energy from renewable resources. The challenged provisions introduced a new type of a fee for the producers of wind and solar energy.

Some of the interested parties in the case argued that besides violating certain constitutional provisions, the amendments also violated the EU law principles of legal certainty, legitimate expectations, Directive 2009/72,¹⁰⁰ and Articles 63 and 107 TFEU, as well as the Commission Guidance for state intervention in electricity. The Bulgarian Photovoltaic Association even suggested that the EU law violation by itself was a violation of Article 4(1) CRB, which sets out the *Rechtsstaat* principle in Bulgaria. In its case law, the BCC has stated that the *Rechtsstaat* means “exercising State power on the basis of the Constitution, in accordance with laws that materially and formally comply with the Constitution and which are created for preserving human dignity, for achieving freedom, justice and legal certainty.”¹⁰¹ Considering the view of the BCC that international agreements “can acquire the status and force of laws,”¹⁰² it can be argued that in this way the BCC could start to consider EU law as a constitutional parameter. Unfortunately, the BCC did not comment on the arguments relating to EU law.

⁹⁹ Decision no. 13 of 2014 in Case no. 1 of 2014, SG 65 of 6 August 2014.

¹⁰⁰ European Parliament and Council (EC) Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, 2009, O.J. L211/55.

¹⁰¹ Decision no. 1 of 2005 in Case no. 8 of 2004, SG 13 of 8 February 2005.

¹⁰² Decision no. 9 of 1999 in Case no. 8 of 1999, SG 57 of 25 June 1999.

In the *Appeal of administrative acts* case,¹⁰³ in which the BCC was seized to give a binding interpretation and not review laws, an interesting point can be made relating to the Article 4(1) arguments in the *Renewable energy* case. The BCC was seized to interpret Article 120 CRB, according to which “citizens and legal entities shall be free to contest any administrative regulation which affects them, except those listed expressly by the laws.” The BCC stated that the *Rechtsstaat* principle in Article 4(1) CRB requires proportionality for restrictions introduced with a law. Determining proportionality as a fundamental component of the *Rechtsstaat* principle is, in the words of the BCC, connected to the case law of the European Court of Human Rights (ECtHR) as well as the provisions on access to court in the international agreements ratified by Bulgaria. The BCC, interestingly, referred to Article 6(1) ECHR *in conjunction with* Article 6(2) TEU. Unfortunately, however, it did not elaborate on its reason for mentioning Article 6(2) TEU, nor on whether it would consider EU law in its interpretations of Article 4(1) CRB. Time will show whether the BCC is willing to change its view on the role of EU law as a constitutional parameter.

2. Review of *Conventionnalité*

The competence to review the conventionality (also known as *contrôle de conventionnalité*) of legislation, that is, whether they are in accordance with the international agreements to which Bulgaria is a party, can be found in Article 149(1)(4) CRB. Under the power to review the *conventionnalité* of laws, the BCC showed its openness towards EU law but all the same did not enter into dialogue with the CJEU.

2.1 Paid Leave Case

The *Paid leave* case¹⁰⁴ was the first case in which the BCC was asked to review the *conventionnalité* of certain provisions in light of, *inter alia*, EU law, next to conducting a *constitutionnalité* review. The law at issue was the Labour Code. The challenged provisions stated that paid leave unused from previous years, up to 1 January 2010, could only be used until 31 December 2011. The first six points of the case dealt with the *constitutionnalité* review, from which EU law was absent. The BCC then discussed the incompatibility with international law, by going through a long list of human and labor rights instruments, before finally getting to the EU law discussion. This last discussion was based on Article 31(2) in conjunction with Article 52(1) of the Charter of Fundamental Rights of the European Union (the Charter)¹⁰⁵ and Article 7 of Directive 2003/88¹⁰⁶.

¹⁰³ Decision no. 14 of 2014 in Case no. 12 of 2014, SG 95 of 18 November 2014.

¹⁰⁴ Decision no. 12 of 2010 in Case no. 15 of 2010, SG 91 of 19 November 2010.

¹⁰⁵ Charter of Fundamental Rights of the European Union, 2007, OJ EU C303/01.

¹⁰⁶ European Parliament and Council Directive (EC) 2003/88 concerning certain aspects of the organization of working time, 2003, OJ L299/9.

Unfortunately, this discussion amounted to no more than a paragraph, and a legal analysis of the provisions was not provided. Furthermore, the BCC did not explain why it believed the Charter to be applicable in that case. The extra-judicial comment of one of the judges explained the absence of a request for preliminary ruling in that regard as stemming from the *acte clair* doctrine.¹⁰⁷ Probably this was also the reason for the extreme judicial economy.

2.2 Waste Management Case

The *Waste management case*¹⁰⁸ was the second case in which the BCC was seized with a request to review the *conventionnalité* of certain provisions in light of, *inter alia*, EU law, as well as conducting a *constitutionnalité* review. The law in question was the Law on Waste Management (LWM). The challenged provisions included a new requirement for the licensing of waste activities, which was essentially not up to the operators to fulfil but to the municipalities. This made it close to impossible for many waste operators to obtain licenses. It was argued that these provisions also violated Article 3 TEU, Articles 9, 11, 119, 145, 151, and 191 TFEU, Directives and Regulations in the area of waste management, and Articles 16, 17, and 37 of the Charter.

The BCC found this requirement to be only unconstitutional and did not find incompatibility between the challenged provisions and the multitude of international provisions invoked, including the cited EU law provisions. With respect to EU law, the BCC started with a discussion of the doctrine of direct effect in general and then turned to the different instruments. As regards the Regulations, it stated that the request did not contain a reference to a specific norm with direct effect. The BCC did not provide an analysis as to why, in its opinion, there were no provisions with direct effect. As regards the invoked Directives, the BCC stated that they did not have direct effect but only a “vertical effect” requiring the legislator to produce the result required by a particular Directive. It was held that this had been done in the present case. According to the BCC, the Bulgarian legislator remained within the discretionary limits set out by the Directive. The BCC, however, did not provide an analysis of why this was the case. It did not discuss what it considered to be the scope of discretion allowed under the Directive and how the Bulgarian legislator remained within it. Surely on both issues (direct effect and limit of discretion) the CJEU would have been better suited to comment.

As regards the provisions of the Treaties, the BCC was also quite concise. It stated that the rules in the challenged LWM were developed in accordance with Articles 9, 11, and 191 TFEU and Article 3 TEU. The BCC also found it necessary to mention in one sentence that

¹⁰⁷ DRUMEVA, *supra* note 61, at 175.

¹⁰⁸ Decision no. 3 of 2012 in Case no. 12 of 2011, SG 26 of 30 March 2012.

the competition was not distorted, as the licensing requirement was applicable to all economic entities. There was no mention of the Charter provisions invoked. Consequently, the BCC, seemingly acting under the *acte clair* doctrine, rejected the arguments for inconsistency with EU law. However, as already explained, it did not provide a convincing analysis to underpin its implicit reliance on the *acte clair* doctrine.

2.3 Labour Associations Case

The *Labour associations case*¹⁰⁹ was yet another case where the BCC was seized with the request to review the *conventionnalité* of certain provisions in light of, *inter alia*, EU law, as well as to conduct a *constitutionnalité* review. The law in question was once again the Labour Code. The challenged provisions introduced two sets of changes. The first one was by the challenged Articles 34 and 35 of the Labour Code, with which the legislator increased the number of criteria to be met by employers and employees' organizations in order to participate in the National Council for Tripartite Cooperation. The second one was by the challenged Article 414(a) of the Labour Code, which provided for the imposition of an administrative fine on a worker working without an employment contract.

With regard to the challenge of Articles 34 and 35, the BCC found some of the amended criteria in Article 35 to be unconstitutional but did not find any of them to be incompatible with the international agreements to which Bulgaria is a party. With regard to Article 414(a), the BCC found it to be contrary to a number of constitutional provisions, because this provision equates the employee's and the employer's positions in the violation, which, according to the BCC, is impermissible. The BCC also found Article 414(a) to be in violation of Article 15 of the Charter (the freedom to choose an occupation and the right to engage in work). The BCC pointed out that this is not an absolute right and that it can be limited if the principle of proportionality is observed. However, it went on to hold Article 414(a) was disproportionate as it was neither necessary, nor suitable, and nor was it the least restrictive available measure.

Although the, albeit short, discussion and application of the Charter is to be welcomed, it is to be noted that the BCC, once again, did not discuss why it believed the Charter to be applicable. It is not clear how the legislator was acting within the scope of EU law when adopting Article 414(a), which is a requirement for the Charter's application according to the CJEU case law.¹¹⁰ Bearing in mind the *Paid leave* case, one could conclude that the BCC treats the Charter like any other human rights instrument, disregarding its more limited scope of application. The BCC seemed to have applied the *acte clair* doctrine, ignoring again the preliminary reference tool. Finally, what is even more peculiar is that in the operative part of the case, the BCC declared the discussed Labour Code provisions to be

¹⁰⁹ Decision no. 7 of 2012 in Case no. 2 of 2012, SG 49 of 29 June 2012.

¹¹⁰ See, e.g., Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 2013 E.C.R. I-0000, para. 19.

only unconstitutional. That is, it omitted its finding of a Charter violation, despite this being the very last thing that it discussed in its Decision prior to the operative part.

2.4 Waste Management II Case

The most recent case in which the BCC was seized to review, *inter alia*, the *conventionality* of certain provisions with EU law was the *Waste Management II* case (the constitutionality review part of which was discussed above).¹¹¹ The provision allegedly violating EU law was Article 82(2) LWM. This set out rules concerning bank guarantees which were required to obtain permits relating to the separate collecting and recycling of certain waste. In particular, Article 82(2) LWM requires, in the relevant part, that the guarantee in question be issued by a commercial bank with a court registration in Bulgaria and licensed by the Bulgarian National Bank (BNB). It was argued that Article 82(2) LWM violated Article 56 TFEU because banks registered in another EU MS would not be able to provide the required bank guarantee. This requirement was also argued to inhibit economic entities registered in other EU MSs from providing waste management services in Bulgaria, because they would not be able to present a bank guarantee from a bank in another EU MS. In the submission of some of the interested parties, it was also argued that Article 82(2) violated Article 18 TFEU.

The BCC agreed that the text of Article 82(2) LWM could be seen as contradicting the TFEU only if it applied to banks, both, within and outside of the EU. However, the BCC held that Article 82(2) LWM did not have such wide scope of application. In ruling this way the BCC had to employ consistent interpretation methods to interpret Article 82(2) LWM together with the Law on the Credit Institutions (LCI). Using this interpretation technique was necessary because the text of Article 82(2) LWM did not suggest any limitations on the scope of application. The relevant LCI provisions that were needed for the interpretation state that banks registered in an EU MS may provide in Bulgaria all the services that they are licensed for in that EU MS provided the BNB is notified by the competent authority that issued the license. Relying on these provisions, the BCC ruled that Article 82(2) LWM applies only to banks licensed outside the EU, thus, making Article 56 TFEU inapplicable for the case. The LCI was ruled to be the applicable law for the bank guarantee. Hence, Article 82(2) LWM did not need to be subjected to *conventionality* review.

While the consistent interpretation approach is to be respected, one might wonder whether, for reasons of legal clarity, a declaration of inconsistency with EU law would have been more desirable, forcing the legislator to redraft the provision and, at the very least, include a “without prejudice” supplement. In the opinion of this author the BCC should discourage such ambiguous legislative practices as the one in which every time a provision seems contrary to EU law one must go through every possibly relevant Law to find a

¹¹¹ Decision no. 11 of 2014 in Case no. 2 of 2013, SG 61 of 25 July 2014.

provision excluding the possible EU law inconsistency. Such ambiguity may, on certain occasions, even violate the principle of the effectiveness of EU law.

D. Conclusion

The preliminary reference mechanism set out in Article 267 TFEU has proved to be an indispensable tool for European integration through law. It is the formal venue for 'judicial dialogue' within the EU, and Constitutional Courts are increasingly getting into 'the mood for talking'. However, there is still a group of Constitutional Courts that prefer to remain silent. The BCC is one of them, and why this is the case is open to discussion.

This Article examined the legal framework applicable to the BCC and provided some possible explanations for that silence. From the point of view of EU law, the BCC seems to fulfil the criteria for a court or tribunal set out in Article 267 TFEU. However, from the point of view of Bulgarian constitutional law, the picture is not necessarily clear and the fact that the BCC has never found it suitable to discuss the preliminary reference procedure is puzzling. While it is certainly possible to look at the CRB and conclude that the BCC is constitutionally barred from requesting a preliminary ruling, there are also good arguments to the contrary, and in the opinion of the author, it is the latter that should be followed. They should be followed not only because of the principle of supremacy but also because they present a more harmonious reading of the CRB.

This Article also conducted an exhaustive overview of the BCC's case law in which EU law issues were present, with the aim of this being to look for possible explanations as to the BCC's silence. All of the cases were direct proceedings where the BCC was a court of last instance. From the very beginning, the BCC introduced a dichotomy in its case law between the review bases, ruling that EU law is not a constitutional parameter. Despite the persistence of arguments relying on EU law on points of constitutionality review, the BCC has been unwavering. However, more recently a certain shift can be observed in the way in which the parties before the BCC use EU law as a constitutional parameter by relying on the Bulgarian equivalence of the *Rechtsstaat* principle. It is too early to say if this is a temporary occurrence or not and whether the BCC will be persuaded. In the few cases in which the BCC was seized to review the *conventionalité* of certain provisions, the BCC seemed to have acted under the *acte clair* doctrine and did not need the guidance of the CJEU (assuming it could have asked for it).

Generally, the BCC has been quite inconsistent in its treatment of EU law issues and has rarely given them proper consideration. The BCC's ambiguous stance on the preliminary reference tool has regrettably continued for more than eight years now, even though the BCC has dealt with numerous cases with EU law relevance. In the light of the recent historical decision of the German Constitutional Court to request a preliminary ruling from the CJEU, the Constitutional Courts that are still silent have lost their main role-model. The extreme formalism and positivist reading of Article 149(2) CRB should be criticized and not

adopted. It is high time that the BCC joined or at least expressed its openness towards joining the “judicial dialogue” and began to play its role in European integration.

The Romanian Constitutional Court and the Principle of Primacy:¹ To Refer or Not to Refer?

By Viorica Viță*

A. Introduction

This Article aims to constructively analyze the emerging constitutional dialogue between the Constitutional Court of Romania (the CCR or the Court) and the Court of Justice of the European Union (CJEU).² It focuses, in particular, on the lack of a reference for a preliminary ruling from the first court, and aims to unveil the possible motives underlying this passive behavior.

As more and more European constitutional jurisdictions have broken the silence in the dialogue with the CJEU,³ the lack of a preliminary reference from the CCR has stirred at least the interest of academic observers in what has lately been a highly vocal and vivid

¹ The term “supremacy” is used by the Constitutional Court of Romania in reference only to the national Constitution, pursuant to Articles 1(5) and 146(1) thereof. For the purpose of this Article, we shall use the term “primacy” when referring to EU law and ‘supremacy’ when referring to the constitutional system of Romania, without however attaching a particular meaning to the term “primacy” as opposed to “supremacy.” When referring to the EU legal order, the terms “supremacy” and “primacy” are used interchangeably in the literature. Scholars such as Rosas and Armati have suggested distinguishing between the terms. See ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 55–56 (2012).

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² The author holds the view that the CJEU, whilst not a specialized constitutional court of the EU, has important features of a constitutional jurisdiction, including the assessment of the consistency of acts of the EU and Member States with the letter and spirit of the constituent Treaties, the general principles of EU law, the compliance with fundamental rights, and the observance of the inter-institutional balance of power. In taking this stance, the article joins the scholarly work supporting the constitutional character of the CJEU. On the constitutional features of the CJEU. See Antoine Vauchez, *Brokering EuropeEuro-Lawyers and the Making of a Transnational Polity*, 19 *LSE LAW SOCIETY AND ECONOMY WORKING PAPERS*, 8 (2013); Grainne De Búrca, *The ECJ and the international legal order: a re-evaluation*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM*, 105-150 (Joseph H.H. Weiler and Grainne De Búrca eds., 2011).

³ See, e.g., Spanish Constitutional Tribunal referral in *Melloni*, Sentence 26/2014; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13, Order of 14 January 2014; French Conseil Constitutionnel referral in *Jeremy F*, Decision No 2013–314P of 4 April 2013.

field of scholarly inquiry.⁴ If one assumes that referral to the CJEU is a deliberate rational choice on the part of the national constitutional courts, rather than an obligation,⁵ then the question that arises is: Why do constitutional courts refer to the CJEU? And, if they do not, why not?

A close reading of the CCR's jurisprudence shows that like other constitutional courts of EU Member States, its general discomfort lies with the principle of primacy and the preliminary reference procedure.⁶ Here again we find it useful to ask: what could be the appropriate theoretical benchmarks for assessing the Court's behavior?

Purely legal arguments may fall short in explaining the complexity of the subject-matter. Therefore, beyond the legal constitutional literature, we have appealed to political science, which can prove particularly helpful when inquiring on the issue. We first chose to test the CCR's behavior against Burley and Mattli's theory of legal integration, which argues that the actors most likely to drive the process of European legal integration are the ones pursuing their self-interest in the European sphere.⁷ Secondly, we look at Alter's judicial competition theory, which claims that national courts' interaction with the CJEU, including through the preliminary reference procedure, is determined by competitive strategic considerations in the attempt to advance one court's power in the judicial landscape.⁸ According to the theory, higher courts and constitutional jurisdictions would be the last to initiate the reference dialogue and only if interested in advancing their line of reasoning at the EU level.⁹ We shall return to these theories in the last section of this article.

⁴ See L'OBLIGATION DE RENVOI PREJUDICIEL À LA COUR DE JUSTICE UNE OBLIGATION SANCTIONNEE? (Laurent Coutron ed., 2014); Matthias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It*, 15 GERMAN L. J. (2014); see also DARINKA PIQANI, SUPREMACY OF EU LAW AND THE JURISPRUDENCE OF CONSTITUTIONAL RESERVATIONS IN CENTRAL EASTERN EUROPE AND THE WESTERN BALKANS: TOWARDS A 'HOLISTIC' CONSTITUTIONALISM (2010).

⁵ In line with Art. 267(3) TFEU and CJEU's *CILFIT* doctrine, Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. I-03415.

⁶ See Maria Dicosola, Cristina Fasone & Irene Spigno, *Foreword—Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, in this *Special Issue*.

⁷ Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 43 (1993).

⁸ Karen J. Alter, *The European Court's political power*, 19 W. EUR. POLS. 458–87(1996); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2002).

⁹ Lisa Conant, *Compliance and What EU Member States Make of It*, in COMPLIANCE AND THE ENFORCEMENT OF EU LAW 1, 26 (Marise Cremona ed., 2012).

The aim of the present contribution is to go beyond the surface. It attempts to explore the unexplored dialogue between the CCR and CJEU by way of the preliminary reference procedure and to unveil the CCR's holistic attitude towards the EU legal order.

To this end, the Article first introduces the Romanian constitutional architecture, contextualizing the constitutional review tradition, the role of the CCR, and the peculiar constitutional *locus standi* of EU law (Section B).

Then, the Article engages in a close reading of the CCR's pre-accession and post-accession line of reasoning towards EU law (Section C). Particular attention shall be paid to the decisions of the Court where the principle of primacy has been discussed.

Building on the findings, the Article will finally try to draw together the conclusions on the CCR's attitude towards the preliminary reference dialogue, aiming to unveil the possible inner sensibilities of the Court, to explore the underlying causal factors, and to advance a possible hypothesis as to the future dialogue avenues opened by means of the preliminary reference procedure (Section D).

B. The Romanian Constitutional Tradition: Preliminary Remarks

Pierre Pescatore stated that, “[b]efore one can talk of the substance of legal norms, one must see what the structure is into which these norms are integrated.”¹⁰ This section aims at precisely that. It introduces the essential constitutional shapes and structures within which the future discussion on the CCR and the preliminary reference mechanism will be integrated. At the same time, it sets an overarching conceptual framework in support of our further attempt to understand the position of the CCR within this complex architecture. Following a presentation of the Romanian constitutional review system and the Constitutional Court (I), the *locus standi* of EU law as compared to international and national law sources will be identified through the lenses of constitutional hierarchy (II).

I. An “Old” Constitutional Review Tradition and a “Young” Constitutional Court

The constitutional review tradition of Romania goes back to 1912, when the High Court (now, *Înalta Curte de Casație și Justiție*) confirmed in the famous ‘Case of Trams’ (*Procesul tamvaieilor*) the competence of the ordinary courts to review the compatibility of ordinary laws with the Constitution in cases pending before them.¹¹ The constitutionality review was further centralized by the Constitution of 1923 under the

¹⁰ Interview with Pierre Pescatore: Composition and working methods of the Legal Group, Luxembourg, 10 September 2003, available at www.cvce.eu.

¹¹ High Court, Decision of 16 March 1912.

competence of the High Court judging in full court (the “United Chambers”).¹² The provisions were also preserved in the 1938 Constitution.¹³ According to the 1923 and 1938 Constitutions, when confronted with a question of unconstitutionality (called ‘*exceptie de neconstituționalitate*’—exception of unconstitutionality), national courts could refer the question to the United Chambers of the High Court, competent to review the constitutionality of the challenged norms and declare them inapplicable if contrary to the Constitution. The constitutional review lacked a general binding nature. Thus, its legal effects were limited *inter partes* in the specific case pending before the referring court.

During the post-bellum period, a time of unrest followed for Romania’s constitutional values. Until the violent overthrow of the communist regime in 1989, constitutional review was maintained on a fictive level. Its true notion and scope was long-forgotten in the legal vocabulary, as incompatible with and even inconceivable within the structure and aims of the totalitarian regime.¹⁴

The 1989 Revolution marked a ‘momentum zero’ in the Romanian constitutional tradition. Like most post-communist states (except Hungary and Latvia), Romania adopted a completely new Constitution.¹⁵ It is only with the 1991 Constitution that a specialized constitutional review was formally established, for the first time, under the exclusive jurisdiction of a Constitutional Court.¹⁶

Guardian of the supremacy of the Constitution,¹⁷ the CCR was first established and fully functioning as of 1992.¹⁸ As a post-Cold War institutional edifice, the CCR is a relatively young constitutional jurisdiction, both within the national legal tradition and within the EU constitutional family.

¹² Constitution of Romania 1923, Art. 103.

¹³ Constitution of Romania 1938, Art. 75.

¹⁴ The 1952 Constitution made no reference to the constitutional review, whereas Article 53 of the 1965 Constitution delegated the constitutional control to the legislator, namely the Constitutional and Legal Committee of the Popular Assembly.

¹⁵ For a short constitutional history of Romania, see Association Pro-democracy, *The Constitutional Reform in Romania*, 17–22 (2008), available at <http://legislatie.resurse-pentru-democratie.org/constitutie/reforma-constitutionala-in-romania.pdf>.

¹⁶ Constitution of Romania 1991, Title V, Arts. 140–45.

¹⁷ Constitution of Romania 1991, revised in 2003, Official Monitor Part I, No. 758 of 20 October 2003, available in English at <http://www.cdep.ro/pls/dic/site.page?id=371&id=2>. Article 1(5) thereof reads, “In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.” Art. 142(1) states, “The Constitutional Court shall be the guarantor for the supremacy of the Constitution.”

¹⁸ Law 47/1992 on the organization and functioning of the Constitutional Court of Romania, Official Monitor of Romania Part I, No. 101 of 22 May 1992, as republished in 2010, available in English at <http://www.ccr.ro/en/Legea-nr-471992> [hereinafter Law 47/1992].

Since its creation, the CCR has been in a continuous struggle to find and consolidate its standing within the national judicial spectrum. It has often had to reaffirm its authority in front of the judiciary, especially in its relationship with the High Court that previously enjoyed the constitutional review competence. Some commentators even speak of an open “rivalry” between the two jurisdictions.¹⁹ The rivalry is particularly fuelled by a special procedure at the disposal of the High Court—the recourse in the interest of the law (*‘recurs in interesul legii’*), which allows the High Court to issue a decision on the unitary interpretation and application of law in case of dissenting national jurisprudence.²⁰ The interpretation given by the High Court on a legal matter is compulsory for all the courts. The procedure has often raised tensions between the High Court, on the one hand, and the Constitutional Court, on the other. The latter had to reaffirm in several instances that its decisions are compulsory on all the judiciary, including the High Court.²¹ This context put pressure on the CCR to search and assert its genuine line of reasoning on substantive law matters. This holds true also for the CCR’s position on EU law matters, where the court sought to adopt a stance distinctive from the rest of the judiciary, reserving to itself only several EU law prerogatives, as we shall see below.

As to the institutional architecture, the Constitutional Court of Romania was much inspired by its French counterpart, borrowing substantial composition and competence features.²²

The CCR is composed of nine judges, invested with a nine-year, non-extendable mandate. Three judges are named in function by the President, three by the Chamber of Deputies,

¹⁹ Renate Weber, *The Romanian Constitutional Court: in search of its own identity*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 283 (Wojciech Sadurski ed., 2003).

²⁰ Constitution of Romania, Art. 126(3) (“The High Court of Cassation and Justice shall provide a unitary interpretation and application of the law by the other courts of law, according to its competence.”). Rules are detailed in Articles 514–18 Romanian Code of Civil Procedure, Article 471 Romanian Code of Criminal Procedure. The legal standing in the procedure is limited to the General Prosecutor’s Office attached to the High Court of Cassation and Justice, acting *ex officio* or at the request of the Minister of Justice, the College Board of High Court of Cassation and Justice, leading boards of the courts of appeal, and the Ombudsman, which have the duty to ask the High Court of Cassation and Justice to rule on questions of law which have been solved differently by the courts. The solution and interpretation of the High Court is compulsory on all the other Courts from the day of its publication in the Official Monitor of Romania.

²¹ One could mention with the title of example the decriminalization of insult and calumny clash between the two courts. The decriminalization of the offences was declared unconstitutional by the CCR based on human dignity concerns by Decision No. 62/2007, Official Monitor No.104 of 12 February 2007; solution overturned by the High Court by Decision No. 8/2010, Official Monitor No. 416 of 14 June 2011. Finally, the CCR intervened again and declared the interpretation of the High Court unconstitutional, explaining at the same time that the recourse in the interest of law procedure may not be turned into a constitutionality review in Decision 206/2013, Official Monitor No. 350 of 13 June 2013.

²² For a comparison see the structure and function of the CCR as provided by the Constitution of Romania (note 17), Title V, Arts. 142–47 as compared to the Constitution of French Republic of 1958, Title VII, Arts. 56–63.

and three by the Senate.²³ The composition of the CCR is renewed every three years by three judges, according to the provisions of the special law on the functioning and organization of the Court.²⁴

The competences of the CCR are both jurisdictional and consultative. The jurisdictional competences concern: the constitutionality review of normative acts, monitoring and result confirmation of electoral scrutiny and referenda, and solving the inter-institutional constitutional conflicts. The Court also decides on the conditions that justify the interim exercise of the President function, the constitutionality of political parties and checks the conditions for the exercise of the citizens' legislative initiative. With a consultative title the advice of the Court must be sought on a President's suspension proposal.²⁵

From a temporal point of view, the constitutional review of normative acts of general application is exercised *a priori* and *a posteriori*.

A priori, the CCR is empowered to undertake the constitutional review of laws at the request of the President, the Speakers of the two Parliament Chambers, the High Court of Cassation, the Government, the Ombudsperson, fifty members of the Chamber of Deputies, or twenty-five Senators. The Court may also review *a priori* the constitutionality of international treaties and agreements before their ratification, at the request of the Speakers of the two Parliament Chambers or a number of at least fifty Deputies or twenty-five Senators.²⁶ In addition, the CCR may review *ex officio* legislative initiatives on constitutional amendments, as a supplementary guarantee of the supremacy of the Constitution and its limits of revision.²⁷

A posteriori, the CCR may review the constitutionality of laws and government ordinances²⁸ by way of a decision on "exception of unconstitutionality" raised by the Ombudsperson, or during the proceedings *pendente* by the parties, the prosecutor, or *ex officio* by the court hearing the case.²⁹ The procedure is the expression of the ante-bellum

²³ Constitution of Romania, Art. 142(2)-(3).

²⁴ *Id.* at Art. 142(5); Law 47/1992.

²⁵ Constitution of Romania, Art. 146.

²⁶ Constitution of Romania, Art. 146 b). Once the constitutionality of the international treaty has been established *a priori* it may not be the object of an *a posteriori* constitutionality claim. The international treaty declared unconstitutional cannot be ratified by the Parliament or the Government.

²⁷ *Id.* at Art. 146 a).

²⁸ Understood as both Government Ordinances and the Emergency Ordinances, which are forms of delegated legislative acts adopted by the Government, pursuant to Article 115 of the Constitution.

²⁹ Weber, *supra* note 19, at 283

“exception of unconstitutionality” tradition, decided at the time by the United Chambers of the High Court.

Under the present constitutional framework, the CCR is conceived as being the sole constitutional jurisdiction, distinct from the rest of the judiciary, with explicitly designed powers and competences.³⁰ As such, from the point of view of national constitutional law, the CCR is not part of the judiciary.³¹ The Court is the sole constitutional jurisdiction, with its main task being that of guaranteeing the supremacy of the Constitution. The specific position of the CCR within the national institutional framework also has an effect on the Court’s attitude towards the EU legal order, as we shall further observe.

As a general rule, the acts of the CCR are adopted by its members—nine judges—acting by majority.³² By derogation, the decisions on the proposals of the revision of the Constitution and rulings on validation of referenda results are taken by two-thirds of its members.³³ The EU accession did not include any reference to cooperation with the CJEU in the law on the functioning of the CCR. Therefore, according to the current provisions, a decision on a referral to the CJEU would need to be adopted according to the general procedure, thus by absolute majority of five out of nine judges of the Court.

Regarding the legal effects of the CCR’s decisions, these are of general application and produce effects only for the future—*ex nunc*.³⁴ The laws, government ordinances, and Parliament’s rules of procedure, as well as the specific normative provisions declared unconstitutional in an *a posteriori* review, are legally suspended from the publication of the CCR decision, and, if not amended within forty-five days by the Parliament or the Government, cease to produce any legal effect.³⁵ Acts found to be unconstitutional *a priori* have to be re-examined by the Parliament before their adoption.³⁶

³⁰ Constitution of Romania, Title V, “Constitutional Court.”

³¹ *Id.* at Title III, Chapter VI ‘Judicial Authority’.

³² Law 47/1992, Art. 6.

³³ *Id.* at Arts. 21, 47.

³⁴ Constitution of Romania, Art. 147(4).

³⁵ *Id.* at Art. 147(1). In addition, according to Article 147(3), where an international treaty is found incompatible with the Constitution it cannot be ratified by the Parliament, unless the Constitution is revised. At the same time, the international treaty may not be subject to an *a posteriori* constitutional review once its constitutionality is confirmed *a priori* by the CCR.

³⁶ *Id.* at Art. 147 (2).

II. Hierarchy of Norms: What Place for EU Law?

Having regard to the above, several additional points have to be highlighted in order to understand the Romanian constitutional architecture and its relationship with EU law.

First, as a matter of principle, the Constitution of Romania establishes a dualist system of reception of international law.³⁷ Pursuant to Article 11 of the Constitution, treaties—*lato sensu*, including declarations, memoranda, and protocols—are part of the national legal order from the moment of ratification by Parliament, taking the same position in the national legal hierarchy as the act of ratification. Consequently, the legal effects of an international norm depend on the nature and legal force of the national reception norm—the ratification act.

However, as scholars have argued, the traditional monist-dualist doctrine is no longer apt at explaining the present day legal realities of international law reception, and it surely falls short in explaining the EU model of legal integration.³⁸ This is the case for both international human rights treaties and EU law under the Romanian constitutional system. Both normative systems derogate from the principle dualist model and have been assigned specifically adapted positions in the constitutional realm.

As such, international human rights treaties occupy a twilight area between the classical monist-dualist divide, holding a privileged position in the legal hierarchy. These are part of the so-called “constitutionality block.” According to Article 20 of the Romanian Constitution, constitutional fundamental rights and freedoms are to be interpreted and applied in the light of the Universal Declaration of Human Rights and other human rights treaties. In practice, the European Convention on Human Rights (ECHR) is the primary inspiration for the CCR on fundamental rights matters. In case of a conflict between national law or the Constitution on the one hand, and international human rights treaties on the other, the latter shall have “priority,” unless the national law or the Constitution guarantees a higher standard of protection.³⁹ Therefore, where the Constitution provides for a lower standard of human rights protection, international human rights treaties have priority over the Constitution itself.

This complex, yet highly interesting, doctrine of constitutionality block responds to the need to accommodate a new source of international law – human rights treaties – distinct

³⁷ *Id.* at Art. 11(2) (“The treaties ratified by the Parliament, pursuant to the legal provisions, are part of the national law.”).

³⁸ Niel MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1–18 (1993).

³⁹ Constitution of Romania, Art. 20(2) (“Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall have priority [*‘prioritate’*], unless the Constitution or national laws comprise more favorable provisions.”).

from prior arrangements, which demand priority over lower national standards of human rights protection, including constitutional ones. The constitutionality block doctrine is a fascinating legal construct which allows a harmonious and soft 'co-habitation' between the supremacy of the national Constitution and the priority of higher international human rights standards of protection (*de facto* primacy). Its essential trait is that, as part of constitutionality block, international human rights treaties do not have a pre-defined and definitive position in the national legal hierarchy. They are neither positioned higher, nor lower, than the Constitution. They are embedded in the "spirit" of the fundamental law, constituting its inner, indissoluble *alter ego*. As such, the provisions of the Constitution are to be applied and interpreted so as not to affect these underlying principles. If, however, the constitutional text goes contrary to the higher international standard of human rights protection, the latter necessarily prevails.

EU law, including its principle of primacy, does not fall within the above-described constitutionality block doctrine. It enjoys a separate, carefully tailored, *locus standi* and a peculiar *status quo* in the Romanian constitutional architecture.⁴⁰ As such, binding EU norms make their way into the Constitution *via* Article 148, introduced by the 2003 reform preparing the EU accession. De Witte pointed out that EU membership clauses are usually seen as the constitutional basis of legitimizing the acceptance of the principle of primacy into the national discourse.⁴¹ This is also the case for the Romanian Constitution. Article 148 constitutes in fact the "accession clause." It allows for the transfer of national competences to the EU level and guarantees the 'priority' of EU law over the conflicting national provisions, without distinguishing between national law and the Constitution, as Article 20 does. It also adds that the President, the Government, the Parliament, and the judiciary shall all be bound to ensure the "priority" of EU law.⁴² The conclusion which

⁴⁰ Constitution of Romania, Title VI: Euro-Atlantic Integration, Art. 148 "Integration into the European Union."

⁴¹ Bruno de Witte, *Direct Effect, Primacy and the Nature of the Legal Order*, in THE EVOLUTION OF EU LAW 346, 353 (Paul Craig & Gráinne de Búrca eds., 2011).

⁴² Constitution of Romania, Art. 148 reads:

(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall have priority ['prioritate'] over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

(3) The provisions of paragraphs (1) and (2) shall also apply

would follow from a pure textual interpretation of the Constitution would be that it is only for the ordinary judiciary and not for the Constitutional Court to observe Romania's obligations under EU law, including the "primacy" of binding EU rules.⁴³ Nevertheless, the Constitutional Court sees itself as an important actor in the EU legal process and has never employed such a narrow and formalistic legal interpretation. At the same time, as we shall see below, the CCR has been sure to demarcate a separation line regarding its competence on the matter.

It is interesting to note, moreover, that the accession clause is also seen by the CCR as the basis for the reception of the Charter of Fundamental Rights of the EU (the Charter) into the national legal order. The Court analyzes the Charter as EU primary law, rather than as an international human rights treaty (Article 20). In practice however, the CCR's line of interpretation on the Charter is suspended somewhere in between the two constitutional provisions.⁴⁴ On the one hand, the Charter is seen as an emanation of the Article 148 accession clause, being assimilated to EU law. On the other hand, the Court has appreciated, in the spirit of Article 20(2) on the priority of human rights treaties, that the Charter might apply the constitutionality review when it ensures a higher standard of fundamental rights protection or at least guarantees the same standard as the Constitution.⁴⁵

Lastly, one should note that the Constitution of Romania uses the term "supremacy" only when referring to the Constitution itself.⁴⁶ When referring to EU law or human rights treaties, the term "priority" ("*prioritate*") is employed.⁴⁷ This wording has played an important role in the interpretation of the CCR. Even if both the Constitution and the CCR

accordingly for the accession to the acts revising the constituent treaties of the European Union.

(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.

(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

⁴³ Based on the textual interpretation of Articles 148(4) and 148(2), corroborated with the provisions of Title V "Constitutional Court" and Title III, Chapter VI "Judicial Authority."

⁴⁴ CCR, Decision 871 of 25 June 2010, Official Monitor of Romania No. 433 of 28 June 2010.

⁴⁵ *Id.*

⁴⁶ Constitution of Romania, Arts. 1(5) and 142(1).

⁴⁷ *Id.* at Art. 20 (2), Art. 148 (2).

use the term “priority,” in fact the term refers to primacy of application of EU law over national law.

With these central concepts of the Romanian constitutional system in mind, the next section embarks on an analysis of the CCR’s struggle to define its line of reasoning with regards to the EU legal order. The section presents the relevant case law from an evolutionary-comparative perspective, running through the pre-accession and post accession periods, and up to the most recent decisions. The findings highlight the CCR’s evolving discourse and its maturing line of reasoning towards the “new [EU] legal order,” as well as the challenges encountered alongside this evolutionary road.

C. The CCR and the CJEU: An Emerging Dialogue

This section engages in a close reading of the CCR’s EU line of reasoning. The approach departs from the presumption of a close link between the principle of direct effect, the principle of primacy, and the preliminary reference procedure.⁴⁸ It assumes that once a constitutional jurisdiction is reticent towards the reception of one of the three elements, the effectiveness of the other two might be hampered. Thus far, the CCR has not made use of the referral mechanism. As for the other two elements, while the CCR has never questioned direct effect, the acceptance of the principle of primacy has been problematic, especially with regard to the Constitution itself. This preliminary point leads us towards a necessarily deeper investigation into the CCR’s degree of acceptance of the principle of primacy, which might provide valuable insights on the unemployed referral procedure.

The decisions discussed below correspond to the country’s EU integration timeline and are linked to the important moments thereof, such as: the start of EU accession negotiations (1999),⁴⁹ the signature and ratification of the accession treaty (2005),⁵⁰ the entry into force of the treaty of accession (1 January 2007),⁵¹ and the post-accession developments (post-2007).

Analyzing the benchmark decisions of the CCR in which EU law discourse was employed, its overall attitude towards the EU legal order can be seen and assessed as generally fluctuant

⁴⁸ G. Federico Mancini & David T. Keeling, *From CILFIT to ERT: the Constitutional Challenge facing the European Court*, 11 Y.B. EUR. L. 1–13, (1991).

⁴⁹ Proposal for a Council Decision on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Romania, COM (99) 0530 final, 13 October 1999, endorsed by the Council Decision 1999/852/EC of 6 December 1999, O.J. 1999 L 335/15.

⁵⁰ Treaty of Accession of Romania and Bulgaria to the EU, signed in Luxemburg on 25 April 2005, O.J. L157/11, 2005.

⁵¹ *Id.* at Notice on the entry in force (“Subject to the ratification procedure, the Treaty of Accession will enter into force on 1 January 2007 . . .”).

and cautious, although progressively gaining in confidence. The decisions show that the CCR has largely reserved to itself the authority to define the relationship between EU law and national constitutional law, adopting what Alter has called the “‘don’t ask and [CJEU] can’t tell’ policy.”⁵² Given the CCR’s fluctuant position on EU law matters, as well as the diversity of areas covered, the decisions shall be largely presented separately. In as much as is possible, the analysis will cluster the arguments and draw a holistic picture from the conclusions.

I. Approaching EU law: First Pre-Accession Steps

The CCR was one of the active voices during the EU integration process of the country. Already during the pre-accession period the CCR illustrated a promising interest in the EU “new legal order.” The trend was gradually emphasized under the imminence and proximity of accession.⁵³ Compared to its Bulgarian counterpart, the CCR did not hesitate to refer repeatedly to the CJEU case law, to invoke questions of European values,⁵⁴ and to cite EU secondary legislation, even though the latter did not yet constitute binding law.⁵⁵

In 2000, shortly after the launch of the accession negotiations, the CCR referred to the EEC Copyright Directive,⁵⁶ citing comprehensive parts of the EU act in support of its reasoning.⁵⁷ The challenged national law provisions were in fact transposing the relevant provisions of the directive as part of the EU pre-accession *acquis*. When asked to review the constitutionality of the correlative national provisions, the Court went directly to their EU source, even though the latter did not yet have binding effect. In this way, the CCR adopted a broader view and did not consider the non-binding nature of the Directive to be an obstacle. Instead, it gave effect to the duty of consistent interpretation of national law with EU law to support its findings. In this respect, the CCR appreciated that the directive constituted an important source of reference, prescribing “internationally recognized standards,” relevant to the constitutional review.⁵⁸

⁵² Alter, *supra* note 8, at 465–66.

⁵³ Kathleen Barrett, *Pre-Accession Influence of the European Court of Justice: Do Constitutional Courts Use the European Court of Justice?*, GEORGIA STATE UNIVERSITY, 19–22 (2007), available at http://citation.allacademic.com//meta/p_mla_apa_research_citation/1/7/8/4/7/pages178478/p178478-2.php.

⁵⁴ *Id.* According to Barrett, the CCR referred to the CJEU case law in seven decisions and to European values in more than twenty decisions; Barrett also shows that the overall activity of the Court and its judges showed an increasing openness towards the European legal system.

⁵⁵ CCR, Decision no 253/2000, Official Monitor of Romania No 261 of 22 May 2000 [hereinafter CCR Decision no 253/2000].

⁵⁶ Council Directive 93/83/EEC of 27 September 1993 O. J. 1993 L 248.

⁵⁷ CCR, Decision no 253/2000.

⁵⁸ *Id.*

A second EU-friendly decision found its way into the CCR jurisprudence immediately following the ratification of the EU accession treaty on 17 May 2005.⁵⁹ By Decision 408/2005, the CCR upheld its prior practice and reviewed a national norm in the light of its EU secondary law source.⁶⁰ Departing from the text of the Eurovignette Directive,⁶¹ the CCR found that national provisions exempting certain vehicles from the tax on access to the public roads network were consistent with the constitutional principle of equality before the law. The decision was supported by two arguments: First, the Court found that derogations were allowed by the text of the directive “subject to the [European] Commission’s agreement,” and second, the measures were in line with the ECtHR case law and the Constitution.⁶²

On the cusp of the 2007 accession,⁶³ the Court continued its proactive attitude and, beyond the references to EU secondary legislation highlighted above, referred to the CJEU’s case law.

As such, the CCR found, based on the CJEU’s ruling in *Mangold*,⁶⁴ that the age limit conditioning access to the exercise of the profession of lawyer was unconstitutional as it discriminated on grounds of age.⁶⁵ In making this finding, the CCR engaged in a twofold argument. First, it held that even if “age” is not expressly mentioned as a ground of discrimination in the Constitution, the constitutional provisions could not be interpreted as prescribing an exhaustive enumeration of grounds of discrimination. Second, and in order to reinforce its findings,⁶⁶ the CCR referred to the similar solution adopted by the CJEU in *Mangold*.⁶⁷

⁵⁹ Parliament of Romania, Law 154/2005 on the Ratification of the Treaty of Accession of Romania and Bulgaria to the EU signed in Luxemburg on 25 April 2005, adopted in the joint session of the Chamber of Senate and Chamber of Deputies of 17 May 2005, available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=6308. The treaty entered into force on 1 January 2007.

⁶⁰ CCR, Decision 408/2005, Official Journal of Romania No. 706 of 4 August 2005 [hereinafter CCR Decision 408/2005].

⁶¹ EC Directive 1999/62 of 17 June 1999, O.J. 1999 L 187, Article 6(2) b).

⁶² CCR Decision 408/2005.

⁶³ CCR, Decision no 513 of 20 June 2006 Official Monitor of Romania no 598 of 11 July 2006, para. 1.

⁶⁴ Case C-144/04, *Werner Mangold v. Rüdiger Helm*, 2005 E.C.R. I-09981.

⁶⁵ Law 51/1995 on the organization and exercise of the profession of a lawyer. The provision declared unconstitutional reads, “[t]he person who fulfills the legal requirements to access the profession of a lawyer may require that at least 5 years before the normal retirement age”

⁶⁶ Decision no 513 of 20 June 2006 Official Monitor of Romania No 598 of 11 July 2006.

⁶⁷ *Mangold*, Case C-144/04.

The decision is remarkable from several points of view. First, it should be noted that the CCR refers to the case law of the CJEU, not only in an incidental manner, but as a core argument of the legitimacy of its decision. Second, in so doing, the Court advances the reception of the non-discrimination *acquis* prior to accession, upholding “age” as an explicit ground of discrimination. Third, the example is telling, as by referring to *Mangold*, the Court adopts a cooperative attitude towards the CJEU and gives effect to the principle of loyal cooperation and uniform interpretation of EU law.⁶⁸ Lastly, it proves that the Court was closely following the CJEU.

Beyond the reference to EU law and CJEU case law, the 2003 Constitutional reform, preparing the accession, offered the CCR the chance to ‘speak’ on the principle of the primacy of EU law. Upon the *ex officio* review of the legislative initiative on the revision of the Constitution, the CCR expressed for the first time its view on the principle of primacy.⁶⁹ In the CCR’s view: “[...] Member States of the European Union agreed to situate the *acquis communautaire*—Treaties establishing the European Union and regulations derived from them - on an intermediate position between the Constitution and other laws, when it comes to European binding legislative acts.”⁷⁰ This formulation exposes a still fragile understanding of the primacy principle.⁷¹ However, the decision is helpful in as much as it hints at the CCR’s first comprehension of the new EU legal order, which it perceives as being a special international source of law, supra legislative, yet subordinated to the Constitution.

In the light of the above decisions, what does the pre-accession period show? On the one hand, the Court is open to invoking EU law sources and interpreting national law consistently with EU law in support of its constitutionality analysis. On the other hand, the CCR refuses to limit the privileged position of the Constitution in the national legal order, and thus excludes it from the scope of application of the principle of primacy.

⁶⁸ Case C-28/62, *Da Costa en Schaake NV and others v. Administratie der Belastingen*, 1963, E.C.R. 1963.

⁶⁹ CCR, Decision 148/2003, Official Monitor of Romania No 317 of 12 May 2003.

⁷⁰ *Id.* Author’s translation from Romanian.

⁷¹ The formulation may be contested from several points of view. First, the genesis of the principle of primacy may not be attributed to the Member States’ agreement; quite on the contrary, it has known a jurisprudential inception following the CJEU’s *Costa v. ENEL* judgment. Second, the limitation of EU *acquis* to EU treaties and binding regulations is an overly narrow definition of the term. Third, the claim that the EU law enjoys generally an infra-constitutional position in all the Member States is false.

II. Post-Accession Developments: In Search of an EU Reasoning Stance

As we shall see in the set of decisions presented below, the Court did not take the same EU-open approach in the post-accession period.

This general observation has, however, known one exception.⁷² The exception refers to Decision 59/2007 pronounced on 17 January 2007, immediately after the entry into force of the treaty of accession on 1 January 2007.⁷³ One may refer to the Decision as a ‘post-accession inertia’ following a pre-accession driven movement, announcing the stop of the EU-open constitutional reasoning machinery.

1. The “Inertial” Move

Decision 59/2007 is quite an EU law delight. It is an outstanding example of where the Court is generous with EU law arguments, going from the analysis of the founding treaties and EU regulations to the articulation of the principle of direct effect and primacy. Even if one might praise the CCR for its attempt to engage with an in-depth and EU-open argument, the Decision is an outstanding example of “when the CCR got it wrong.”⁷⁴

In fact, when asked whether a national law prescribing a state-aid scheme was compatible with the Constitution,⁷⁵ via the accession clause,⁷⁶ the CCR embarked on a veritable EU law journey. In assessing the constitutionality of the state aid measure, it adopted its pre-accession practice and went directly to the EU law source. As such, the CCR assessed the constitutionality of the national law in the light of the EU law state aid provisions through the lenses of the Article 148 accession clause, which enshrines the ‘priority’ of EU law over conflicting national provisions. In doing so, the CCR first noted that all national provisions on state aid were void as of the date of accession and that the Treaty provisions together with other relevant secondary EU law sources were directly applicable. Second, as the national law was adopted in the state aid area, the Court examined whether the scheme conflicted with the EU law and whether there was a need to enforce the principle of primacy *in casu*. Finally, the CCR concluded that the contested state aid law was

⁷² CCR, Decision 59/ 2007, Official Monitor of Romania No 98 of 08 February 2007 [hereinafter CCR Decision 59/2007].

⁷³ Treaty of Accession of Romania and Bulgaria to the EU, signed in Luxemburg on 25 April 2005, O.J. L157/11, 2005.

⁷⁴ We adapted the metaphor of Joseph H.H. Weiler, The 2013 European Constitutional Law Network Conference: “When the ECJ gets it wrong,” Florence, 18–19 November 2013.

⁷⁵ Constitution of Romania, Art. 135(2) on the obligation of the state to ensure a loyal market competition.

⁷⁶ *Id.* at Art. 148.

compatible with EU law—thus constitutional—and that the state’s obligation to give full effect to EU law under the accession clause was fulfilled.

The decision shows a confident court, which undertakes the task of checking the conformity of national law with the corresponding EU law provisions. In doing so, the CCR does not see any problem of competence either with respect to the national judiciary or the CJEU. Moreover, the CCR does not see any overlap with the competences of the European Commission—the competent authority to authorize the state aid scheme, as of accession. In this sense, even if the CCR acknowledged the competence of the European Commission, it nevertheless undertook itself the analysis of the state aid’s compatibility with the single market. The Court was equally not dissuaded by the highly complex and technical field of EU state aid law. Thus, following a brief analysis of the pertinent EU legal sources, the CCR “appreciate[d]” that the state-aid scheme was compatible with both the national and the EU market.⁷⁷ Moreover, the CCR appreciated that the measure was capable of fostering competition.

The dissenting opinion of two of the nine judges did not stop there. The opinion found the state aid scheme to be contrary to EU law and argued for its unconstitutionality, in application of the principle of the primacy of EU law *via* the accession clause.⁷⁸

Whereas the Decision exemplified a highly open stance towards EU law, it is important to stress that it remains an isolated post-accession case and, moreover, a highly criticized one.⁷⁹ In the rest of the cases we find the CCR to be quite hesitant, if not reticent, about referring to the EU legal order on its own motion. When confronted with a question of EU law, the court approaches it with extreme caution so that the result does not backfire in future constitutionality reviews. In the most recent decisions, the CCR seems to regain a relative confidence. However, it does so by setting clear limits and rules concerning the relationship between the national constitutional order and the EU legal order.

2. From “Chilling Effect” to a Gradual Constitutional Warming

The post-accession case law shall be considered by drawing on three case studies: (2.1) the European Arrest Warrant, (2.2) the Pollution tax, and (2.3) the Data Retention Directive. The examples put forward are particularly interesting, for several reasons. First, the European Arrest Warrant (EAW) cluster of decisions illustrates stagnation in reasoning

⁷⁷ CCR Decision 59/2007.

⁷⁸ *Id.* (dissenting Opinion of Judges Vida and Cochinescu).

⁷⁹ Elena Simina Tănăsescu, *Tendances dans la jurisprudence de la Cour Constitutionnelle après l’adhésion de la Roumanie à l’UE*, in *LE RÔLE ET LA PLACE DES COURS CONSTITUTIONNELLES DANS LE SYSTÈME DES AUTORITÉS PUBLIQUES* 159–62 (Genoveva Vrabie ed., 2010).

when it comes to EU law matters, as compared with Decision 59/2007 analyzed above.⁸⁰ Second, the Pollution tax cases depict a continuous reconceptualization of the EU law argument under the constant pressure of numerous constitutionality challenges. Finally, the Data retention duplet bridges the previous two case studies. It illustrates the contrast in the CCR's reasoning between its 2009 inwards-looking Decision and the 2014 Decision, where it closely following the CJEU.⁸¹ The section concludes with a very recent decision of the CCR in which the court expressed a radical position on the primacy of EU law over the Constitution, seeing it as impinging upon the core constitutional guarantees and limiting substantially its own competence (2.4).

1.1 European Arrest Warrant

Shortly after accession, as the Framework Decision on the EAW gained binding force at national level,⁸² the CCR was asked to review its constitutionality. In all instances it found the EU judicial cooperation mechanism to be compatible with the Constitution, showing, nevertheless, a rather scarce EU law rhetoric.

In the first Decision 400/2007, the CCR found the EAW to be constitutional, based on the respect of "pre-eminence of international law, notably the international judicial cooperation in criminal matters."⁸³ Any reference to the EAW Framework Decision was lacking. If one looks at the decisional timeline of the CCR, notably at the previous 'inertial' Decision 59/2007 issued three months before, the contrast is quite dramatic. Not only did the court not refer to the EU source of the national provisions, but it presented the EAW exclusively as an international - rather than an EU - form of judicial cooperation in criminal matters.

In Decision 419/2007, the CCR relaxed its stand. It mentioned the EU source of the national EAW implementing provisions, reasoning on their logic and mentioning the principle of mutual recognition.⁸⁴ As an additional argument supporting the constitutionality finding, it underlined that "the Romanian legislator has implemented exactly the provisions of the

⁸⁰ CCR Decision 59/2007.

⁸¹ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*, (Apr. 8, 2014), <http://curia.europa.eu/>.

⁸² Council Framework Decision 2002/584/JAI of 13 June 2002, O.J. 2002 L 190, implemented by Law 302/2004 on international judicial cooperation in criminal matters as amended by Law 224/2006, Official Monitor of Romania No. 594 of 1 July 2004.

⁸³ CCR, Decision 400/2007, Official Monitor of Romania No.296 of 4 May 2007.

⁸⁴ CCR, Decision 419/2007, Official Monitor No 330 of 16 May 2007 [hereinafter CCR Decision 419/2007].

[EAW] Framework Decision, adopting the principles and directing lines thereof.”⁸⁵ Even if this reasoning left more space for EU law arguments, the position was not replicated. In subsequent decisions, while consistently supporting the constitutionality of the EAW, the CCR preferred to refer exclusively to its first Decision 440/2007, in which it had avoided any EU law discussion.⁸⁶

It is also important to stress that by Decision 1127/2007⁸⁷ the CCR informs the public that it is largely aware of the constitutional contestations on the EAW Framework Decision in other Member States.⁸⁸ As an expression of constitutional judicial dialogue, the CCR refers to the prior decisions of the Polish and German Constitutional Courts. It is interesting to note that the Court uses the Polish and German examples in support of the EAW’s constitutionality rather than in the opposite sense, as one might have expected. First, the CCR states that, given the importance of the EAW instrument, the Polish Constitution has been amended to allow the operation of the judicial cooperation tool. Second, it underlines that the unconstitutionality finding of the German Constitutional Court was based on fundamental rights concerns, which was not the case in the Romanian implementing measures.⁸⁹

The EAW case study shows that while respectful to EU law judicial cooperation instruments and closely following the European legal discourse, the CCR seeks to distance itself from EU law remarks and avoids referring other than incidentally to EU law issues. However, this statement may not be held generally valid, as the CCR has chosen to break the EU law silence, as shown by Decision 419/2007.⁹⁰ Additionally, one may notice that, in the EAW case law, the CCR did not review the constitutionality of national provisions in the light of EU law through the Article 148 “accession clause,” as it had done before.⁹¹

⁸⁵ *Id.* Author’s translation from Romanian.

⁸⁶ With a title of example, in Decision 443/2007, Official Monitor No 318 of 11 May 2007, CCR cites the EAW Framework Decision to confirm that the national implementing norms are consistent on the language of correspondence on EAW issues. As well, by Decision 583/2007 Official Monitor no 422 of 25 June 2007, the CCR sends exclusively to its first precedent Decision 400/2007 see, *supra* note 83, and does not engage in any further argument of EU law.

⁸⁷ CCR, Decision 1127/2007, Official Monitor No 2 of 03 January 2008 [hereinafter CCR Decision 1127/2007].

⁸⁸ For a comprehensive study on the European Arrest Warrant and the decisions of the Constitutional Courts, see O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 29 Y.B. Eur. L. 65–111 (2010).

⁸⁹ CCR Decision 1127/2007.

⁹⁰ CCR Decision 419/2007.

⁹¹ CCR Decision 59/2007.

1.2 The pollution tax

The pollution tax was introduced in 2006 as a special environmental tax levied on used motor vehicles upon their first registration on the territory of Romania.⁹² After the accession, the European Commission initiated infringement proceedings against Romania, asking it to amend the taxation legislation in accordance with the provisions of the Treaties (Article 90 EC, now Article 110 TFEU), as the tax was capable of discriminating against vehicles imported from other Member States.⁹³ In 2008, the amendment took the form of a Government Emergency Ordinance.⁹⁴ As the Commission did not find the amendments satisfactory, it issued another letter of formal notice in 2009.⁹⁵

The CCR, as we shall see below, refused to give effect to EU law and rejected all the constitutionality claims. As to the national ordinary courts, these adopted a highly dissenting jurisprudence on the issue. Several chose to give effect to the principle of the primacy of EU law and set aside the national conflicting provisions. Others appreciated that the tax was neither discriminating nor discouraging free movement of vehicles originating from other Member States and consequently gave effect to the national provisions. Ultimately, it was for the High Court to harmonize the diverging case law. It gave effect to the principle of the primacy of EU law over national law, ordering lower courts to set aside the conflicting national provisions as of 2011.⁹⁶ It did so by means of the '*recurs în interesul legii*' extraordinary procedure, described above.⁹⁷ Following the decision of the High Court, in 2012, the tax was finally abrogated.⁹⁸

The period from 2009 until 2012 may generally be described as a period of absolute legal confusion. Its results can be summarized in: more than 3 years of general legal uncertainty and dissenting national jurisprudence with regards to the nature of the tax and the primacy of Article 110 TFEU; more than 122 unconstitutionality challenges rejected by the

⁹² Law 343/2006, Official Monitor of Romania No. 662 of 1 August 2006, Art. 1.

⁹³ Letter of Formal Notice IP/07/372, Brussels, 21 March 2007. According to the letter, "[s]imilar infringement procedures regarding discriminatory car taxation had been opened against Cyprus, Poland and Hungary upon their entry to the EU."

⁹⁴ Emergency Ordinance 50/2008, Official Monitor of Romania No 327 of 25.04.2008.

⁹⁵ Letter of Formal Notice, IP/09/1012, Brussels, 25 June 2009.

⁹⁶ Decision of the High Court of Cassation and Justice no. 24/2011 of 14 November 2011 regarding the uniform interpretation and application of the legal provisions regulating the pollution tax, Official Monitor No. 1 of 3 January 2012.

⁹⁷ See, *supra* note 20.

⁹⁸ Law 9/2012, Official Monitor of Romania No 17 of 10 January 2012.

Constitutional Court;⁹⁹ hundreds of thousands of petitions addressed to the European Commission, to the national and European Parliaments; twelve applications for a preliminary ruling from lower ordinary courts;¹⁰⁰ and two judgments of the CJEU finding the pollution tax to be in breach of the treaty.¹⁰¹

The pollution tax jurisprudence is an incredibly telling example of the CCR's position towards the CJEU and the EU legal order. It depicts the overall tensions and interactions between the two constitutional systems. Most importantly, the case law illustrates the evolution under pressure of the CCR's EU law discourse and suggests some thoughts as to its direction.

When first asked to review the constitutionality of the pollution tax, having regard to the constitutional accession clause (Article 148),¹⁰² the CCR introduced a novel 'lack of competence' argument.¹⁰³ In other words, it made it clear that the review of conformity of national laws with EU Treaties exceeded its competence.¹⁰⁴ The court invited national ordinary courts to undertake such a review and, as the case may be, to use the preliminary reference mechanism. It further stated that if it were to adopt the opposite approach—of

⁹⁹ According to CCR database search results by keyword "Ordonanța 50/2008", during the 2008-2011 period, 122 *a posteriori* exceptions of unconstitutionality were brought in front of the CCR, challenging the constitutionality of the Government Emergency Ordinance 50/2008 establishing the tax, available at <http://www.ccr.ro>.

¹⁰⁰ Joined Cases C-29/11 and C-30/11, Aurora Elena Sfichi v Direcția Generală a Finanțelor Publice Suceava and Others, 2011 E.C.R. I-00059; Case C-573/10, Sergiu Alexandru Micșa v. Administrația Finanțelor Publice Lugo, 2011 E.C.R. I-00101; Case C-441/10, Ioan Anghel împotriva Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00164; Case C-440/10, SC SEMTEX SRL împotriva Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00163; Case C-439/10, SC DRA SPEED SRL v. Direcția Generală a Finanțelor Publice Bacău, 2010 E.C.R. I-00162; Case C-438/10, Direcția Generală a Finanțelor Publice Bacău and Administrația Finanțelor Publice Bacău v. Lilia Druțu, 2011 E.C.R. I-00100; Case C-335/10, Administrația Finanțelor Publice a Municipiului Târgu-Jiu și Administrația Fondului pentru Mediu v. Claudia Norica Vijulan, 2011 E.C.R. I-00099; Case C-336/10, Administrația Finanțelor Publice a Municipiului Târgu-Jiu și Administrația Fondului pentru Mediu împotriva Victor Vinel Ijac, 2011 E.C.R. I-00058; Joined Cases C-136/10 and C-178/10, Daniel Ionel Obreja v. Ministerul Economiei, 2011 E.C.R. I-00057; Case C-402/2009, Ioan Tatu v. Statul Român prin Ministerul Finanțelor și Economiei and Others, 2011 E.C.R. I-02711; Case C-263/10, Iulian Nisipeanu v. Directia Generala a Finantelor Publice Gorj, 2011 E.C.R. I-00097.

¹⁰¹ Cases *Tatu*, Case 402/2009; *Nisipeanu*, Case C-263/10.

¹⁰² See, *supra* note 42.

¹⁰³ CCR, Decision 1596/2009, Official Monitor of Romania No. 37 of 18 January 2010.

¹⁰⁴ *Id.* at para. 4. The CCR seems to have adopted a similar reasoning to its Polish and Hungarian counterparts, confronted with the same case of car pollution tax conflicting with the Treaty. See PIQANI, *supra* note 4, at 246-47. See, for the same line of reasoning, the Constitutional Courts of Hungary and Poland, ALLAN F. TATHAM, CENTRAL EUROPEAN CONSTITUTIONAL COURTS IN THE FACE OF EU MEMBERSHIP: THE INFLUENCE OF THE GERMAN MODEL IN HUNGARY AND POLAND 164 (2013).

reviewing the conformity of national law with EU law—it would generate a “possible conflict of jurisdictions [with the CJEU],” which would be inadmissible “at this level.”¹⁰⁵

Not managing to get itself heard, at a later stage, the CCR went further and suggested that in addition to the national ordinary courts, it is also the obligation of the national Parliament to give “priority” to EU law, pursuant to the Article 148 accession clause.¹⁰⁶ This position made it clear that the CCR distanced itself categorically from the principle of primacy, adopting a strict interpretation of the accession clause. As mentioned above,¹⁰⁷ the Romanian Constitutional system reserves a special place for the CCR, separate from the three branches of the state, including the judiciary.¹⁰⁸ From this point of view, the CCR suggests a separation of tasks, meaning that the application and enforcement of EU law is to be undertaken by the judiciary, executive, and legislature; whereas the CCR is to observe the fulfillment of this obligation pursuant to the Constitution. In any case, the Court denied its own competence on the matter.

The subsequent cases upheld this line of reasoning and further elaborated on the subject. By Decision 137/2010, the CCR held that the duty to set aside the conflicting national norm and to apply, with “priority,” the EU legislation, is to be borne by the national ordinary courts.

This excludes, in the view of the court, the competence of the Constitutional Court, as it is not a matter of constitutionality but of the application of law.¹⁰⁹ Again the Court stated, this time without any doubt, that if it were to review the validity of national law with the EU Treaties, then it would “evidently” breach the competences of the CJEU, as only the CJEU has the power to interpret the Treaties.¹¹⁰

Further on, in Decision 1249/2010, the CCR approached, albeit briefly, the question of balance between national and EU law. It held that: “[i]t is a question of application of law, not of constitutionality. [...] in the relationship of the EU and national legislation (except

¹⁰⁵ CCR, Decision 1596/2009, (note 103), para. 4 (Author’s translation from Romanian).

¹⁰⁶ CCR, Decision 668/2011, Official Monitor of Romania No. 487 of 08 July 2011. [hereinafter CCR Decision No. 668/2011].

¹⁰⁷ See, *supra* note 30.

¹⁰⁸ According to the Constitution of Romania, “Judicial Authority” is enshrined at Title III, Chapter VI, pursuant to which justice is realized through the High Court of Cassation of Justice and other courts as established by law. The Constitutional Court enjoys a separate Title V.

¹⁰⁹ Decision no. 137/2010, Official Monitor of Romania no. 182 of 22 March 2010.

¹¹⁰ *Id.*

the Constitution) we can talk only about priority in application of the former, which falls into the competence of national ordinary courts.”¹¹¹

The decision is important, as the CCR starts to form its EU law standing. Unfortunately, the Court is not specific enough. Its one-phrase formulation and incidental reference to the Constitution leaves the door open to several interpretations. It seems that the CCR deliberately avoided addressing the unanswered question of the relationship between EU law and the Constitution.

The timidity was not, however, longstanding. In one of its last decisions on the pollution tax, prior to the harmonizing judgment of the High Court, the CCR continued to clarify its standing on EU law matters and, most importantly, it also talked about the possibility of referral.¹¹²

As such, by Decision 668/2011, while repeatedly denying its competence, the CCR referred to the CJEU’s judgments in *Tatu*¹¹³ and *Nisipeanu*,¹¹⁴ stressing the CJEU’s position on the interpretation of the treaty. In doing so, the CCR implicitly led the national judiciary to follow the CJEU and, consequently, to disapply the conflicting national provisions.

Moreover, the CCR elaborated on the use of EU law arguments during a constitutionality review. In this sense, the CCR held that when reviewing the constitutionality of a national norm, an EU law norm could be referred to only as subsidiary to the Constitutional norm (the only norm of direct reference in the constitutionality review) subject to two cumulative conditions.

The first condition is objective and refers to the character of the EU norm, which must be “clear, precise and unequivocal,” and thus capable of direct effect.

The second condition implies the substantive appreciation of the CCR of the constitutional relevance of an EU norm. As such, it is for the CCR alone to assess whether an EU norm is constitutionally relevant, meaning that it is “able to support” a possible violation of the Constitution by the national law.¹¹⁵

¹¹¹ Decision no. 1249/2010, Official Monitor of Romania 764 of 16 November 2010 (Author’s translation from Romanian).

¹¹² CCR Decision No. 668/2011.

¹¹³ See, *supra* note 100.

¹¹⁴ *Id.*

¹¹⁵ Decision no. 668/2011, at point 3.

As to the referral, for the first time the CCR recognizes expressly, in the light of the above-mentioned conditions, the possibility of addressing a request for a preliminary ruling. In other words, a reference to the CJEU would be considered by the CCR when the constitutionality review implies the interpretation of a clear, precise, and unequivocal EU law norm; and, at the same time, the CCR appreciates that the EU norm at hand is constitutionally relevant, thus that the interpretation of the CJEU is “able to support” the CCR in deciding on the constitutionality of the challenged national provisions.

Lastly, the Court finds it necessary to underline that the possibility of referring a question to the CJEU is based on judicial cooperation between the EU courts and national constitutional courts and “does not, in any case, imply any hierarchical order between the two jurisdictions.”¹¹⁶ This specification is telling, as it indicates that the CCR does not understand the relationship between the national constitutional courts and the CJEU in terms of a hierarchical vertical scale, but rather in terms of a horizontal cooperation between equal courts with different jurisdictions.

Drawing together the findings of the Pollution tax case study, what are the preliminary remarks that we can make about the CCR’s attitude towards EU law and the referral procedure?

Firstly, one may notice a stance of clear lack of competence coming out from the above-analyzed decisions. The CCR has repeatedly stated that it is for the national judiciary to apply the law, including EU law, and, as the case may be, to address the CJEU with a preliminary reference or give effect to the principle of the primacy of EU law. The CCR appreciates that the legislature is also held to ensure the primacy of EU law. Nevertheless, it does not see its own role here. The Court holds the view that were it to engage in an exercise of EU law interpretation, then a clear conflict of competence with the CJEU would arise. Even if one accepts the CCR lack of competence argument, it should be stressed that the court does not examine the possibility of addressing the CJEU with a preliminary question to avoid an eventual breach of the CJEU’s competence over Treaty interpretation. Nor does it analyze the possibility of an *acte claire* or *acte éclairé* doctrine in the area.

Secondly, the CCR insisted that it was not confronted with a question of constitutionality but rather of application of EU law, which falls under the responsibility of the judiciary. As such, the CCR did not find the present dispute to be caught under the constitutional provisions, not even under the accession clause.¹¹⁷

¹¹⁶ *Id.* (Author’s translation from Romanian).

¹¹⁷ *Contra* CCR Decision No. 59/2007. It must be additionally stressed that in the dissenting opinion, Judge Moțoc found the matter to be precisely a constitutionality one, in view of the Article 148 accession clause, corroborated with Art. 135 (The Economy) on the obligation of the state to secure “the free trade, protection of fair competition, provision of a favorable framework in order to stimulate and capitalize every factor of production.”

Third, when a question of constitutionality arises, the CCR accepts that it may appeal to an EU norm as an “interposed norm” between the national law and the constitution, based on the Article 148 accession clause. It subjects this possibility to two cumulative conditions. The first is the clear, precise, and unequivocal character of the EU law norm. The second is subjective, implying the CCR’s value judgment on the constitutional relevance of the norm, meaning that the norm is able to support the court in reaching a solution in the case at hand.

Fourthly, it appears that the CCR does not recognize the primacy of EU law over the constitution, departing from its incidental – “(except the Constitution)” – formulation.¹¹⁸

Fifth, the CCR is not excluding the possibility of addressing a question for a preliminary ruling. This means that it admits *in abstracto* the eventuality of a direct dialogue with CJEU. The issue may arise when the constitutionality review brings into discussion a clear, precise, and unconditional EU law norm, the interpretation of which could support the CCR in solving the constitutionality challenge.

On this last point, one may have doubts as to whether, by accepting the abstract possibility of referring to the CJEU under the above-enumerated conditions, the CCR is not in fact denying the possibility entirely. The rationale behind a reference to the CJEU is to clarify a question of EU law. When the norm is clear, precise, and unconditional, one could wonder what scope for clarification remains. In principle, such a clear norm could be directly applied *in casu*, application that—according to the Court—is under the exclusive competence of the ordinary courts. Nevertheless, the scenario cannot be completely discarded.

a) From Normative to Structural Primacy

In line with the CJEU’s case law, the primacy doctrine implies that national law provides for efficient remedies in case of breach of EU law.¹¹⁹ De Witte has called it ‘structural primacy’.¹²⁰ This extension of the principle of primacy goes beyond the obligation to set aside the conflicting national law. It entails positive measures in order to ensure appropriate relief able to make good the damage resulting from a breach of EU law.

¹¹⁸ CCR Decision No. 668/2011.

¹¹⁹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others*, 1996 E.C.R. I-01029.

¹²⁰ De Witte, *supra* note 41, at 343.

As mentioned earlier, in January 2012 the High Court enforced the principle of primacy and gave full effect to the EU Treaty provisions over the conflicting national pollution tax ones, putting an end to a long legal controversy.¹²¹ However, the constitutional challenges did not stop there.

In the pollution tax case, the problem was that by the time the High Court enforced the principle of primacy, the individuals who had been subject to an unlawful tax had exhausted all the national judicial remedies. Moreover, in the meantime, the national Parliament had abrogated the domestic provisions allowing for an extraordinary appeal against an irrevocable decision breaching EU law.¹²² Thus, contrary to the CJEU case law,¹²³ the principle of *res judicata* prevented the claimants from challenging the irrevocable tax imposition decisions.

Called to assess the constitutionality of the Parliament's measure, the CCR, by Decision 1039/2012, held that the national law abrogating the remedy for breach of EU law was unconstitutional.¹²⁴ It found that this was so on the basis of the EU accession clause (Article 148), which requires *all* national authorities to ensure the "priority" of EU law. Moreover, the Court found that by granting no remedy for the breach of EU law, the principle of loyal cooperation enshrined in Article 4(3) TEU would be disregarded and the constitutional obligations of Article 148 accession clause would be rendered merely illusory. At the same time, the CCR found that the very essence of the principle of 'priority' (primacy) would be hampered.¹²⁵ In support of its reasoning, the CCR referred to the benchmark cases of the CJEU: *Van Gend en Loos*¹²⁶ and *Costa v ENEL*.¹²⁷ Furthermore, it stated that the lack of a judicial remedy would entail the denial of the principle of "priority application of Union law," which would be contrary to the Constitution and the obligations undertaken by the EU acceding Treaties.

It is interesting to observe that, this time, the CCR found that it was examining a case of constitutionality rather than application of law. Consequently, the CCR was willing to

¹²¹ See *supra* note 96.

¹²² Law 299/2011, Official Monitor of Romania No 916 of 22 December 2011.

¹²³ Case C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA., 2007 E.C.R. I-06199, para. 63.

¹²⁴ CCR, Decision 1039/2012, Official Monitor of Romania no 61 of 20.01.2013.

¹²⁵ *Id.* at point II.

¹²⁶ Case C-26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 1.

¹²⁷ Case C-6/64, Costa v. ENEL, 1964 E.C.R. 1251, 1269.

scrutinize the national law in the light of the Article 148 accession clause, whereas it repeatedly refused to do so in its prior decisions considered above.

One could still wonder to what extent the decision overrules the previous case law or, on the contrary, supports it. What is clear is that, from several points of view, the decision is inconsistent with the CCR's precedents. First, the Court relies on the accession clause to give primacy to EU law and to strike down a conflicting national norm. Second, the Court departs from its previously set conditions on the applicability of an EU law norm in a constitutionality review. As seen above, the court invoked in support of its unconstitutionality findings two EU law principles: the principle of loyal cooperation and the principle of primacy. Recalling the clear, precise, unconditional and constitutionally relevant conditions, one may wonder to what extent the CCR is consistent in applying these. Whereas, indeed, this time the CCR found the EU law norms to be constitutionally relevant, one cannot be so sure about the extent to which the EU law principles relied upon are clear, precise, and unconditional.

Finally, we should stress that this case, whilst bringing more clarity to the CCR's position *vis-à-vis* the principle of primacy, also adds to the confusion over the relationship between EU law and the Constitution itself. We shall consider this in the decisions analyzed below.

1.3 Data Retention Directive

Directive 2006/24/EC on data retention (the Data Retention Directive) was transposed into the national legal order by law no. 298/2008.¹²⁸ Shortly after its enforcement, the law was declared unconstitutional in its entirety,¹²⁹ for going beyond a justified and proportionate limitation of the rights to privacy,¹³⁰ secrecy of correspondence,¹³¹ freedom of expression,¹³² and presumption of innocence,¹³³ as guaranteed by the Constitution.

¹²⁸ Law 298/2008 Official Monitor of Romania no 780 of 21 November 2008.

¹²⁹ CCR, Decision 1258/2009, Official Monitor of Romania No 798 of 23 November 2009 [hereinafter CCR Decision 1258/2009].

¹³⁰ Constitution of Romania, Art. 26(1) ("The public authorities shall respect and protect the intimate, family and private life.").

¹³¹ *Id.* at Art. 28 ("Secrecy of the letters, telegrams and other postal communications, of telephone conversations, and of any other legal means of communication is inviolable.").

¹³² *Id.* at Art. 30(1) ("Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.").

¹³³ *Id.* at Art. 23(11) ("Any person shall be presumed innocent till found guilty by a final decision of the court.").

What is interesting to note for the purpose of our inquiry is that the CCR, confronted with a national law transposing a piece of EU secondary legislation allegedly violating human rights, adopted a completely EU-blind attitude.¹³⁴ The Court simply nationalized the EU source of the national law. Aside from mentioning, incidentally, when citing the arguments of the parties, that the national law transposed the Data Retention Directive and that directives generally leave a large scope of maneuver to Member States in attaining the result prescribed therein, no other consideration was paid to the EU legal act.¹³⁵

In these conditions, our analysis of the CCR's decision looks at what the CCR did not say, rather than what it did.

First, the CCR did not investigate the exact source of the criticized provisions. It avoided making the EU source explicit.

Second, the CCR did not inquire into whether *in concreto* the Parliament had (or not) exercised a large margin of discretion when implementing the Directive. That is to say, the court did not try to establish explicitly whether the challenged provisions emanated from the national or EU legislator, as for instance the German Constitutional Court did when later confronted with the same question.¹³⁶

Third, the CCR failed to consider the possibility of addressing a reference for a preliminary ruling to the CJEU before striking down a source of EU secondary law.¹³⁷ Neither did the Court inquire into whether the CJEU has already clarified the question pursuant to the "*acte éclairé*" doctrine.

Finally, from the human rights angle, reference was made to the right to privacy and family life as enshrined in the Universal Declaration of Human Rights, International Convention on Civil and Political Rights, European Convention on Human Rights (ECHR), and the Romanian Constitution. No attribution was made either to the EU treaty provisions or to fundamental rights as general principles of EU law.¹³⁸ Equally, there was no mention of the Charter,

¹³⁴ CCR Decision 1258/2009. For comparison the pre-accession, see CCR Decision 253/2000.

¹³⁵ *Id.*; Cian C. Murphy, *Romanian Constitutional Court, Decision No 1258 of 8 October 2009*, 47 COMMON MKT. L. REV. 933–41 (2010).

¹³⁶ Press release no. 11/2010 of 2 March 2010, Judgment of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, available at <http://www.bverfg.de/pressemitteilungen/bvg10-011en.html>.

¹³⁷ For contrast, see the subsequent approaches of the Austrian Constitutional Court and the Irish High Court who chose both to address a reference for a preliminary ruling to the CJEU. *Digital Rights Ireland*, Case C–293/12.

¹³⁸ See in this sense the referral of the Austrian High Court of 11 June 2012 in Case C–293/12, where the Court does not limit the referral to the Charter provisions, but goes far beyond referring to the treaty articles and general principles of EU law.

which was about to enter into force in two months time (1 December 2009). The simple lack of binding force of the Charter explanation does not seem to be plausible here. As shown above, the lack of binding force did not constitute a dissuasive factor for the Court in the pre-accession case law.¹³⁹ Moreover, fundamental rights protection at the EU level already enjoyed a well-established position in EU law and in the CJEU case law, especially with regards to protection of personal data and privacy. The Charter could, consequently, have been invoked as the expression of the EU *acquis* in the area.¹⁴⁰

As the CCR declared a national law transposing an EU Directive unconstitutional, it has been argued that the CCR *de facto* disregarded the *Foto-Frost* case law, which establishes the lack of jurisdiction of national courts to declare an EU act void.¹⁴¹ Weiler has suggested that, in principle, the competence in deciding on the invalidation of any community measure on any ground would have to stay with the CJEU and not with the national higher courts.¹⁴² However, from the point of view of the national Constitutional Courts, this opinion has encountered—and apparently still encounters—strong resistance.

The CCR decision has also stirred strong reactions from the European Commission, which called on the Romanian Parliament to comply with the obligations under the Directive, notwithstanding the decision of the CCR.¹⁴³

Given the imminence of infringement proceedings, the Romanian Parliament again transposed the Directive by Law 82/2012, arguably having regard to the CCR's critiques. The second transposition of the Data Retention Directive put the Parliament in a difficult position. The legislator struggled, on the one hand, to respect the authority of the CCR decisions and, on the other hand, the EU law obligations of correctly transposing a

¹³⁹ CCR Decision 253/2000, (note 55).

¹⁴⁰ See CCR, Decision 871/2010, Official Monitor of Romania No. 433 of 28 June 2010, para. II.3; Decision 1.479/2011, Official Monitor of Romania No. 59 of 25 January 2012. See also THE EUROPEAN COURT AND NATIONAL COURTS- DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77–142 (Anne Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds., 1998).

¹⁴¹ Case C–314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 04199, paras. 15–20.

¹⁴² Joseph H.H. Weiler & Ulrich R. Haltern, *Constitutional or International? The Foundations of The Community Legal Order and the Question of Kompetenz-Kompetenz*, in THE EUROPEAN COURT AND NATIONAL COURTS- DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 333 (Anne Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler eds., 1998).

¹⁴³ European Commission, press release - IP/11/1248, 27 October 2011, *Data retention: Commission requests Germany and Romania fully transpose EU rules*, available at http://europa.eu/rapid/press-release_IP-11-1248_en.htm.

directive.¹⁴⁴ Ultimately, the adopted law has been able to address only to a limited extent the concerns of the CCR.¹⁴⁵

Between 2012 and 2014, a general silence veiled the Data Retention issue. In the attempt to avoid a new clash between the EU and national constitutional legal orders, the transposition law was not again brought under constitutional scrutiny. This silence, however, was broken by the CJEU's ruling in the *Digital Rights Ireland* case.¹⁴⁶

Several months after the Data Retention Directive was declared invalid by the CJEU, the CCR was once again asked to review the constitutionality of the second transposition law.¹⁴⁷ Following closely the CJEU's judgment, the CCR struck down, for the second time, the national law on data retention by Decision 440/2014.¹⁴⁸ In support of its finding of unconstitutionality, the CCR found that the arguments developed by the CJEU were in principle applicable by analogy to the national transposition law. Additionally, when compared to the vices identified in 2009, the CCR found that those still persisted and thus that the same unconstitutionality solution was imminent in the case at hand. Ultimately, the CCR cited the precedents of the German,¹⁴⁹ Czech,¹⁵⁰ and Bulgarian¹⁵¹ Constitutional Courts that adopted a similar position on data retention matters.

The CCR's Data Retention duplet is a telling example which brings a special emphasis to the conclusions of the above-discussed EAW and Pollution tax case studies. Even if the two decisions reach the same solution – the unconstitutionality of the domestic data retention law—the way in which the CCR reaches the same response is fundamentally different in each case. From this point of view, the emphasis does not lie on what the Court ultimately said, but rather on how the Court said it.

¹⁴⁴ See Simona Sandru, *Noul act normativ privind retinerea datelor—între constituționalitate și europenitate*, 8 CURIERUL JUDICIAR (2012). The author argues that the new legal text does not insert substantive differences in terms of human rights protection and that ultimately has adopted a border stance between constitutionality and the need to conform to EU obligations.

¹⁴⁵ Law 82/2012, Official Monitor of Romania No 406 of 18 June 2012.

¹⁴⁶ *Digital Rights Ireland*, Case C-293/12.

¹⁴⁷ CCR, Decision 440/2014, published in Official Monitor No 653 of 4 September 2014, http://www.ccr.ro/files/products/Decizie_440_2014_reviz.pdf.

¹⁴⁸ *Id.*

¹⁴⁹ Bundesverfassungsgericht [BVERFG] [Constitutional Court], 2 Mar. 2010, 1 BvR 256/08, http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html.

¹⁵⁰ Constitutional Court of the Czech Republic, Pl. ÚS 24/10 of 22 March 2011.

¹⁵¹ Supreme Administrative Court of Bulgaria, Decision No.13.627 of 11 December 2008.

When compared with the first 2009 Decision, in 2014 the CCR not only makes it clear from the very beginning what is the source of the contested national law, but it actively refers to the Directive throughout the judgment, mentioning it more than fifty times. However, it does so indirectly, referring to the substantive provisions of the Directive only when citing the CJEU. Thus, the Court does not engage directly in an analysis of the Directive.

Moreover, given that in 2014 the CJEU's point of view on the matter largely responded to the CCR's 2009 concerns, the CCR heavily relied on the CJEU's arguments in defining its own reasoning on the issue. As such, it started by citing comprehensive parts of the CJEU's judgment, referring to sixteen paragraphs therein. Subsequently, it found that both its 2009 precedent and the CJEU's judgment were equally applicable *in casu*. Having regard to the CJEU findings, as well as to its own 2009 congruent precedent, the CCR ultimately declared the law to be unconstitutional.

The 2014 decision reveals a higher level of confidence on the part of the CCR towards EU law rhetoric. This time, the CCR did not simply avoid EU law reasoning, but properly acknowledged the EU law source of the national law, reviewed the CJEU's position regarding the Directive, and—having regards to the arguments developed by the CJEU—proceeded to the constitutionality review of the national law based solely on the constitutional provisions. From this point of view, the decision shows that the Court draws a clear demarcation line between the two jurisdictions.

It is important to stress that, similar to the 2009 Decision, the CCR continues to avoid referring to the Charter. The CCR's 2014 Decision mentions the Charter only twice and exclusively when referring to the CJEU's findings.

In the light of the above observations, one may argue that we witness a novel position on the part of the CCR towards EU law and the CJEU: a cooperative separation stance. The Court attributes both the Directive and the Charter exclusively to the CJEU, while keeping national law and the Constitution for itself. Whilst one must welcome the CCR's increased confidence and its maturing line of reasoning towards EU law, we believe that the separation position adopted is too rigid, at least in so far as the Charter is involved.

1.4 What Place for Primacy? The Clarification

The above case law presented a puzzled and highly fluctuating position of the CCR towards EU law and an even more confusing one when it comes to the primacy of EU law over constitutional provisions. Even if the reluctance of the CCR towards primacy could have been inferred from the CCR's case law as of 2003,¹⁵² a direct answer was for a long time kept in the shadows.

¹⁵² CCR Decision 148/2003.

Recently, the silence was broken and the CCR expressed its position in Decision 80/2014 on the 2013 legislative project concerning the revision of the Constitution.¹⁵³ The law on the revision of the Constitution has not yet been adopted and is still pending in the Parliament, subject to new amendments. Nevertheless, the reasoning of the CCR on the matter is highly revealing for our research question.

The revision project proposed a rewording of the accession clause in a membership one. Upon an *ex officio* constitutional review, the Court found the proposed amendment of Article 148(2) dealing with primacy to be highly problematic with regards to its own competence and the limits of revision of the Constitution.¹⁵⁴ As a result, the proposed change was found *a priori* unconstitutional by unanimity.

Two core changes coming out from the membership clause reform proposal entail that: first, the exhaustive reference to executive, legislature, and judiciary would be replaced by “Romania” as a sole subject mandated to observe EU law obligations; second, the precedence of EU law over “national laws” would be replaced by “national legal order.”

The consequences implied by the newly proposed wording are also twofold.

First, the CCR, even if not formally part of the judiciary, would also be held expressly, together with the executive, legislature, and judiciary, to ensure the respect of EU law obligations, including the respect of the primacy principle.

Second, accepting the proposed wording would mean that EU law would take precedence not only over “national law” (interpreted by the Court to comprise only Parliament’s legislative acts and Government Ordinances), but also over the whole “national legal order,” including the Constitution.

The first consequence was not contested by the CCR, which confirmed once again that it sees itself as an important EU actor and is committed together with other state authorities to ensuring the obligations undertaken by Romania under the accession and founding treaties. The second consequence, however, was seen in highly problematic terms. This proves that the sensibilities of the CCR genuinely lie in the concern of allowing the primacy

¹⁵³ For more details on the 2013 Constitutional reform, see Viorica Vita, Country Report Romania, Constitutional Change through Euro Crisis Law, Section III, *available at* <http://eurocrisislaw.eui.eu>. See also: Venice Commission, Opinion 731/2013, On the Draft Law on the Review of the Constitution of Romania, *available at* [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)010-e).

¹⁵⁴ Decision 80/2014, paras. 461–62, Official Monitor of Romania No 246 of 7 April 2014, *available in Romanian at* http://www.ccr.ro/files/products/Decizie_80_2014_opinii2.pdf.

of EU law to impinge on the national constitution and affect in any way its own competences.

The Court found that allowing ‘priority’ over the whole national legal order, including the Constitution, would necessarily put the Constitution in a lower hierarchical position to EU law,¹⁵⁵ and by consequence, limit its own jurisdiction in favor of the CJEU, including in the areas of shared competence.¹⁵⁶ Moreover, the Court went as far as saying that this would go against the permissible limits of constitutional review, as it would be capable of restricting the individual’s right of access to constitutional justice, thus risking restricting either the individual’s fundamental rights and liberties or their correlative guarantees as enshrined in the Constitution.¹⁵⁷ The CCR then stressed, citing the precedent of the Polish Constitutional Tribunal,¹⁵⁸ that the accession to the EU could not imply the supremacy of EU law over all the national legal order.¹⁵⁹ Moreover, it asserted that the Constitution is the expression of the will of the people, which cannot lose its binding force solely because a legal conflict may arise between the latter and a provision of EU law.¹⁶⁰

The position adopted by the CCR is particularly strong and telling. It reflects a protectionist stance, first with regards to the Constitution, and second with regards to the Court’s own jurisdiction.

The jurisdiction argument is a new and curious one. As such, the CCR departs from the presumption that if EU law were to have primacy over the Constitution the CCR would always have to refer the constitutionality questions on EU normative acts to the CJEU, and by consequence, limit its jurisdiction to the areas of national competence.

¹⁵⁵ *Id.* at para. 458.

¹⁵⁶ *Id.* at para. 461 (“... accepting the new wording proposed at Article 148 (2) would amount to creation of necessary premises allowing the limitation of the jurisdiction of the Constitutional Court, in the sense that only the normative acts adopted in the areas not subject to the transfer of competences to the European Union would still be subject to constitutional review, whereas the normative acts [...] adopted in the areas of shared competence, would be subject exclusively to the legal order of the European Union, being excluded from constitutional control. However, irrespective of the area of the legal acts, these must respect the supremacy of the Romanian Constitution, according to Article 1 para. 5 thereof.”) (Author’s translation from Romanian).

¹⁵⁷ *Id.* at para. 462 (“Therefore, the Court finds that such a change would constitute a restriction of the citizens right to constitutional justice, to defend certain constitutional values, rules and principles, namely the suppression of a guarantee of these constitutional values, rules and principles, which also include the sphere of fundamental rights and freedoms.”) (Author’s translation from Romanian).

¹⁵⁸ Constitutional Tribunal of Poland, Decision no K 18/04 of 11 May 2005.

¹⁵⁹ CCR Decision 80/2014 at para. 459.

¹⁶⁰ *Id.*

This presumption, however, seems to confuse the EU competence as defined in the treaties and the jurisdiction of the two courts. It is first for the national courts, including the constitutional ones, to give effect to an EU law provision in cases pending before them irrespective of their EU legal basis. When a question of EU law arises in the proceedings, in line with the *CILFIT* doctrine the national courts may—the last instance courts must—refer a preliminary question to the CJEU. Again, the national courts are to do so without distinguishing whether the legal act was adopted in the area of shared or exclusive competence.

Departing from the technicalities of the reasoning, the overall message sent by the decision is clear: no primacy over the Constitution. The CCR adopts a radical in block position and takes away the whole Constitution from the principle of primacy. The second message sent by the Court is: no limitation of its jurisdiction and constitutional review prerogative.

The position brings transparency to a long line of fluctuating reasoning of the CCR on EU law matters. However, it does not shed clarity on the sensibilities behind. It is clear that the Court denies by unanimity any primacy of EU law over the Constitution and does not make any circumstantiations on the prohibition. However, the legal reasoning behind this falls short in explaining the position. It remains to be seen whether the Court will further keep up with its restrictive stand or, similarly to the case studies analyzed above, gradually reshape its position.

D. The Dialogue Between the CCR and the CJEU: What Avenue for Referral?

Having regards to the CCR case law, the question that arises is first: what place for primacy? And second: how open is the Court to a direct dialogue by means of the preliminary reference procedure?

I. Primacy Under Condition

There is no doubt that the CCR has generally accepted the principle of the primacy of EU law. However, it has not recognized an absolute primacy as requested by the CJEU. The examined case law shows that the CCR subjects primacy to several limitations.

First, the CCR limits the applicability of primacy to ordinary national law and does not recognize any primacy of EU law over the Constitution, contrary to the CJEU interpretation in *Internationale Handelsgesellschaft*.¹⁶¹ As the CCR has repeatedly stated, the Constitution

¹⁶¹ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (hereafter *Internationale Handelsgesellschaft* case).

guarantees the “priority” of EU law over national law, “(except the constitution).”¹⁶² De Witte has seen this extension of the “old” constitutional courts’ line of reasoning to the “new” Central-Eastern European courts as a “domino effect.”¹⁶³ The incidental reference to the relationship between EU law and the Constitution clearly underlines a cautious attitude. In this sense, it is useful to recall a recent Report of the CCR, where it was argued that the degree of acceptance of the principle of the primacy of EU law in the national constitutional hierarchy results from the corroborative interpretation of Articles 20 and 148 of the Constitution.¹⁶⁴ More precisely, EU law is to have primacy over all national laws (supra-legislative), except the Constitution (infra-constitutional).¹⁶⁵ This position seems rather constant, being endorsed by the Court’s case law as of 2003¹⁶⁶ and culminating with its most recent decision of 2014.¹⁶⁷

Second, as a result of the first limitation, the CCR explicitly delegated the application of primacy only to the ordinary courts, as, on the one hand, only the ordinary courts are competent to apply *in concreto* the law, and, on the other hand, EU law has no primacy over the Constitution, meaning that consequently there is no scope for the CCR to apply the principle. In this case, however, no general principle rule can be inferred, as Decisions 59/2007 and 1039/2012 show.¹⁶⁸ There the CCR nevertheless found the EU law issue to be constitutionally relevant¹⁶⁹ and, by declaring the national law unconstitutional, *de facto* gave primacy to the EU provisions over the conflicting national law.¹⁷⁰

Third, the CCR held that it is competent to apply the Constitution as the only norm of direct reference in a constitutionality review. At the same time, the CCR stated that it could interpret the Constitution in the light of EU law, subject to a two-fold conditionality. On the one hand, the EU norm would have to be directly applicable, and, on the other hand, the court would need to find it relevant to the constitutional review. This reasoning was

¹⁶² CCR Decision 668/2011.

¹⁶³ De Witte, *supra* note 41, at 354–55.

¹⁶⁴ CCR, *National Report Romania*, Congress of the Conference of the European Constitutional Courts, May 2014, available at <http://www.confueconstco.org/reports/rep-xvi/LB-Roumanie-EN.pdf> [hereinafter CCR *National Report Romania*].

¹⁶⁵ *Id.*

¹⁶⁶ CCR Decision 148/2003.

¹⁶⁷ CCR Decision 80/2014.

¹⁶⁸ See CCR Decision 59/2007 at 124.

¹⁶⁹ CCR Decision 59/2007.

¹⁷⁰ CCR Decision 1039/2012.

adapted in Decision 1039/2012, where the enumerated conditions of a clear, precise, and unconditional norm were not rigidly observed.¹⁷¹

Finally, the fourth limitation addresses the level of human rights protection. Consequently, EU law on fundamental rights, including the Charter, is to have primacy over all national laws, unless the latter prescribes higher standards of human rights protection.¹⁷² In the view of the CCR, the Charter is to apply with priority only insofar as it “ensures, guarantees and develops”¹⁷³ the constitutional fundamental rights or at least prescribes a similar protection.¹⁷⁴ In this respect, it might be argued that the CCR adopts a “*Solange*” type reasoning in line with the German Constitutional Court.¹⁷⁵ Even if lately the Charter has been increasingly relied upon in front of the Court, it has scarcely been upheld in its reasoning so far. From this point of view, the CCR still sees the ECtHR as its main cooperation partner and the ECHR as its main reference. The court even stated that in case of a clash between the two human rights systems—EU and ECHR—it would be inclined to “*tip the balance*” towards the Strasbourg Court.¹⁷⁶ This is not surprising, as according to Article 20 of the Constitution, international human rights treaties, thus including the ECHR, are to be applied with ‘priority’ even as against the Constitution, when they ensure a higher standard of human rights protection.

In trying to bring together the puzzling picture of the CCR’s jurisprudence, it is worth noticing that dealing with EU law arguments has not been an easy task for the CCR. The CCR has itself held that reconstructing its case law with regards to EU law has been a rather “complex process.”¹⁷⁷ The CCR added that it was especially so given the specificity of EU law and its “autonomy with regards to the national legal systems, which makes its reception in the national law very difficult.”¹⁷⁸ When it comes to the primacy of EU law, the CCR’s attitude could be generally characterized as resilient. This trend has been underlined in the literature as a common one in the Central Eastern European Member States.¹⁷⁹ Although we lately see a Constitutional Court gaining in confidence when engaging with

¹⁷¹ *Id.*

¹⁷² CCR National Report Romania.

¹⁷³ Decision 871 of 25 June 2010, Official Journal of Romania no. 433 of 28 June 2010, para. II.3.

¹⁷⁴ *Id.*

¹⁷⁵ On the phenomenon, see TATHAM, *supra* note 104, at 164.

¹⁷⁶ CCR National Report Romania.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Wojciech Sadurski, “*Solange, chapter 3*”: *Constitutional Courts in Central Europe – Democracy – European Union*, European University Institute Working Papers, (2006).

the EU legal order, it chooses to do so by clearly isolating EU law from national transposition provisions, a separation which might be seen as excessive, if not artificial.¹⁸⁰

II. The Pending Case of Referral: Setting the Scene

Returning to the case of referral, in the light of the above analysis, we notice the following developments.

Initially, we have a hesitant Court, extremely silent on EU law matters, and unwilling to address the EU law nature of the norms under constitutional review.¹⁸¹ The most recent case law illustrated a progressive, but still nuanced, acceptance of EU law arguments. In fact, we notice a primacy “under condition,” which further translated into a referral “under condition.”¹⁸²

The Court recognized, for the first time, the possibility of addressing a referral for a preliminary ruling to the CJEU in 2011,¹⁸³ but nevertheless it leaves the dialogue tool unused. Instead, it clearly marks the limits and holds that the referral question would be subject to the same conditionality as the use of an EU norm in the constitutionality review. Namely, the norm would have to be “clear, precise, unequivocal” and “constitutionally relevant.”¹⁸⁴ It is for the CCR only to assess the constitutional relevance of the EU norm. Having fulfilled these criteria, it is to be subsequently to the “appreciation” of the Court—not the duty—to refer for a preliminary ruling to the CJEU. It is also worth noting that the Court did not indicate any benchmarks that might influence its margin of appreciation. From this point of view, the CCR chose to preserve a full discretion as to the possibility of referral.

Even if the CCR has never addressed a preliminary ruling request to the CJEU, it has set out important positive grounds for a future reference.

In this sense, the CCR has already expressly accepted that it is a jurisdiction for the purpose of Article 267 TFEU, and it has admitted its competence to refer a question for a preliminary ruling. Moreover, the CCR has set the explicit “rules” in case that possibility occurs. Finally, the CCR has consistently held that it is not entitled to interpret any EU law

¹⁸⁰ CCR Decision 440/2014.

¹⁸¹ CCR Decision 1258/2009.

¹⁸² Decision 668/2011.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

matter, given the risk of a “conflict of jurisdiction between the two courts,” qualified by the Court as “inadmissible.”¹⁸⁵

Therefore, when confronted with a future question of interpretation of EU law, the CCR might find it appropriate to address the question to the CJEU.

II. Beyond the Legal Argument

The dialogue between the CJEU and the CCR is at an incipient stage. Thus far, the CJEU has mostly been the speaker, and the CCR has only started to pay attention to its rhetoric. In fact, one could argue that the CCR has started to give a shy reply.

Given the Court’s multiple inconsistencies and variables in its line of reasoning towards EU law, it is difficult to draw a conclusion based solely on a legal analysis. In an attempt to fill this gap in legal reasoning, let us now turn to the possible motives behind the fluctuating legal arguments and reiterate the two theories brought forward in the preliminary stages of our analysis.

As mentioned above, Burley and Mattli argue that the actors most likely to drive the process of European legal integration are the ones pursuing their self-interest in the European sphere.¹⁸⁶ If one extends this theory to the CCR as a national actor, the theory could explain the Court’s attitude towards the EU legal order pre- and post-accession. Whereas during the pre-accession period the CCR was pursuing the national interest of EU accession,¹⁸⁷ in the aftermath of the accession it found itself in an uncomfortable position. On the contrary, lower courts empowered by the new competences have been the drivers of post-accession integration, being more open to directly enforcing EU law and to giving it primacy over conflicting national law. In this context, the CCR tried to reconsolidate its position as the sole guarantor of the supremacy of the Constitution, avoiding in as much as possible EU law questions unless these were congruent with its own findings or strictly necessary.

On the other hand, Alter has argued from the point of view of judicial competition theory that “[c]ourts act strategically *vis-à-vis* other courts [...] so as to avoid provoking a response which will close access, remove jurisdictional authority, or reverse their decisions.”¹⁸⁸ Alter

¹⁸⁵ *Id.*

¹⁸⁶ Burley & Mattli, *supra* note 7, at 43.

¹⁸⁷ The pro-European attitude and the enthusiasm towards EU accession are most visible in the CCR’s “inertial” Decision 59/2007. The Decision mentions repeatedly the moment of accession of 1 January 2007 and the duty to respect the EU accession treaty commitments.

¹⁸⁸ ALTER, *supra* note 8, at 45–46.

adds that whereas the lower courts would in principle be more open to judicial dialogue,¹⁸⁹ higher and constitutional courts would find it more difficult to bear EU supremacy.¹⁹⁰ Scholars like Conant have taken the theory further and have appreciated that “national supreme courts will begin to send references in an effort to influence the direction of the ECJ’s legal interpretation in ways that are more deferential to national legal traditions.”¹⁹¹

This judicial competition theory is also helpful when studying the behavior of the CCR towards the preliminary reference procedure.

The judiciary of Romania¹⁹² launched the direct dialogue with the CJEU during the first month of EU membership—January 2007.¹⁹³ It was a lower court—the Tribunal of Ilfov County—that addressed the first question for a preliminary ruling to the CJEU in the famous *Jipa* case.¹⁹⁴ According to the 2013 Annual Report of the CJEU, the Romanian courts have, since accession, addressed sixty-three questions for a preliminary ruling, out of which six originate from the High Court.¹⁹⁵

Having regard to Alter’s theory, one might expect the CCR to come next in line. As we have seen, in the early post-accession period, the CCR attempted to distance itself from EU law arguments. However, the isolation attempt was not feasible.

Subsequently, under the competitive pressure of the rest of the judiciary and notably of the High Court, the CCR felt the need to adapt to the new realities. As such, it had generally

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 34.

¹⁹¹ Conant, *supra* note 9, at 1–30. The statement is endorsed by the most referrals of the Constitutional Courts. For instance, in the *M. Jeremy F.* referral, the French Conseil Constitutionnel formulates the questions strategically so as to clearly suggest its views on the legal issue and implicitly the preferred answer it would like to hear from the CJEU. Conseil Constitutionnel, Decision n° 2013-314P of 4 April 2013. See on this point: EUI, Centre for Judicial Cooperation, Database, *M. Jeremy F.*, case note (“[t]he Constitutional Council included in the preliminary reference addressed to the CJEU its own interpretation of the balance between the principle of mutual recognition of criminal judgments and the right to effective remedy, seemingly in favor of higher guarantees for the right to an effective remedy, making a strategic attempt to influence the CJEU.”), *available at* <http://judcoop.eui.eu/data/?p=data&fold=10&subfold=10.3>.

¹⁹² Constitution of Romania, Arts. 126(1) & Art. 2(2) Law 304/2004 on judicial organization (“Justice shall be administered by the following courts: a) High Court of Cassation and Justice; b) courts of appeal; c) tribunals; d) specialized tribunals; e) military courts; f) district courts.”).

¹⁹³ Case C–33/07, *Directia Generala de Pasapoarte Bucuresti v. Jipa*, 2008 E.C.R I–0515.

¹⁹⁴ *Id.* The case concerned the free movement of citizens and the prohibition imposed on a Romanian citizen to enter the territory of another Member State following a decision for expulsion based on public security reasons.

¹⁹⁵ CJEU, *Annual Report 2013*, 109 (2013).

abandoned the EU-blind stance and started to reintegrate the EU law arguments in order to avoid being left outside the legal discourse. Nevertheless, the CCR started to engage with EU law arguments in so far as these did not encroach on its own authority and competences, an attitude strongly confirmed by Decision 80/2014.¹⁹⁶

As to the possibility of referral, one might notice that the CCR has not yet been persuaded by a strong enough argument to break the silence. The Data Retention case was, without doubt, a good opportunity to initiate the referral dialogue. However, one must stress that whereas in the 2009 period the Court adopted a general “splendid isolation” stance towards EU law, when asked for the second time in 2014 to re-examine the issue, the CJEU had already dealt with the question. Therefore, a reference did not find its *raison d’être*. The CCR instead, guided by the *acte éclairé* doctrine, interpreted the national law in the light of the CJEU *dictum* and gave it full effect.

In the light of this context, one might expect the CCR to consider the opportunity of referral when a question of EU law of constitutional relevance arises during a future constitutional review, given that the question has not yet been addressed by the CJEU and that the CCR itself appreciates that the answer of the CJEU could support its (un)constitutionality findings.

Finally, if one would translate the CCR’s case law into an address to the CJEU, what would the CCR say?

The message ultimately would send a general note of “uncertainty and lack of confidence”¹⁹⁷ towards the EU legal order, recently coupled with a threat to its own competence and human rights guarantees. There is still a lack of trust towards the new dialogue partner. The CCR seems to admit the idea, since by giving preference to the ECtHR over the CJEU in human rights matters its core argument relies on the existence of more “ancient” ties with the former.¹⁹⁸ With regards to the CJEU, the ties are rather recent and mainly indirect. The CCR even found it necessary to underline that no “hierarchy” between the two jurisdictions could be brought into discussion.¹⁹⁹ What the CCR has perhaps not yet heard is that the EU legal order should be read in the language of “constitutional

¹⁹⁶ See, *supra* note 154.

¹⁹⁷ Dragos Efrim, Gabriela Zanfir & Madalina Moraru, *The Hesitating Steps of the Romanian Courts Towards Judicial Dialogue on EU Law Matters*, Social Science Research Network, 27 (2013), available at <http://papers.ssrn.com/abstract=2261915>.

¹⁹⁸ See, *supra* note 164.

¹⁹⁹ CCR, Decision 668/2011.

tolerance,” where the national constitutional actors are “invited” to cooperate on their own will, without any subordination.²⁰⁰

E. Conclusion

This Article presents the puzzling picture of the CCR’s position towards the EU legal order. This is perhaps because one of the most consistent patterns in the CCR’s EU law line of reasoning is precisely its inconsistency. The Court adopts different stances depending on the case in question, and includes the EU law rationale only in so far as the latter does not infringe on its own prerogatives.

In this Article, we tried to adopt a positive approach. We looked at the steps that have been taken during the eight post-accession years. The CCR has defined its position, has recognized the possibility of addressing a reference for a preliminary ruling, and has established clear conditions to initiate the procedure. It could be argued that the right pre-requisites are now in place for a future preliminary reference momentum.

²⁰⁰ Joseph H.H. Weiler, *In Defence of the European Status quo: Europe’s constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7–23 (Joseph H.H. Weiler & Wind Marlene eds., 2003).

Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU

By *Clelia Lacchi**

A. Introduction

The Constitutional Courts of a number of Member States exert a constitutional review on the obligation of national courts of last instance to make a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU).

Pursuant to Article 267(3) TFEU, national courts of last instance, namely courts or tribunals against whose decisions there is no judicial remedy under national law, are required to refer to the CJEU for a preliminary question related to the interpretation of the Treaties or the validity and interpretation of acts of European Union (EU) institutions.¹ The CJEU specified the exceptions to this obligation in *CILFIT*.² Indeed, national courts of last instance have a crucial role according to the devolution to national judges of the task of ensuring, in collaboration with the CJEU, the full application of EU law in all Member States and the judicial protection of individuals' rights under EU law.³ With preliminary references as the keystone of the EU judicial system, the cooperation of national judges with the CJEU forms part of the EU constitutional structure in accordance with Article 19(1) TEU.⁴

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¹ The CJEU specified in that regard that courts whose decisions may be reviewed by the Constitutional Court, within the limits of an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, are courts of last instance within the meaning of Article 267(3) TFEU. Case C-416/10, *Križan and Others*, para. 72 (Jan. 15, 2013), <http://curia.europa.eu/> and Opinion of Advocate General Kokott at para. 58, Case C-416/10, *Križan and Others* (Apr. 12, 2012), <http://curia.europa.eu/>. Moreover, it is worth pointing out that the obligation set out in Art. 267(3) TFEU applies also to Constitutional Courts. The article, however, does not focus on the role of Constitutional Courts as courts of last instance. For the sake of clarity, the references in the case law to ex Arts. 234(3) EC and 177(3) EEC are replaced by Art. 267(3) TFEU.

² Case C-283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. 03415. See also Joined Cases C-28-30/62, *Da Costa en Schaake NV and Others v. Administratie der Belastingen*, 1963 E.C.R. 00061.

³ Opinion 1/09, 2011 E.C.R. I-01137, paras 66-68 and 83-86.

⁴ Opinion 2/13, para. 165 and paras. 174-76 (Dec. 18, 2014), <http://curia.europa.eu/>.

Since individuals do not have remedies under EU law to obtain a preliminary ruling from the CJEU against the national court's refusal to make a preliminary reference, the responsibility of judges of last instance is enhanced by the case law of the CJEU concerning the financial liability of Member States for judicial acts. Accordingly, in *Köbler*, the CJEU ruled that Member States are obliged to make good damage caused to individuals by infringements of EU law for which they are responsible, including where the alleged infringement stems from a decision not to refer of a court of last instance.⁵ This was then confirmed in *Traghetti del Mediterraneo*, *Commission v. Italy* and recently in *Ferreira da Silva*, where the CJEU found for the first time that the national court failed to comply with its obligation under Article 267(3) TFEU.⁶ Although the potential effect of the principle enshrined in this case law cannot be overlooked, the requirements in order to engage the judicial liability of Member States might confine its value.⁷ Individuals may also file a complaint before the European Court of Human Rights (ECtHR) for a violation of Article 6(1) of the European Convention on Human Rights (ECHR) due to the national court's refusal to refer to the CJEU. The latter recognizes that the refusal might violate the right to a fair trial and, in two judgments of April 2014 and July 2015 respectively, it determined the existence of an infringement.⁸

Taking this backdrop into account, this article focuses on the case law of the Member States where individuals are entitled to introduce a constitutional complaint before the Constitutional Court for a violation of the constitution and to challenge the decision of a court of last instance not to refer to the CJEU.⁹ In this regard, the Constitutional Courts of

⁵ Case C-224/01, *Gerhard Köbler v. Republik Österreich*, 2003 E.C.R. I-10239. In this regard, it should be pointed out that the judicial liability is not linked to the decision not to refer but to the damages produced by that decision.

⁶ Case C-173/03, *Traghetti del Mediterraneo*, 2006 E.C.R. I-05177; Case C-379/10, *Commission v. Italy*, 2011 E.C.R. I-00180; Case C-160/14, *Ferreira da Silva e Brito* (Sept. 9, 2015), <http://curia.europa.eu/>. See also Opinion of Advocate General Léger, Case C-173/03, *Traghetti del Mediterraneo* (Oct. 11, 2005), 2006 E.C.R. I-05177; Opinion of Advocate General Bot at para. 98, Case C-2/06, *Kempter* (Apr. 24, 2007), 2008 E.C.R. I-00411.

⁷ Laurent Coutron, *L'irénisme des cours européennes*, in *L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE?* 13, 46-53 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

⁸ *Dhahbi v. Italy*, App. No. 17120/09 (Apr. 8, 2014), <http://hudoc.echr.coe.int/>; *Schipani and others v. Italy*, Appl. No. 38369/09, (July 21, 2015), <http://hudoc.echr.coe.int/>. See *Ullens de Schooten and Rezabek v. Belgium*, App. Nos. 3989/07 and 38353/07 (Sept. 20, 2011), <http://hudoc.echr.coe.int/>; *John v. Germany*, App. No. 15073/03 (Feb. 13, 2007), <http://hudoc.echr.coe.int/>.

⁹ It is also worth mentioning that similar procedures concerning the judicial review of the duty to refer under Article 267(3) TFEU exist, for instance, in France. The supreme administrative court (*Cour de Cassation*) pointed out that the omission to refer might constitute a denial of justice (French *Cour de cassation*, Oct. 26, 2011, Case No. 1002). Moreover, in Sweden, national legislation reinforces the obligation to refer in that a reasoned decision is compulsory (see *Lag (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol*, 24 May 2006). These cases, nonetheless, are beyond the scope of this article since they are not based on constitutional complaints for the infringement of constitutional rights. It is also appropriate to point out that the

Germany, Austria,¹⁰ Spain, the Czech Republic, and, more recently, Slovenia, have elaborated a constitutional guarantee which reinforces the duty to refer under Article 267(3) TFEU against arbitrary refusals.¹¹ Moreover, the Slovak Constitutional Court also recognizes that the refusal to refer of a court of last instance could breach the Constitution. Thus far, however, it has not determined the existence of a violation.

On what basis do these Constitutional Courts justify the exercise of their judicial review over this matter?¹² They have developed a judicial construction, by linking a constitutional right to the preliminary reference procedure.¹³ Accordingly, they consider themselves competent to examine whether a national court of last instance violates the obligation to make a preliminary reference to the CJEU. The rights that come into play are linked to the right to effective judicial protection, which includes, *inter alia*, the right to a lawful judge, the right of access to justice, the right to effective remedies, the right to a fair trial, and the right of defense.¹⁴ Emphasis will be given to the legal reasoning of the Constitutional Courts in question, with the purpose being of looking at the connection that has been developed between these rights and preliminary references.

The *conditio sine qua non* for this practice is that, in the Member States under analysis, when other legal remedies are exhausted, individuals may file a complaint, under certain circumstances, before those Constitutional Courts, for a breach of the rights set out in the

analysis of the case law of the Constitutional Courts in question focuses on the aspects of the judgments that are relevant to the judicial review of the obligation to refer. Moreover, the article does not take into account the follow-up to the decisions of the Constitutional Courts before the concerned national courts.

¹⁰ The review by the Austrian Constitutional Court is confined to administrative decisions and this excludes the judgments of administrative or ordinary courts. However, it exerts its review on decisions of administrative bodies that may be regarded as court of last instance within the meaning of Article 267(3) TFEU. See, *infra*, section B.I.

¹¹ The word "arbitrary" is used by these courts in order to define a refusal to refer to the CJEU which is based on reasons other than the criteria established by law.

¹² Certainly, one may argue that Constitutional Courts do not enjoy jurisdiction to solve a conflict which arises between EU and national law. Constitutional Courts, in fact, have the power to decide in proceedings involving the protection of fundamental constitutional rights and to review the compliance of domestic law and, prior to their ratification, of the Treaties with the Constitution. However, they do not have jurisdiction to assess the compliance of the decisions of domestic courts of last instance with the duty provided for in Article 267(3) TFEU.

¹³ Jirí Malenovský, *Le renvoi préjudiciel perçu par trois Cours "souveraines"*, 200, 6, J. DROIT EUROPEEN 214, 217, (2013); see also *Colloque de l'Association des Conseils d'Etats et des juridictions administratives suprêmes de l'Union européenne*, 20–21 May 2002, Helsinki, http://www.aca-europe.eu/images/media_kit/colloquia/2002/gen_report_fr.pdf.

¹⁴ Adelina Adinolfi, *The "procedural autonomy" of Member States and the constraints stemming from the ECJ's case law: Is judicial activism still necessary?*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 282, 296 (H.W. Micklitz & Bruno de Witte eds., 2012).

Constitution.¹⁵ In fact, although the rights of access to justice and to a lawful judge are fundamental rights common to all Member States,¹⁶ procedural rules prevent individuals from submitting a direct action before the Constitutional Courts for the infringements of constitutional rights. This seems to be the main reason for the lack of a similar practice in the other Member States.

Within the limits of the case law of the CJEU, the decision to refer a preliminary question depends entirely on the national judges' assessment as to whether a reference is necessary to resolve the dispute brought before them.¹⁷ Overall, the decision or the refusal to refer depends on the appreciation of national judges insofar as it should not be influenced by the request of the parties to the main proceedings.¹⁸ Moreover, the judgments of national supreme courts, including Constitutional Courts, cannot prevent national judges from referring to the CJEU. This is so even where there is a national constitutional rule which obliges them to follow the judgment of the higher court.¹⁹ In this perspective, when assessing the compliance of the decisions of national courts with Article

¹⁵ This possibility also exists before the Hungarian Constitutional Court. Although a constitutional complaint against a national court's refusal to refer to the CJEU was filed, the Constitutional Court dismissed it according to domestic procedural provisions. Therefore, it did not assess whether the complaint's right to a fair trial under Article XXVIII of the Fundamental Law of Hungary was violated. See Alkotmánybíróság [Hungarian Constitutional Court], May 19, 2014, Case No 3165/2014. Georgina Naszladi, *The Hungarian Constitutional Court's Judgment Concerning the Preliminary Ruling Procedure—Comments on a Rejection Order*, PÉCS J. INT'L & EUR. L. 37–43 (2015), available at http://epa.oszk.hu/02600/02691/00002/pdf/EPA02691_pjje1_2015_1_037-043.pdf.

¹⁶ See Opinion of Advocate General Ruiz-Jarabo Colomer at para. 29, Case C–14/08, *Roda Golf* (Mar. 5, 2009), 2009 E.C.R. I–05439 ("Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny or delay right or justice' proclaimed the Magna Carta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the case law of the Court. Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised."). Daniel Sarmiento, *National Voice and European loyalty. Member States Autonomy, European Remedies and Constitutional Pluralism in EU Law*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 340 (H.W. Micklitz & Bruno de Witte eds., 2012).

¹⁷ Heikki Kanninen, *La marge de manœuvre de la juridiction suprême nationale pour procéder à un renvoi préjudiciel à la Cour de justice des Communautés européennes*, in *UNE COMMUNAUTE DE DROIT* 611, 620 (Ninon Colneric ed., 2003).

¹⁸ Joined Cases 28–30/62, *Da Costa*; Case C–364/92, *SAT Fluggesellschaft v. Eurocontrol*, 1994 E.C.R. I–00043, paras. 8–9; Case 40/70, *Sirena v. Eda*, 1979 E.C.R. I–03169; Case C–402/98, *ATB and Others*, 2000 I–05501, para. 29; Case C–2/06, *Kempton*, 2008 E.C.R. I–00411, para. 41. Arjen Meij, *The Rules of the Game. Party Autonomy in the EU Courts*, in *DE REGELS EN HET SPEL. OPSTELLEN OVER RECHT, FILOSOFIE, LITERATUUR EN GESCHIEDENIS AANGEBODEN AAN TOM EUSBOUITS* 261, 273 (Jan-Herman Reestman, Annette Schrauwen, Manet Van Montfrans & Jan Jans eds., 2011); Jean-Claude Bonichot, *Le rôle des parties au principal dans le traitement des questions préjudicielles*, 227–28, *GAZETTE DU PALAIS* 16 (2013).

¹⁹ See, e.g., Case C–166/73, *Rheinmühlen*, 1974 E.C.R. I–00033; Case C–188/10 and C–189/10, *Melki and Abdeli*, 2010 E.C.R. I–05667; Case C–210/06, *CARTESIO Oktató és Szolgáltató bt.*, 2008 E.C.R. I–09641; *Križan and Others*, Case C–416/10; Case C–112/13, *A v. B and Others*, (Sept. 11, 2014), <http://curia.europa.eu/>.

267(3) TFEU, these Constitutional Courts play an unconventional role. In these circumstances, a number of questions arise: Is it consistent with the role of national judges under EU law that Constitutional Courts invoke their competence, under the national constitution, to review a decision of a national court of last instance not to refer to the CJEU? In doing so, can Constitutional Courts establish and follow their own criteria, where those criteria diverge to a certain extent from the case law of the CJEU? Should those criteria related to the obligation to refer apply also to them, or do Constitutional Courts perceive their role as the ultimate supervisor of the implementation of EU law by domestic courts in the national legal order?

In analyzing the case law of the abovementioned Constitutional Courts, the article will firstly focus on the judicial construction according to which a national constitutional right might be violated by the decision of a national judge of last instance not to refer (B). In the subsequent section, the criteria, which those Constitutional Courts have developed and under which a constitutional right might be breached by the refusal to refer, will be explored (C). The article further discusses the implications that this case law might have on the relations between these Constitutional Courts and the CJEU. Moreover, one might ask whether this case law is compatible with the case law of the CJEU related to *CILFIT* and *Köbler* and to the margin of discretion of national judges as regards the decision to refer and the procedural autonomy of Member States (D).

B. The Infringement of the Constitution Due to the Refusal to Refer

Before examining the judicial construction of the concerned Constitutional Courts, it is important to recall the functioning of the obligation to submit preliminary references under EU law and the division of competences between the CJEU and national courts.

The CJEU has jurisdiction to give preliminary ruling on the interpretation and validity of EU law. As regards preliminary references on interpretation, national courts of last instance must ask the CJEU for a preliminary ruling, unless, on the one hand, the interpretation of EU law is so obvious as to leave no scope for any reasonable doubt concerning the manner in which the question raised is to be resolved (*acte clair*) and, on the other hand, a question is materially identical to a question of interpretation raised before another court and the CJEU has already given a preliminary ruling on that matter (*acte éclairé*). Moreover, a domestic court is not obliged to refer when the question is not relevant for deciding the main proceeding.²⁰ Concerning preliminary references on validity, conversely, the CJEU has the sole jurisdiction to declare an EU act void or invalid, and if a question concerning the validity of an EU act arises before a national judge, the latter is obliged to refer to the CJEU.²¹

²⁰ *CILFIT*, Case C-283/81; *Da Costa*, Joined Cases 28-30/62.

²¹ Case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. I-04199.

It is in the light of the foregoing that the legal reasoning of the Constitutional Courts will be analyzed.

Scrutinizing the case law of the Constitutional Courts in question concerning the breach of the constitution as a result of an arbitrary refusal of national courts of last instance to make a reference under Article 267(3) TFEU, two approaches might be identified as regards the judicial construction linking the preliminary reference procedure to a constitutional right.²² However, as will be shown in the next section (C), although some of these Constitutional Courts refer to the infringement of the same right and follow a similar reasoning, the criteria developed in order to assess an arbitrary refusal may diverge.

Both approaches assume that the CJEU is the competent court to rule on the validity and interpretation of EU law in line with the EU Treaties (i.e., the TEU and TFEU) insofar as Member States have transferred part of their State sovereignty to the EU.²³ Moreover, they both take into account that the purpose of the preliminary reference procedure is to establish a uniform case law and prevent courts of last instance from possibly interpreting EU law differently and creating national case law that is inconsistent with EU law.

The first approach is based on the right to a lawful judge. The legal reasoning elaborated by the Federal Constitutional Court of Germany, followed by the Austrian, Slovak, and Czech Constitutional Courts, seeks to identify the competent court to settle the dispute. It focuses on the division of competences between the CJEU and national courts, according to which, under certain circumstances, national judges of last instance have no jurisdiction to decide in a proceeding where a question concerning the interpretation or the validity of EU law is raised in a case pending before them. Article 267(3) TFEU implies that the CJEU is the lawful judge established by the EU Treaties, to which Member States are bound. It follows that where national courts of last instance resolve a dispute without referring to the CJEU, their decision might violate the right to a lawful judge (I).

As to the second approach, one may note that the Spanish and the Slovenian Constitutional Courts draw attention to the right to judicial protection with a particular focus on the right to a fair trial, which includes procedural guarantees. More specifically, the jurisdiction of the CJEU is linked to the right to defense of the parties, according to the

²² These two approaches diverge in their starting point concerning the assessment of whether the refusal to refer of a domestic court of last instance infringes a constitutional right. However, they both reach the same outcome: under certain circumstances, the (arbitrary) refusal to refer to the CJEU may violate the constitutional right under consideration.

²³ For a comment on the approaches of a number of Constitutional Courts as regards their relationship with the CJEU after the Treaty of Lisbon. See Kristine Kruma, *Constitutional Courts and the Lisbon Treaty: The future on mutual trust*, in *THE AREA OF FREEDOM, SECURITY AND JUSTICE TEN YEARS ON. SUCCESSES AND FUTURE CHALLENGES UNDER THE STOCKHOLM PROGRAMME*, CEPS 38, 48 (Guild, Carrera & Eggenschwiler eds., 2010).

protection of legitimate expectations and the respect of the sources of law. Hence, when a national judge of last instance decides a case without making a reference to the CJEU, even though a question concerning the interpretation or the validity of EU law is raised, it might deprive individuals of access to justice and thereby undermine the correct application of the sources of law as well as the right to defense, in line with the right to judicial protection (II).

I. The CJEU as the Lawful Judge

The German Federal Constitutional Court (*Bundesverfassungsgericht*) was the first constitutional court of a Member State to recognize the CJEU as the lawful judge.²⁴ It has been followed by the Austrian, the Czech, and the Slovak Constitutional Courts. It is in that order that I will explore the case law of these Constitutional Courts.

The German Federal Constitutional Court examines, among other things, any complaint a citizen files against a decision of a court of last instance, which might have violated a fundamental right or a right equivalent to a fundamental right, enshrined in the Basic Law (*Grundgesetz*, i.e., the German Constitution).²⁵ Under Article 101, section 1, sentence 2, Basic Law no one may be removed from the jurisdiction of the lawful judge. This provision is interpreted as including the jurisdiction of the CJEU in the framework of the preliminary reference procedure.²⁶ Therefore, the Federal Constitutional Court stresses that the constitutional right to the lawful judge might be violated by the refusal of a national court of last instance to refer to the CJEU. Consequently, individuals may challenge such a

²⁴ This Constitutional Court has developed extensive case law concerning its relationship with the CJEU. In this context, the role of the preliminary reference procedure to the CJEU is particularly interesting. See, e.g., Asterios Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU law*, 36 ELR, 109–23 (2011); Gertrude Luebbe-Wolff, *Who has the last word? National and Transnational Courts—Conflict and Cooperation*, 30 Y.B. EUR. L. (2011); Mattias Kumm, *Who is the final arbiter of Constitutionality in Europe?: Three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351, 386 (1999). For a critical view as regards the reasoning of the German Federal Constitutional Court inasmuch as it considers that the CJEU is to be seen as a lawful judge, see Meij, *supra* note 18, at 265. Meij stresses that, since the preliminary reference procedure constitutes an incident in the proceeding before the national court and it is for the latter to decide the dispute, it is questionable whether one may distinguish two lawful judges in one case.

²⁵ See Art. 93, § 1, sentence 4 bis, Basic Law; Arts. 13, sentence 8 bis, and 90, § 1, *Bundesverfassungsgerichtsgesetz* (the Federal Law concerning the procedural rules before the Constitutional Court). Renate Jaeger and Siegfried Broß, *The relations between the Constitutional courts and the other national courts, including the interference in this area of the action of the European Court. Report of the Constitutional Court of the Federal Republic of Germany*, Conference of European Constitutional Courts XIIth Congress (Warsaw 16–17 May 1999), <http://www.confcoconsteu.org/reports/rep-xii/Duitsland-EN.pdf>; Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, Vol. 9, n. 1, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 29–30 (1960).

²⁶ Malte Beyer-Katzenberger, *Judicial activism and judicial restraint at the Bundesverfassungsgericht: Was the Mangold judgement of the European Court of Justice an ultra vires act?*, 11(4), ERA-FORUM 517, 521 (2011).

decision, pursuant to Article 90 of the Federal Constitutional Court Act (*Bundesverfassungsgerichts-Gesetz, BVerfGG*), which states that any person who claims that one of his basic rights or one of his rights under Article[s] [...] 101, [...] of the Basic Law has been violated by a public authority may lodge a constitutional complaint with the Federal Constitutional Court.²⁷

Confirming the orientation taken in *Vielleicht* regarding the importance of the preliminary reference procedure for the collaboration between national courts and the CJEU,²⁸ in *Solange II* the Federal Constitutional Court stated, for the first time, that the CJEU is the lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law.²⁹ That is to say that the CJEU enjoys the judicial monopoly to rule on EU law matters in the framework of preliminary references. Thus, the national court of last instance's failure to refer to the CJEU may violate the constitutional right to the lawful judge.³⁰

The Federal Constitutional Court based its reasoning on the following considerations. The first crucial step in the acceptance of the jurisdiction of the CJEU was the recognition that, on the one hand, the protection of fundamental rights in the EU legal order is ensured at a substantially similar level to the level required under the Basic Law in the German legal order and, on the other hand, the CJEU is able to ensure the legal standard required in a due process and the essential content of fundamental rights.³¹ In the second place, the

²⁷ According to Article 92 of the Federal Constitutional Act, the reasons for the complaint shall specify the right which is claimed to have been violated, and the act or omission of the organ or authority by which the complainant claims to have been harmed. In other words, an individual, who believes that an ordinary court has violated its duty to refer to the CJEU under Article 267(3) TFEU, can challenge such a decision before the Federal Constitutional Court, by claiming a violation of the constitutional right to a lawful judge within the limits of Article 101, section 1, sentence 2 of the Basic Law.

²⁸ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 25, 1979, *Steinike & Weinlig ('Vielleicht')*, Case No. 2 BvL 6/77.

²⁹ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Oct. 22, 1986, *Solange II*, Case No. 2 BvR 197/83; Ranier Arnold, *Review by constitutional courts of proceedings before ordinary courts applying community law: The experience of the Federal Constitutional Court of Germany*, Venice Commission, Report CCS 2006/05, 2–4 (2005), available at <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282006%29026-e>; see also E. R. Lanier, *Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge*, 11 B. C. INT'L & COMP. L. REV. 20 (1988); Jochen Abraham Frowein, *Solange II. Constitutional complaint Firma W.*, 25 COMMON MKT. L. REV. 201–06 (1988).

³⁰ See, e.g., Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Jan. 9, 2001, NJW, Case No. BvR 1036/99. In particular, the Federal Constitutional Court stated that the right to a lawful judge was violated as the national court of last instance interpreted EU legislation in contrast to EU fundamental rights. Consequently, the refusal to refer violated the protection of the fundamental rights of individuals, which the CJEU would have taken into account in its preliminary ruling. It is interesting to note that as far as fundamental rights are concerned, the constitutional review seems to limit, more than when other interests are involved, the margin of discretion of the court of last instance when deciding whether or not to refer.

³¹ Lanier, *supra* note 29, at 26; BVERFG, Case No. 2 BvR 197/83.

Federal Republic of Germany, having ratified the EU treaties, conferred on the CJEU the jurisdiction to rule when EU law is involved directly or by the implementation of secondary EU legislation in its national system.³² Besides, in line with the purpose of the preliminary reference procedure, only the CJEU will guarantee that the objectives of the EU Treaties of integration, legal security, as well as uniform application and interpretation of EU law, are protected. Moreover, the duty to refer of a national judge of last instance shall be ensured as a consequence of the obligations arising out of the EU Treaties.³³

The same year of its accession to the EU, the Austrian Constitutional Court (*Verfassungsgerichtshof*) delivered a judgment in which it recognized the CJEU as the lawful judge within the meaning of Article 83(2) of the *B-VG* (i.e., the Austrian Constitution).³⁴ It also held that a violation of the obligation of national courts of last instance to refer to the CJEU might violate the right to the lawful judge. In doing so, it applied its settled case law concerning the right to the lawful judge within the meaning of Article 83(2) of the Austrian Constitution.³⁵

Under Article 144(1) of the Austrian Constitution, individuals may bring an action before the Austrian Constitutional Court concerning a violation of constitutional rights. It should be clarified, however, that the judicial review by the Austrian Constitutional Court is confined to administrative decisions. Therefore, the judgments of ordinary courts or administrative courts are excluded.³⁶ In these circumstances, the Austrian Constitutional

³² Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 31, 1990, Case No. 2 BvR 89/159, para. 131.

³³ BVERFG, Case No. 2 BvR 197/83.

³⁴ Verfassungsgerichtshof [VfGH] [Austrian Constitutional Court], Dec. 11, 1995, Case No. VfSlg. 14.390; Regina Valutyte, *Legal Consequences for the infringement of the obligation to make a reference for a preliminary ruling under constitutional law*, 19 MYKOLO ROMERIO UNIVERSITETAS 1171, 1174 (2012); Tanja Marktler, *The European Court of Justice as Lawful Judge, Austrian Constitutional Court Judgment from December 11th, 1995 VfSlg. 14.390*, 2 VIENNA ONLINE J. INT'L CONST. L. 294 (2008), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/vioincl2&div=37&id=&page>. It is noteworthy that in the judgment VfSlg U 466/11 (VfGH, March 2012, Case No. VfSlg U 466/11) the Austrian Constitutional Court held, in essence, that its constitutional review applies to the provisions of the Charter of Fundamental Rights of the European Union (Charter). Concerning the effect of this judgment on the duty of national courts to refer a preliminary question to the CJEU, a national court submitted a reference to the CJEU. The latter delivered its ruling in September 2014. Cf. *A v. B and Others*, Case C-112/13. See, *infra* section D.II.

³⁵ This court gives a broad interpretation to this right, including public authority, in order to preserve the division of competences at both judiciary and administrative level. Alexander Pelzl, *Rapport autrichien, in L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE?*, 83, 90 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

³⁶ *Id.* at 83, 91–92.

Court determined that administrative bodies might also be considered courts of last instance within the meaning of the case law of the CJEU and, thereby, be obliged to refer.³⁷

The Czech Constitutional Court was reluctant, at first, to exercise judicial review over conflicts between EU law and national law, including on the violation of the obligation of national courts of last instance to make a reference for a preliminary ruling to the CJEU.³⁸

This attitude changed in a judgment of 2009.³⁹ In *Pfizer*, the Constitutional Court of the Czech Republic received a constitutional complaint against, *inter alia*, the decision of the Supreme Administrative Court (a court of last instance), asserting a violation of the right to a fair trial under Article 36(1) of the Czech Charter of Fundamental Rights and Freedoms (the Czech Charter) and the complainant's right to a lawful judge, which is guaranteed by Article 38(1) of the Czech Charter, due to the refusal to refer a question to the CJEU.⁴⁰ The Czech Constitutional Court clarified the reason of its intervention. More specifically, it pointed out that, in principle, it is within the competence of an ordinary court to interpret EU law in line with the principle of primacy and by making use of the preliminary reference procedure, since the scope of its review concerns the protection of constitutionality and individual rights. However, it argued that the failure of a court of last instance to refer may, in certain circumstances, violate the constitutional right to a lawful judge. In this context, the Constitutional Court can assess whether a domestic court of last instance, in applying EU law, fails, in an arbitrary way, to ask the CJEU for a preliminary ruling.⁴¹ The Czech Constitutional Court skipped the examination of whether the refusal to refer could have violated the right to fair trial, notwithstanding the dissenting opinion of one of the judges of the case who observed that particular focus should be placed on the right to a fair trial, instead of on the right to a lawful judge.⁴² It determined that the failure to make a

³⁷ VfGH, Case No. VfSlg. 14.390.

³⁸ Tomáš Dumbrovský, *Constitutional Pluralism and Judicial Cooperation in the EU after the Eastern Enlargements: A Case Study of the Czech and Slovak Courts*, in CONSTITUTIONAL EVOLUTION IN CENTRAL AND EASTERN EUROPE. EXPANSION AND INTEGRATION IN THE EU 89, 100 (Kyriaki Topidi & Alexander H.E. Morawa eds., 2010); Valutyté, *supra* note 34, at 1177–78.

³⁹ Ústavní soud [ÚS] [Constitutional Court of the Czech Republic], Jan. 8, 2009, *Pfizer*, Case No. II. ÚS 1009/08, *English version available at* http://www.usoud.cz/en/decisions_

⁴⁰ In the Czech legal order, the Charter is a constitutional act, which focuses on the protection of human and civil rights, while the Constitution concerns state sovereignty, territorial integrity, and the institutions. Both are constitutional acts of equivalent hierarchical level.

⁴¹ ÚS Case No. 1009/08 at para. 21; Markéta Navratilova, *The preliminary ruling before the Constitutional Courts 2012*, <http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/navratilova.pdf>.

⁴² See Dissenting Opinion of Judge Dagmar Lastovecká; Malenovský, *supra* note 13, at 219; David Petrлік, *Rapport tchègue*, in L'OBLIGATION DE RENVOI PRÉJUDICIEL À LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNÉE? 409, 416 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

reference to the CJEU entailed a violation of Article 38(1) of the Czech Charter. Accordingly, it recognized the CJEU as the lawful judge.⁴³

The reasoning of the Czech Constitutional Court is structured as follows. Article 38(1) of the Czech Charter states that no one can be removed from the jurisdiction of the statutory court established by law (i.e., the court enlisted to decide a matter according to procedural rules in order to ensure the principle of fixed assignment). Further, due to the accession of the Czech Republic to the EU, national courts of last instance became obliged to refer to the CJEU for a preliminary ruling. Under this procedural obligation, the CJEU is the only court which enjoys the jurisdiction to rule and, consequently, it is considered the lawful court. Moreover, the role of the CJEU as a lawful judge aims at ensuring the uniform interpretation of EU law for individuals, as well as the foreseeability of the law in line with the principle of a law-based state. This line of case law was confirmed in another judgment two years later.⁴⁴

It is interesting to note that in *Pfizer* there is nothing but a vague reference to the relevant practice of the Federal Constitutional Court of Germany.⁴⁵ Nevertheless, it is clear that the Constitutional Court of the Czech Republic was widely inspired by the case law of its German counterpart and this has been explicitly confirmed in the judgment of 2011.⁴⁶ In this regard, scholars have argued that the *Pfizer* judgment of the Czech Constitutional Court was rather influenced by a previous judgment of the Slovak Constitutional Court, which was delivered a few months before.⁴⁷

As to the latter, in *Commercial Agent*, the Slovak Constitutional Court received a constitutional complaint concerning an infringement of the right to a lawful judge, as laid down in Article 48(1) of the Slovak Constitution, in that the Regional Court of Bratislava did not refer a question for a preliminary ruling to the CJEU. The Slovak Constitutional Court stated that a refusal to refer might violate the right to a lawful judge. It pointed out that this right includes that each dispute is settled by a court, relying on a correct legal basis. Thus, since the accession of the Slovak Republic to the EU, the interpretation of EU law

⁴³ In the English translation of the judgment there is the word "statutory" instead of "lawful." However, the meaning does not differ.

⁴⁴ ÚS, Nov. 29, 2011, Case No. II. ÚS 1658/1, http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Aktualne_prilohy/2012_01_03.pdf.

⁴⁵ ÚS 1009/08 at paras. 20, 22. The Czech Constitutional Court referred to the practice of the German Federal Constitutional Court "for the sake of comparison and information".

⁴⁶ II ÚS 1658/11 at para 18.

⁴⁷ Ústavný súd Slovenskej republiky [Constitutional Court of the Slovak Republic], July 3, 2008, Case No. IV. ÚS 206/08-50, available at http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=214397. Dumbrovský, *supra* note 38, at 101.

given by the CJEU through the preliminary reference procedure is also part of the national proceeding, according to Article 109 section 1(c) of the Slovak Code of Civil Procedure. However, it dismissed the complaint as inadmissible due to the fact that the claimant should have filed an extraordinary appeal to the Supreme Court, and the possibility to file a claim before the latter prevents the exercise of the jurisdiction of the Constitutional Court.⁴⁸

II. The Breach of the Right to Judicial Protection Due to the Refusal of National Courts of Last Instance to Refer to the CJEU

Even though the Spanish and the Slovenian Constitutional Courts also recognize that the failure to refer to the CJEU might lead to a breach of a constitutional right, their reasoning is based on different grounds, since these courts do not consider the CJEU to be the lawful judge.

The Spanish Constitutional Court (*Tribunal Constitucional*) finds that the failure of national judges of last instance to comply with the obligation under Article 267(3) TFEU might infringe the right to effective judicial protection, enshrined in Article 24 of the Spanish Constitution. In this regard, one may point out that, in the Spanish legal system, the constitutional review of the duty under Article 267(3) TFEU deals with the protection of the right to effective judicial protection, rather than with the division of competences between courts, which is ensured by the right to the lawful judge.⁴⁹ In other words, the existence of an obligation to refer to the CJEU under Article 267(3) TFEU does not imply that the national judge of last instance is not the lawful judge in the main proceeding any more. The denial, however, prevents access to the CJEU and it might undermine the right to defense, since it could lead, in certain circumstances, to the misapplication of the sources of law, affecting the right to effective judicial protection.⁵⁰

⁴⁸ See Articles 237g of the Slovak Code of Civil Procedure and Article 127, 1f, of the Constitution; see also *Informations rapides sur les développements juridiques présentant un intérêt communautaire* N° 2/2009, http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-07/fr_2009_reflets2.pdf.

⁴⁹ Cristina Izquierdo Sans, *Cuestión prejudicial y artículo 24 de la constitución española*, 23 REVISTA GENERAL DE DERECHO EUROPEO 18 (2011).

⁵⁰ This reasoning is inspired by the constitutional complaint brought for a violation of Article 24 of the Constitution due to the fact that a national judge does not raise a constitutional issue before the Constitutional Court. In fact, when an ordinary court decides by its own authority to set aside a national law as unconstitutional, its ruling undermines the sources of law and leads to a violation of the right to effective judicial protection. Ricardo Alonso García, *Spanish Constitutional Court. Judgment 58/2004, of 19 April 2004. Tax on the use of gambling machines. "Recurso de amparo" (individual appeal for constitutional protection) and EC preliminary ruling. Failure to request an EC preliminary ruling considered as a violation of the fundamental right to effective judicial protection*, 42 COMMON MKT. L. REV. 535, 538, 2005; Valutyté, *supra* note 34, at 1181; Daniel Sarmiento, *Rapport espagnol*, in *L'OBLIGATION DE RENVOI PRÉJUDICIEL À LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNÉE?* 165, 168 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

Since the accession of Spain to the EU, the Spanish literature has embarked on a vibrant debate concerning the question of whether the refusal to make a reference to the CJEU may be challenged by an appeal filed by individuals against judicial decisions of last instance for a violation of a fundamental right of constitutional relevance (*recurso de amparo*).⁵¹ In this respect, particular attention was given to the connection between the failure to refer under Article 267(3) TFEU and Article 24 of the Spanish Constitution. The first paragraph of Article 24 of the Spanish Constitution ensures the right to effective judicial protection, while the second paragraph refers to the right to a fair trial, which includes the right to a lawful judge and the right to defense. Scholars were divided on the identification of the right under Article 24 of the Spanish Constitution, which could be violated by the refusal of a national court of last instance to make a reference for a preliminary ruling.⁵² Moreover, a number of scholars stressed that the Constitutional Court did not have jurisdiction to review the obligation of national courts of last instance to make a reference for a preliminary ruling to the CJEU and that, thereby, a constitutional complaint could not be admissible. The Spanish Constitutional Court seemed to have followed that view at first, by stating its incompetence to review any issue related to the interpretation of EU law.⁵³

Subsequently, it started to point out the existence of a link between the protection of the constitutional rights laid down in Article 24 of the Spanish Constitution and the preliminary reference procedure to the CJEU. In particular, it underlined the crucial role of preliminary references in ensuring the protection of the fundamental rights of individuals. Indeed, it held that the preliminary reference procedure is a means of defense for the parties to the national proceeding.⁵⁴ However, it specified that ordinary courts of last instance have exclusive competence concerning the decision to make a reference for a preliminary ruling to the CJEU in the context of the positive assessment of compatibility of Spanish legislation with EU law.⁵⁵ Against this background, it stated that the parties to the proceedings could challenge the decision not to refer of a national court of last instance before the Constitutional Court in order to protect their fundamental rights.⁵⁶ However, a

⁵¹ Ricardo Alonso García & José María Baño León, *El recurso de amparo frente a la negativa a plantear cuestión prejudicial ante el Tribunal de Justicia de la CE*, 29 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 193 (1990).

⁵² In particular, Izquierdo Sans, *supra* note 49, at 2.

⁵³ Tribunal Constitucional [TC] [Spanish Constitutional Court], Dec. 1993, Case No. STC 372/1993 of December 1993; Valutyé, *supra* note 34, at 1180.

⁵⁴ See Tribunal Constitucional [TC] [Spanish Constitutional Court], Cases No. STC 180/1993; STC 201/1996; STC 203/1996.

⁵⁵ Tribunal Constitucional [TC] [Spanish Constitutional Court], Cases No. STC 111/1993.

⁵⁶ *Id.*

constitutional complaint was admissible not against the refusal to refer to the CJEU, but against arbitrariness or clear unreasonableness or due to obvious error in the grounds of the decision,⁵⁷ or the arbitrary or clearly unreasonable or patently erroneous reasons in the selection of the applicable rule,⁵⁸ in spite of any connection with the obligation to ask the CJEU for a preliminary ruling.

The turning point in the constitutional case law is identified in a judgment of 2004. Differently from before, the national judge of last instance decided to disapply a national legislative provision as contrary to EU law and refused to ask the CJEU for a preliminary ruling. In that context, for the first time, the Constitutional Court regarded as well founded a constitutional complaint challenging the refusal of an ordinary court of last instance to make a preliminary reference to the CJEU for a violation of Article 24 of the Spanish Constitution.⁵⁹ In this regard, it should be underlined that the Spanish Constitutional Court focused on whether the Spanish court had decided within the limits of the CJEU's case law, in particular *Da Costa* and *CILFIT*.⁶⁰ It stressed that, prior to disapplying a domestic provision as contrary to EU law, national courts are obliged to ask the CJEU for a preliminary ruling. This is crucial where they propose an interpretation that leads to a different decision from the case law of other domestic judicial bodies. In fact, the Spanish Constitutional Court pointed out that other national courts had already stated that there was no contradiction between national legislation and EU law on that matter. Moreover, a judgment of the CJEU had confirmed those opinions.⁶¹ In this perspective, the failure to initiate a preliminary reference procedure before the CJEU infringed the right to effective judicial protection under Article 24(1) of the Constitution.⁶²

⁵⁷ Tribunal Constitucional [TC] [Spanish Constitutional Court], Feb. 11, 2002, Case No. STC 35/2002.

⁵⁸ Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 180/1993. In this judgment the Spanish Constitutional Court stressed that national judges are not obliged to provide explanations concerning an issue raised by the parties. It should be observed that in judgment 35/2002, the Constitutional Court pointed out that the decision to ask or not for a ruling on constitutionality should be sufficiently explained. The Constitutional Court kept applying this practice, e.g., Tribunal Constitucional [TC] [Spanish Constitutional Court], Nov. 29, 1999, Case No. STC 214/1999; March 27, 2006, Case No. STC 96/2006; May 4, 2009, Case No. STC 105/2009; and June 3, 2013, Case No. STC 127/2013.

⁵⁹ Tribunal Constitucional [TC] [Spanish Constitutional Court], April 19, 2004, Case No. STC 58/2004. This is also due to the fact that in 2004 the Spanish Constitutional Court delivered Opinion 1/2004 on the constitutionality of the Treaty establishing a constitution for Europe in which it began to recognize the status of EU law. Daniel Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law: Tribunal Constitucional*, 50 COMMON MKT. L. REV. 875, 881 (2013). Laurence Burgogues-Larsen, *La déclaration du 13 décembre 2004 (DTC n°1/2004): «un Solage II à l'espagnole»*, 18 CAHIERS DU CONSEIL CONSTITUTIONNEL 154, 161 (2005).

⁶⁰ Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 58/2004; *CILFIT*, Case C-283/81 and *Da Costa*, Joined Cases 28-30/62.

⁶¹ Joined Cases C-370-372/95, *Careda and Others v. Administración General del Estado*, 1997 E.C.R. I-03721.

⁶² In the Spanish constitutional literature, various scholars have pointed out the similarity between preliminary references on constitutionality to the Constitutional Court and preliminary references to the CJEU. In this regard,

In a recent decision of November 2013, the Slovenian Constitutional Court also recognized that the refusal to refer to the CJEU, under Article 267(3) TFEU, may violate the right to judicial protection within the meaning of Article 23(1) of the Slovenian Constitution.⁶³ The Slovenian Constitutional Court based its judgment on the fact that, by joining the EU, Slovenia transferred the exercise of part of its sovereign rights to the EU. By consequence, under Article 23(1) of the Constitution the right to judicial protection of an individual, who is party to the national proceedings, refers also to the duty of a court to submit the case to the CJEU on the basis of Article 267 TFEU.⁶⁴ It is interesting to observe that Article 23 of the Slovenian Constitution alludes to the right to judicial protection, including the rights of access to justice and to a lawful judge. More specifically, the first paragraph refers to the right of access to justice, within the meaning of an independent, impartial court constituted by law. The second paragraph concerns the right to a lawful judge. Prior to this judgment, which explicitly referred to the first paragraph of Article 23 of the Slovenian Constitution, scholars were divided on whether non-compliance with the duty to refer provided for in Article 267(3) TFEU could violate the right of access to justice or the right to a lawful judge.⁶⁵

C. Assessing the Obligation for National Courts of Last Instance under Article 267(3) TFEU: The Criteria Elaborated by Constitutional Courts

Under which circumstances can a refusal of a national court of last instance violate a constitutional right? In the Member States examined, the Constitutional Courts have

in order to explain the practice developed by this Constitutional Court concerning the *recurso de amparo* for a breach of Article 24 of the Constitution due to the refusal to refer under Article 267(3) TFEU, it is worth exploring briefly the case law regarding the constitutional complaint for a breach of Article 24 of the Constitution due to the decision of a national judge of last instance, which has a duty to refer a preliminary question to the Constitutional Court. One may distinguish two hypotheses. On the one hand, when national courts make a negative assessment of constitutionality and do not apply a national law due to its unconstitutionality, the Constitutional Court stressed that there is an obligation to ask the Constitutional Court to rule on that matter. In other words, the failure to request a preliminary ruling on constitutionality produces an "abuse of authority", notwithstanding a reasoned decision of the relevant ordinary court. On the other hand, the positive assessment of constitutionality falls within the "exclusive and non-reviewable" margin of appreciation of national judges, even if the parties to the proceeding raise arguments of unconstitutionality of the relevant legislative provisions. García, *supra* note 50, at 535–39; *see, e.g.*, Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 173/2002; Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 151/1991.

⁶³Ustavno sodišče Republike Slovenije [Constitutional Court of Slovenia], Nov. 21, 2013, Case No. Up-1056/11, available at <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/17AF41EB27FD758DC1257CA500364679>.

⁶⁴*Id.* at para 9.

⁶⁵Verica Trstenjak & Katja Plaustajner, *Slovenian Report, in L'OBLIGATION DE RENVOI PREJUDICIEL A LA COUR DE JUSTICE. UNE OBLIGATION SANCTIONNEE?*, 460, 476–77 (Laurent Coutron & Jean-Claude Bonichot eds., 2014).

elaborated a number of additional, albeit complementary, criteria to the requirements set out in the case law of the CJEU. These criteria determine the extent of the obligation of courts of last instance to ask for a preliminary reference. They affect the margin of discretion of national judges of last instance under Article 267(3) TFEU and the scope of review of these Constitutional Courts accordingly.

Although all these Constitutional Courts argue that a violation of the constitutional right to either a lawful judge or judicial protection is due to an *arbitrary* decision not to refer, the interpretation of the notion of arbitrariness diverges. In analyzing the case law, one may identify, in essence, three main approaches that these Constitutional Courts have adopted in order to determine the existence of an arbitrary failure to refer to the CJEU. First, the German and the Austrian Constitutional Courts examine whether a refusal to refer is arbitrary in relation to the assessment that the national judge made as to its duty under Article 267(3) TFEU (I). Second, the Czech and the Slovenian Constitutional Courts refer to the statement of reasons for the refusal to refer under Article 267(3) TFEU (II). Third, the Spanish Constitutional Court looks at whether the national court of last instance appears to have doubts concerning EU law (III).

I. Arbitrary Decisions As Regards the Assessment of the Duty under Article 267(3) TFEU

The Constitutional Courts of Germany and Austria examine whether national courts of last instance (or administrative bodies which may be seen as equivalent to national courts of last instance, as far as Austria is concerned) comply with their duty under Article 267(3) TFEU. However, as has been argued, it is not clear whether the review by these courts follows the criteria established by national constitutional law or by EU law.⁶⁶

The Federal Constitutional Court of Germany has indicated the scope of its review concerning the obligation of ordinary courts of last instance to make a reference for a preliminary ruling and the hypothesis where Article 101, section 1, sentence 2, Basic Law might be violated by the decision not to refer.⁶⁷

As for the scope of its review, the German Federal Constitutional Court clarified that it does not engage in a detailed review concerning a decision not to refer for a preliminary ruling to the CJEU.⁶⁸ It pointed out that it does not consider itself a “supreme court of review for submission.” In fact, it focuses on whether the right to a lawful judge is violated

⁶⁶ Arnold, *supra* note 29.

⁶⁷ MONICA CLAES, THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION 426–32 (2006); Valutyé, *supra* note 34.

⁶⁸ Felix Arndt, *The German Federal Constitutional Court At the Intersection of National and European Law: Two recent Decisions*, 2 GERMAN L. J. (2001).

rather than on the refusal to make a reference.⁶⁹ Thus, it is not that any refusal to refer constitutes a violation of the constitutional right to a lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law.⁷⁰ The latter is breached by an arbitrary refusal to refer insofar as a court of last instance disregards its obligation under Article 267(3) TFEU in an indefensible manner⁷¹ and its decision appears “manifestly untenable.”⁷² According to the German Federal Constitutional Court, it is possible to identify three cases where this happens.⁷³ First, the refusal to refer is manifestly untenable when a court of last instance deciding on the merits does not at all consider making a submission despite the fact that EU law is involved and although it has doubts regarding the relevant interpretation of the issue concerned (fundamental disregard of the obligation to make a submission). Second, the domestic court deliberately deviates from the case law of the CJEU (deliberate deviation without making a submission). Third, the right to a lawful judge is violated when the court of last instance decides without making a reference, even though the case law of the CJEU is not yet available with regard to the relevant EU law issue or existing case law has not yet exhaustively answered the question or there is the possibility of further development of the CJEU’s case law. This is the case if possible countervails are to be clearly preferred over the opinion put forward by that court (incompleteness of the case law of the CJEU).⁷⁴

Moreover, it is interesting to highlight the existence of a contradictory interpretation between the two panels of the Federal Constitutional Court, namely the first Senate and the second Senate.⁷⁵ In order to illustrate the diverging reasoning of the two panels, it is

⁶⁹ *Id.*; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Case No 2 BvR 2661/06 at para. 90; see also Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Nov. 9, 1987, Case No. 2 BvR 808/82; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 6, 2008, Case No. 2 BvR 2419/06. A different view is held in an order of the third chamber of the First Senate. See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 2010, Case No. 1 BvR 230/09; Laurent Dechâtre, *Karlsruhe et le contrôle ultra vires : une «source de miel» pour adoucir la très acidulée décision Lisbonne*, 4 REVUE DES AFFAIRES EUROPÉENNES 861, 867 (2009–2010); Valutytė, *supra* note 34, at 1174.

⁷⁰ For the first time, in a decision of 8 April 1987, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], April 8, 1987, Case No. 2 BvR 687/85; Arnold, *supra* note 29.

⁷¹ BVERFG, Case No. 2 BvR 687/85; Valutytė, (note 34), 1774.

⁷² 29 BVerfGE 198 (207); BVerfG, Case No. 2 BvR 687/85 at para. 62.

⁷³ 82 BVerfGE 159.

⁷⁴ *Id.*

⁷⁵ The Federal Constitutional Court consists of two Senates, each of which comprises eight judges and appoints several chambers. Which of the two Senates is competent to decide is stated in Articles 13 and 14 of the Federal Constitutional Court Act. Concerning the contradictory interpretation in the two Senates, see Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame—the Ultra Vires Decision of the German Federal Constitutional Court* 11 GERMAN L. J. 1407, 1413 (2010); Malenovský, *supra* note 13, at 214, 224.

worth remembering the decision of the second Senate of 6 July 2010, in the *Honeywell* case, and the judgment of the first Senate of 30 August 2010.⁷⁶ In *Honeywell*, the second Senate of the Federal Constitutional Court held that Article 101, section 1, sentence 2, Basic Law was not violated. It rejected the constitutional complaint as unfounded in that the national court of last instance applied the content of the *Mangold* ruling of the CJEU in a justifiable way. By focusing on the outcome of the decision rather than on the obligation under Article 267(3) TFEU, it concluded that, in those circumstances, the refusal to refer fell within the margin of discretion of the national court of last instance.⁷⁷ In a judgment delivered a few months later, the first Senate of the German Federal Constitutional Court stated that the challenged judgment of the national court of last instance failed to discuss the duty to refer the matter to the CJEU under Article 267(3) TFEU and, therefore, violated the complainant's right to a lawful judge within the meaning of Article 101, section 1, sentence 2, Basic Law. Moreover, the German Federal Constitutional Court underlined that the reasoning of the national court of last instance did not demonstrate that the latter sufficiently took EU law into account, nor that it actually considered the possibility of making a reference to the CJEU or the application of one of the exceptions to Article 267(3) TFEU.⁷⁸

One may argue, in this regard, that the first Senate of the Federal Constitutional Court is inspired by *CILFIT* and the duty under Article 267(3) TFEU is directly linked to the fundamental right to a lawful judge.⁷⁹ Accordingly, the margin of appreciation of national judges of last instance is delimited by the compatibility with the "*acte claire*" and "*acte éclairé*" theories. The assessment of a violation of Article 101, section 1, sentence 2, Basic Law requires the assessment of whether national courts comply with the obligation to refer under Article 267(3) TFEU, which is monitored by the Federal Constitutional Court.⁸⁰

⁷⁶ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], July 6, 2010, *Honeywell*, Case No. 2 BvR 2661/06. The case originated in a constitutional complaint challenging the decision of the Federal Labor Court which applied the principles laid down in *Mangold* by the CJEU (C-144/04, *Werner Mangold v. Rüdiger elm*, 2005 E.C.R. I-09981). The complaint considered, on the one hand, the judgment *ultra vires* and, on the other one, the decision of the Federal labor court taken in violation of the protection of legitimate expectations. Matthias Mahlmann, *supra* note 75. As regards the judgment of the first Senate, see Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], August 30, 2010, Case No. 1 BvR 1631/08.

⁷⁷ *Id.* at para. 92; Anja Wiesbrock, *The implication of Mangold for domestic legal system: The Honeywell case*, 18 MAASTRICHT J. EUR. & COMP. L. 201-15 (2011).

⁷⁸ BVERFG, Case No. 1 BvR 1631/08.

⁷⁹ Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 2010, Case No. 1 BvR 230/09; Case No. 1 BvR 1036/99; Case No. 1 BvR 1631/08. When applying the constitutional review concerning the obligation to ask for a preliminary reference to the CJEU, the German Federal Constitutional Court considered, on the one hand, if the national courts took into account EU law and the preliminary reference procedure, and on the other hand, the attitude of the courts of other Member States deciding on the same issue. Mahlmann, *supra* note 75, at 1413; Valutyté, *supra* note 34, at 1176.

⁸⁰ BVERFG, Case No. 1 BvR 230/09, Malenovský, *supra* note 13, at 218.

More specifically, the first Senate stresses that, when reviewing whether a violation of Article 101, section 1, sentence 2, Basic Law has occurred, the decisive factor is the assessment of how the court of last instance treated the obligation to refer under Article 267(3) TFEU, rather than the justifiability of its interpretation of the relevant substantive EU law provisions.⁸¹

As to the second Senate, its case law is mostly inspired by *Köbler* in that it points out that Article 267(3) TFEU does not constitute an autonomous legal basis in order to assess the obligation to refer.⁸² Therefore, national courts of last instance retain the same discretion in the assessment and evaluation, which corresponds to that which they have in handling a provision of the German legal system. The Federal Constitutional Court only acts as a guardian over adherence to the boundaries of this margin. According to this analysis, insofar as the outcome of the judgment is justifiable, the refusal to make a reference appears to be comprehensible and is not manifestly untenable. Therefore, it does not infringe Article 101, section 1, sentence 2, Basic Law. The latter is violated where the national court of last instance, in deciding the case without having asked the CJEU for a preliminary ruling, did not answer the question which is material to the ruling in a manner that is at least justifiable.⁸³ That is to say that no possible counterexamples to the relevant question of EU law are to be clearly preferred over the opinion put forward by the court.⁸⁴

Contrary to the Federal Constitutional Court of Germany, the Austrian Constitutional Court points out that any refusal to make a reference to the CJEU under Article 267(3) TFEU violates the constitutional right to a lawful judge under Article 83 (2) B-VG, even where there is no evidence of a serious failure to refer.⁸⁵

Particular attention should be drawn to the assessment of the Austrian Constitutional Court concerning the obligation to refer under Article 267(3) TFEU. At first sight, its interpretation does not create any problem. Indeed, this Constitutional Court takes into account whether the relevance of a preliminary question in order to reach a decision and the applicability of the *acte clair* and the *acte éclairé* doctrines have been examined. However, it seems that the Austrian Constitutional Court fails to interpret these two concepts, by unifying and combining them in a single notion.⁸⁶ More specifically, while

⁸¹ BVERFG, Case No. 1 BvR 1631/08.

⁸² Malenovský, *supra* note 13, at 218; Beyer-Katzenberger, *supra* note 26, at 517, 521.

⁸³ BVERFG, Case No. 1 BvR 481/01.

⁸⁴ Valutyté, *supra* note 34, at 1177; 1 BvR 481/01 at paras. 21–22; 82 BVerfGE 159 (194).

⁸⁵ Peter Thalmann, *Failure to refer a preliminary question to the CJEU and the right to a lawful judge*, Vol. 7 – 1, 79 ICL JOURNAL 81, 84 (2013); VfGH, Sept. 30, 2003, Case No. VfSlg 16.988/2003.

⁸⁶ VfGH, Case No. VfSlg 14.390/1995.

referring to the *acte clair* doctrine, the Austrian Constitutional Court applies the *acte éclairé* concept. It assesses whether the failure to refer is not justified by the presence of settled case law of the CJEU. It nonetheless skips to examine whether there is an obvious interpretation of EU law which leaves no scope for any reasonable doubts.⁸⁷

II. Arbitrary Decisions as Regards the Lack of Reasoning

When assessing whether the failure to refer to the CJEU of national courts of last instance infringes the Constitution, the Czech and the Slovenian Constitutional Courts focus on whether national judges gave reasons for their refusal.

The Czech Constitutional Court stresses that a court of last instance acts in an arbitrary manner concerning the refusal to refer a preliminary question to the CJEU where it does not “duly substantiate” its failure to refer.⁸⁸ More specifically, national courts of last instance are to provide a statement of reasons, which shows that they did not omit to deal with the issue of whether or not to refer, on the one hand, and with the applicability of the exceptions elaborated in the CJEU’s case law, on the other.⁸⁹ Accordingly, the bare consideration that there are no doubts regarding the interpretation of a given issue is not sufficient, above all when the solution of the court has been contested by the parties to the proceedings. In *Pfizer*, for instance, the Constitutional Court acknowledged a violation of the obligation to make a reference under Article 267(3) TFEU since the ordinary court of last instance, by considering the interpretation of EU law to be obvious, did not consider the argument of the complainant which had suggested a different interpretation of the relevant legislative provisions under EU law and had underlined that the proposed solution was also followed by the courts of other Member States (notably, the Swedish courts).⁹⁰

In this context, one may argue that the Czech Constitutional Court elaborated additional criteria to the requirements established under EU law.⁹¹ Indeed, it analyzes whether the

⁸⁷ Pelzl, *supra* note 35, at 92.

⁸⁸ In order to define an arbitrary conduct, the Constitutional Court pointed out, firstly, that a decision taken in an arbitrary manner is incompatible with Article 1(1) of the Constitution of the Czech Republic (principle of the law-based state) and, then, that this notion should be interpreted, in the light of Article 2(3) of the Constitution (principle of enumerated powers) in conjunction with Art. 4(4) of the Charter (principle of judicial protection), as meaning that state powers shall be exercised within the limits that preserve the essence and significance of the rights and freedoms. ÚS, Case No. 1009/08 at para. 21.

⁸⁹ *Id.* at para. 22. Moreover, in the judgment of November 2011 II. ÚS 1658/11, para. 18, the Czech Constitutional Court referred also to the abovementioned three hypotheses elaborated by the German Federal Constitutional Court in order to determine if a refusal is arbitrary, namely in the cases of a fundamental disregard of the obligation to make a submission, a deliberate deviation without making a submission, and the incompleteness of the case law of the CJEU.

⁹⁰ *Id.* at para. 28.

⁹¹ Valutyté, *supra* note 34, at 1178.

refusal to refer provides duly substantiated reasons by showing a deep scrutiny of the CJEU's case law as well as of the possibility to apply the *CILFIT* criteria. It follows that a "formal referral" to the latter is not sufficient.⁹² Moreover, it should be pointed out that, according to the reasoning of this Constitutional Court, the parties to the proceedings play an active role in order to influence the decision of the national court of last instance and initiate a preliminary reference procedure. It is also worth bearing in mind that, in *Pfizer*, the Constitutional Court criticized the practice of Czech courts, which were unwilling to address preliminary questions to the CJEU.⁹³ In this regard, one may assume that this also had an impact on the decision of the Constitutional Court in that it ruled that the right to a lawful judge requires national judges to give duly substantiated reasons where they refuse to refer under Article 267(3) TFEU and to take into consideration whether the parties have raised an issue concerning EU law.⁹⁴

Similarly to the Czech Constitutional Court, the Slovenian Constitutional Court stresses that, in order to assess whether the right to judicial protection is ensured, within the meaning of Article 23(1) of the Constitution and in the light of the separation of jurisdiction as laid down in Article 267(3) TFEU, national courts of last instance should adopt a sufficiently clear position in relation to the questions related to EU law. More specifically, they have to give reasons and explain why they decided not to ask the CJEU for a preliminary ruling. That reasoning is to include a reference to the motion of the parties to submit a preliminary question to the CJEU and to *CILFIT*. The Slovenian Constitutional Court further points out that the reasoning of national courts of last instance must be adequate to enable the Constitutional Court to determine whether the conditions setting out the duty under Article 267(3) TFEU have been respected. Moreover, it is interesting to note that the Slovenian Constitutional Court, in requiring that the refusals to refer to the CJEU are appropriately substantiated, refers also to the case law of the ECtHR concerning the violation of Article 6(1) ECHR due to an arbitrary refusal to refer.

It is worth observing that the Czech and the Slovenian Constitutional Courts have adopted a higher requirement concerning the obligation to give reasons when deciding not to refer to the CJEU under Article 267(3) TFEU than the one established by the ECtHR. The latter holds that Article 6(1) ECHR obliges national courts of last instance to state reasons for the

⁹² Václav Stehlík & Robert Zbiral, *EU procedural rules and Czech Constitutional order: the case of preliminary ruling procedure*, VIIIth World Congress of the International Association of Constitutional Law, Mexico 6–10 December 2010 (section 18: Constitutional Implication of regional integration); Valutyte, *supra* note 34, at 1180.

⁹³ ÚS Case No. 1009/08 at para. 29; Jan Komárek, *Preliminary references in the Czech Republic*, 50th Anniversary London-Leiden Conference on European Law, 25 June 2011, http://www.biicl.org/files/5751_komerek_25-06-11_biicl.pdf.

⁹⁴ In this regard, it is interesting to point out that after *Pfizer*, national courts of last instance have referred to the CJEU more frequently. Moreover, when they refuse to refer they give reasons by making references to *CILFIT*. Petrлік, *supra* note 42, at 431; see also ÚS, Case No. 1658/11 at para. 18.

refusal to refer, according to *CILFIT*, when a party to the proceedings made a substantiated request in this sense.⁹⁵ However, it accepts that national courts refer to *CILFIT* by mentioning that it comes into play, since its task is not to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.⁹⁶

III. Arbitrary Decisions as Regards the Existence of Doubts

In order to determine whether a refusal to refer under Article 267(3) TFEU is arbitrary, the Spanish Constitutional Court focuses on whether there exist doubts as regards the decision not to refer of a national court of last instance. The existence of doubts is not to be examined with regards to the subjective opinion of a judge concerning the interpretation of EU law.⁹⁷ In fact, the national judge enjoys a wide margin of appreciation concerning the statement of grounds and the merit of the case, since the review by this Constitutional Court is limited to the consideration of the existence of doubts.⁹⁸

The existence of doubts, in the Spanish Constitutional Court's view as held in the judgment of 2004, may be deduced by the presence of a negative assessment of the compatibility of a provision of national law with EU law.⁹⁹ In such cases, the national judge cannot decline to apply a national provision without a prior confirmation of the CJEU through a preliminary ruling. The Spanish Constitutional Court also emphasizes that an interpretative doubt exists where the decision of the national judge departs from settled case law at national or EU level and implies the disapplication of a national law.¹⁰⁰ In these cases, there is an obligation to refer within the limits of the *acte clair* and *acte éclairé* doctrines.

This judgment was followed by another judgment of 2006.¹⁰¹ However, the reasoning of the Spanish Constitutional Court was partially different. The Spanish Constitutional Court recognized an infringement of the right to effective judicial protection due to the decision

⁹⁵ *Dhahbi v. Italy*, App. No. 17120/09, at paras. 31–33; *Vergauwen and others v. Belgium*, App. No. 4832/04 (April 10, 2012), <http://hudoc.echr.coe.int/>, paras. 87–92; *John v. Germany*, App. No. 15073/03.

⁹⁶ *Ullens De Schooten and Rezabek v. Belgium*, App. Nos. 3989/07 and 38353/07 at paras. 61–66.

⁹⁷ Valutytė, *supra* note 34, at 1180.

⁹⁸ Tribunal Constitucional [TC] [Spanish Constitutional Court], Feb. 11, 2013, Case No. STC 27/2013.

⁹⁹ Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 58/2004.

¹⁰⁰ *Id.*

¹⁰¹ STC 194/2006; Víctor Manuel Sánchez Blázquez, *STC 194/2006, de 19 de junio: vulneración del derecho al proceso debido e indefensión de la Comunidad Autónoma de Canarias por inaplicación en una Sentencia del Tribunal Superior de Justicia de Canarias de un precepto de la Ley reguladora del IGIC de contenido idéntico a otro de la Ley del IVA declarado contrario a la Sexta Directiva por el Tribunal de Justicia de las Comunidades Europeas*, http://www.ief.es/documentos/recursos/publicaciones/jurisprudencia_constitucional/2006_STC194_Sanchez.pdf

of the national judge of last instance that set aside domestic legal provisions which were deemed to be in contrast with EU law. It stressed that that national judge was obliged to make a reference to the CJEU for a preliminary ruling before disapplying the national provision.¹⁰² To this end, the Spanish Constitutional Court referred to its case law concerning the obligation to refer to the Constitutional Court before setting aside a national provision due to a conflict with the Constitution.¹⁰³ Such an interpretation was nevertheless problematic in relation to the ruling of the CJEU in *Kücükdeveci*.¹⁰⁴ According to the latter, a national court cannot be obliged to make a preliminary reference to the CJEU for the sole purpose of disapplying a provision of national law.¹⁰⁵

On that account, the Spanish Constitutional Court, in a judgment of 2010, clarified the previous interpretation of the cases in which the refusal to refer under Article 267(3) TFEU might infringe Article 24 of the Constitution.¹⁰⁶ Announcing a correction of its judgment of 2006, the Spanish Constitutional Court pointed out that questions of constitutionality and preliminary references to the CJEU are two different procedures that reflect distinct objectives and do not imply the same requirements. It further argued that the exceptions to the obligation to refer to the CJEU are established in its case law. Where the *acte clair* and *acte éclairé* hypotheses do not apply and the interpretation of EU law serves to settle the dispute before the national judge of last instance, a reference to the CJEU for a preliminary ruling is necessary where the national court of last instance has doubts. This is particularly so, according to the Spanish Constitutional Court, when a national legislative provision, deemed to conflict with EU law, must be set aside. In those cases, should the national judge of last instance decide without referring to the CJEU, Article 24 of the Constitution may be breached.

In subsequent case law, the Spanish Constitutional Court ruled on constitutional complaints related to the case in which the national court of last instance considers that there is no contradiction between EU law and national law. Thus, the question of whether a provision of national law shall be set aside is not raised. In that case, according to the

¹⁰² Ricardo Alonso García, *Cuestión prejudicial europea y tutela judicial efectiva*, IDEIR working paper 8 (2011) <http://www.ucm.es/data/cont/docs/595-2013-11-07-cuesti%C3%B3n%20prejudicial%20europea.pdf>.

¹⁰³ See, *supra* note 50. Unlike the judgment of April 2004, in fact, the Spanish Constitutional Court did not refer to the assessment of whether there was a violation of the right to effective judicial protection under Article 24 of the Constitution or whether the CJEU's case law as regards the applicability of the *CILFIT* criteria could apply.

¹⁰⁴ Case C-555/07, *Kücükdeveci*, 2010 E.C.R. I-00365, paras. 52-56. See also Sarmiento, *Rapport espagnol, supra* note 50, at 169.

¹⁰⁵ *Kücükdeveci*, Case C-555/07 at para. 54.

¹⁰⁶ Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 78/2010; Juana Morcillo Moreno, *El planteamiento de la cuestión prejudicial comunitaria a la luz de la jurisprudencia europea y constitucional: ¿Facultad o deber?*, 185 REVISTA DE ADMINISTRACIÓN PÚBLICA 227-62 (2011).

Spanish Constitutional Court, where the national judge of last instance points out that there are no doubts, the refusal to refer cannot breach Article 24 of the Constitution, in relation to the *acte clair* doctrine.¹⁰⁷ In fact, the Spanish Constitutional Court does not consider its task to be that of determining whether EU law is correctly interpreted by national judges.¹⁰⁸ However, the refusal to refer to the CJEU violates the constitutional right to effective judicial protection where a national judge of last instance applies the national provision of law despite the fact that there is a previous judgment of the CJEU declaring that provision to be incompatible with EU law.¹⁰⁹

In those circumstances, scholars argue that the Spanish Constitutional Court reviews the application of EU law in cases dealing with the defense of its prerogatives (i.e. setting aside national laws that do not comply with the constitution) or the prerogatives of the CJEU (i.e. hearing a preliminary reference).¹¹⁰

D. The Obligation to Refer Under Article 267(3) TFEU from the Perspective of the CJEU and of the Constitutional Courts: Some Implications

The case law of these Constitutional Courts illustrates that individuals may bring, in certain Member States, a direct action against the refusal to refer to the CJEU of a national judge of last instance for the protection of constitutional rights. In exercising the constitutional review, the Constitutional Courts under analysis contribute to ensuring that national courts of last instance do not overlook EU law. In this regard, it could be argued that these courts have elaborated an additional guarantee for individuals. Moreover, the role of the CJEU is reinforced by the practice of the aforementioned Constitutional Courts reconnecting the omission to refer for a preliminary ruling under the obligation laid down in Article 267(3) TFEU to the breach of constitutional rights.¹¹¹ This further implies that the duty to refer and the role of national judges as EU judges are reinforced.¹¹²

¹⁰⁷ Tribunal Constitucional [TC] [Spanish Constitutional Court], Case No. STC 27/2013.

¹⁰⁸ *Id.*

¹⁰⁹ Tribunal Constitucional [TC] [Spanish Constitutional Court], July 12, 2012, STC 145/2012. Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law: Tribunal Constitucional*, (note 59), 885.

¹¹⁰ Sarmiento, *supra* note 109, at 884.

¹¹¹ Andreas Voßkuhle, *The cooperation between European Courts: The Verbund of European Courts and its legal Toolbox*, in *THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE* 81, 90 (Allan Rosas, Egils Levits, & Yves Bot eds., 2013).

¹¹² Allan Rosas, *The National Judge as a EU Judge: Opinion 1/09*, in *CONSTITUTIONALISING THE EU JUDICIAL SYSTEM: ESSAYS IN HONOUR OF PERNILLA LINDH*, 105–21 (Pascal Cardonnel, Allan Rosas, & Nils Wahl eds., 2012).

This line of case law is also symptomatic of the fact that Member States have internalized EU law into their national legal systems. Indeed, the integration between EU law and national law is enhanced by procedural guarantees which are established at national level in order to comply with the duty for national judges to make a preliminary reference to the CJEU. As rightly pointed out, this practice transforms “an obligation of EU law also into a duty to refer under [...] constitutional law”.¹¹³

Nonetheless, a number of issues as regards the compatibility of that practice with the case law of the CJEU and the relations between the CJEU and Constitutional Courts deserve further discussion. I will examine the interplay between the case law developed by these Constitutional Courts and the exceptions elaborated by the CJEU as to the duty to refer for courts of last instance. Moreover, I will discuss whether preliminary references on validity should be subject to such a constitutional guarantee also for lower courts (I). Next, I will focus on the compatibility of the constitutional review of the duty to refer under Article 267(3) TFEU with the case law of the CJEU concerning the interferences with the court's decision regarding preliminary references (II). In addition, attention will be drawn to the constitutional review by these courts in the framework of the judicial protection of individuals (III). Finally, I will highlight some considerations concerning the role of Constitutional Courts *vis-à-vis* the CJEU and the preliminary reference procedure (IV).

I. Exceptions to the Duty to Refer: What Should National Judges Take Into Account?

The obligation to refer set out in Article 267(3) TFEU assumes a different significance at national level than at EU level. Indeed, the CJEU asks national judges to look at the substantial content of the obligation to refer, that is, an issue concerning EU law, which is raised in the proceeding, is relevant in order to take a decision and that the *acte clair* and *acte éclairé* doctrines do not apply.¹¹⁴ On the contrary, at national level, these Constitutional Courts require that, when refusing to make a reference under Article 267(3) TFEU, national judges comply with a series of procedural conditions, that is, a reasoning showing how the court of last instance deals with its obligation to refer and the motions of the parties as well as the lack of any doubts as regards EU law. One may argue, in this regard, that in the process of internalizing EU law, the Constitutional Courts have included the obligation provided for in Article 267(3) TFEU in national procedural criteria, with an impact on the margin of appreciation of national judges when deciding on whether to ask the CJEU for a preliminary ruling.

¹¹³ Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law*, *supra* note 59, at 882; see also Opinion of Advocate General Cruz Villalón at para.25, Case C-173/09, Elchinov (June 10, 2010), 2010 E.C.R. I-08889.

¹¹⁴ *CILFIT*, Case C-283/81. This consideration could also be supported by the fact that the procedural rules governing the decision to ask preliminary questions to the CJEU fall, in principle, within the procedural autonomy of Member States.

The question is whether, and to what extent, the conditions attached to the refusal of national courts of last instance to refer a preliminary question, as elaborated by the Constitutional Courts, are consistent with the exceptions developed by the CJEU.

To this end, I will briefly recall the criteria under EU law. It follows from the settled case law of the CJEU that national judges of last instance must decide whether or not to refer to the CJEU, according to the *CILFIT* criteria exclusively. Moreover, in the light of the principles of equivalence and effectiveness of EU law as well as the principle of sincere cooperation, the national court's decision as to whether or not to refer to the CJEU cannot be affected by national procedural rules limiting it.¹¹⁵ In essence, national judges have the exclusive competence to assess the relevance of the question in order to resolve a dispute brought before them.¹¹⁶ It follows that, pursuant to the obligation to make a reference for a preliminary ruling laid down in Article 267(3) TFEU, the national court may refrain from referring where it considers that a specific question related to EU law is not necessary to enable it to give judgment.¹¹⁷ It should also be observed, in this regard, that a question of EU law may be relevant in order to resolve the dispute even though the parties to the main proceeding did not invoke the issue. In those cases, national courts should raise it by their own motion. And the other way round: the request of the parties to the main proceeding does not affect the decision of the national judge as to whether or not to refer.

Concerning the *CILFIT* criteria, by virtue of the *acte éclairé* doctrine, national courts of last instance may not be constrained by asking for a preliminary reference where a materially identical question was already clarified by the CJEU through a preliminary ruling and the decision may be based on that judgment.¹¹⁸ This exception includes cases in which, even though the questions are not identical, the answer of an earlier question explained the issue in an unambiguous way.¹¹⁹ The exceptions concerning the *acte clair* doctrine might be more complex. In these cases, even though there is not a previous ruling of the CJEU, national judges of last instance may refrain from referring where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The *acte clair* requires

¹¹⁵ Diana-Urania Galetta, PROCEDURAL AUTONOMY OF EU MEMBER STATES: PARADISE LOST? 68–74, 81–100 (2010).

¹¹⁶ In fact, before the CJEU, there is a presumption of relevance to the referred questions and indeed Article 267 TFEU only requires that the judge considers a question necessary and not that the question is necessary. See Case C–379/98, *PreussenElektra*, 2001 I–02099, para. 38; Case C–103/08, *Gottwald*, 2009 E.C.R. I–09117, para. 16; Morten Broberg & Niels Fenger, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 156, 161 (2d ed. 2014).

¹¹⁷ *CILFIT*, Case C–283/81 at para. 10. This is a consequence of the fact that the CJEU refuses to rule on general or hypothetical questions or where the questions are raised in a fictitious dispute. Case 244/80, *Foglia v. Novello*, 1981 E.C.R. I–03045; Case C–215/08, *E. Friz*, 2010 E.C.R. I–02947.

¹¹⁸ *CILFIT*, Case C–283/81 at para. 14.

¹¹⁹ BROBERG & FENGER, *supra* note 116, at 233.

not only that the concerned national court is convinced about a certain interpretation of EU law, but also that the courts of the other Member States and the CJEU agree, in order to prevent national courts from applying EU law inconsistently. Recently, the CJEU gave further indications on the *acte clair* doctrine in two judgments delivered the same day. In *Ferreira da Silva*, the CJEU pointed out that a national court within the meaning of Article 267(3) TFEU is obliged to make a reference where the interpretation of EU law is subject to conflicting decisions of lower courts and it frequently gives rise to difficulties of interpretation in the Member States.¹²⁰ Meanwhile, in *X and T.A. van Dijk*, the CJEU ruled that national courts of last instance are not required to make a reference due to the fact that a lower domestic court has referred a preliminary question on a case involving the same legal issue.¹²¹

However, how should national courts comply with this requirement in practice?¹²² There exist divergent approaches in the national courts concerning the application of the *acte clair* doctrine.¹²³ It has already been mentioned, for instance, that the parties to the proceedings in the Czech Republic and Slovenia assume a procedural role inasmuch as the national judge must examine the issue of EU law that they have raised and provide a duly substantiated decision when refusing to refer to the CJEU, accordingly. Another interesting example is offered by the case law of the second Senate of the German Federal Constitutional Court. Unlike the first Senate, this panel interprets the *acte clair* doctrine in the sense that national judges of last instance may refrain from referring where the correct application of EU law is *justifiable* in that diverging opinions are not clearly preferred.

The abstract content of the *CILFIT* criteria leads to a divergence among national courts as regards the interpretation of Article 267(3) TFEU. Yet these criteria should be interpreted narrowly, since they are the exception to an obligation.¹²⁴ One may ask, however, how a narrow application can be reviewed, since they are related to the margin of appreciation of

¹²⁰ *Ferreira da Silva e Brito*, Case C-160/14 at paras. 41–45.

¹²¹ Joined Cases C-72/14 & 197/14, *X and T.A. Van Dijk*, (Sept. 9, 2015), <http://curia.europa.eu/>.

¹²² How can national judges be sure that other national judges in another Member State will follow the same view? Or, how can they be convinced that the CJEU will interpret the issue in the same sense, bearing in mind the dynamic nature of its case law? See, BROBERG & FENGER, *supra* note 116, at 237–38; Daniel Sarmiento, *CILFIT and Foto-Frost: Constructing and Deconstructing Judicial Authority in Europe*, in *THE PAST AND FUTURE OF EU LAW* 192, 196 (Miguel Poiãres Maduro & Loïc Azoulay eds., 2010).

¹²³ The analysis developed in this article is limited to the experiences of the Member States of the Constitutional Courts in question.

¹²⁴ It is worth mentioning that, while Advocate General Bot pointed out that the CJEU should adopt a strict position concerning the obligation under Art. 267(3) TFEU, Advocate General Wahl argued against a rigid reading of the *CILFIT* case law. See Opinion of Advocate General Bot at para. 101, Case C-160/14, *Ferreira da Silva e Brito*, (June 11, 2015); Opinion of Advocate General Wahl at para. 62, Joined Cases C-72/14 and C-197/14, *X and T.A. van Dijk*, (May 13, 2015).

national judges. It is therefore not surprising that these Constitutional Courts added a number of procedural requirements, with the purpose of monitoring the decision not to refer to the CJEU.

The duty to give reasons for the refusal to refer, which is put forward by the Czech and Slovenian Constitutional Courts (and the ECtHR as well), is not expressly required by EU law but it appears to comply with it. National judges in fact should give reasons for their refusal to refer to the CJEU according to the case law of the CJEU. Besides, the requirement of reasoning reinforces the obligation to refer under Article 267(3) TFEU and does not affect the role of the national judge or the nature of the preliminary reference procedure as indicated by the CJEU. Rather, it is controversial that those Courts link this requirement to a request of the party who invokes EU law and asks the national to refer to the CJEU. The emphasis given to the role of the parties in order to assess whether a refusal to refer violates Article 267(3) TFEU is not compatible with the latter since Article 267 TFEU does not entail that the parties to the proceedings influence the decision to trigger a reference for a preliminary ruling.

Moreover, as far as the Spanish Constitutional Court is concerned, the interpretation and internalization of the *CILFIT* criteria could also be questioned. The Spanish Constitutional Court, in essence, deems that national judges are obliged to refer due to the existence of a reasonable doubt in two cases. The first is where there is a previous judgment of the CJEU declaring the incompatibility of a national provision with EU law and the domestic court decides to apply that provision. The second is where the national judge sets aside a domestic provision as incompatible with EU law, without referring under the conditions set by Article 267(3) TFEU and the case law of the CJEU. While the first hypothesis reflects the *CILFIT* doctrine in a consistent way, one may ask whether the second one does not deviate from the CJEU's case law in that it requires, as a prerequisite, a decision not to apply a national provision.

The importance attached to the *CILFIT* criteria is linked to the fact that, when those exceptions do not apply, national courts of last instance do not have jurisdiction to interpret EU law. Similarly, it is appropriate to point out that national courts, either of last instance or lower courts, cannot rule on the validity of EU law since only the CJEU enjoys jurisdiction to declare an EU act void or invalid.¹²⁵ It should follow from this that the

¹²⁵ *Foto-Frost*, Case 314/85. In this regard, it is worth remembering that a preliminary ruling might be the only possibility for individuals in order to obtain a ruling on the legality of EU acts. A direct action is admissible under Article 263(4) TFEU. However, despite the relevant amendment of the Treaty of Lisbon, the conditions of Article 263(4) TFEU provide narrow access to the CJEU. In this regard, see Antonio Creus, *Commentaire des décisions du tribunal dans les affaires T-18/10 Inuit et T-262/10 Microban*, 3 *CAHIERS DE DROIT EUROPEEN* 659–78 (2011); Melchior Wathelet & Jonathan Wildemeersch, *Recours en annulation: une première interprétation restrictive du droit d'action élargi des particuliers?* 12 *J.D.E.* 75–79 (2012); Jonathan Wildemeersch, *La condition de l'article 263, alinéa 4, TFUE relative à l'absence de mesures d'exécution et l'arrêt Telefónica : de l'inutilité d'une réforme : CJUE, gde ch., 19 décembre 2013, Telefónica/Commission, aff. C-274/12 P*, 4 *REVUE DES AFFAIRES EUROPÉENNES* 861–71

constitutional review concerning the obligation to refer of courts of last instance must also apply, at least in theory, to the decision of any national court which does not ask the CJEU for a preliminary ruling on validity. In fact, it is always incumbent upon national judges to make a reference to the CJEU in those cases. Nevertheless, in practice, this possibility is ruled out, since the constitutional review can be engaged exclusively when all other national remedies have been exhausted.¹²⁶ It is worth noting that by all accounts the Constitutional Courts in question do not differentiate their assessment between preliminary questions on validity and preliminary questions on interpretation. However, the criteria that they have established apply to preliminary references on interpretation since there might be exceptions to the obligation under Article 267(3) TFEU. On the contrary, national judges are always required to refer to the CJEU when they doubt the validity of an EU act. Therefore, it should not be possible to transpose the same criteria.

II. Whether and When a Superior Court May Interfere with a Lower Court's Decision Regarding a Preliminary Reference

It is also necessary to draw attention to the case law of the CJEU concerning the possibility for higher courts to intervene against the lower court's decision to refer for a preliminary ruling to the CJEU. This case law suggests that the latter is not willing to accept the interference of Constitutional Courts concerning the preliminary reference procedure.

In *Cartesio*, the CJEU pointed out that Article 267 TFEU confers an autonomous jurisdiction on the referring court to make a preliminary reference.¹²⁷ Hence, a higher court cannot prevent a lower one from exercising the right to make a preliminary reference.¹²⁸ Similarly, in *Melki and Abdeli*, the CJEU ruled that Article 267 TFEU precludes national legislation which prevents domestic courts from exercising their right or fulfilling their obligation to refer questions to the CJEU for a preliminary ruling.¹²⁹ The CJEU went on in *Križan* and

(2013); Case C-583/11, *P Inuit Tapiriit Kanatami and Others v. Parliament and Council*, (Oct. 3, 2013), <http://curia.europa.eu/>; Case C-133/12 P, *Stichting Woonlinie and Others v. Commission*, (Feb. 27, 2014), <http://curia.europa.eu/>.

¹²⁶ It is certainly possible that the decision of a national judge will be corrected beforehand. However, since these Constitutional Courts have elaborated a link between the obligation under Art. 267(3) TFEU and a constitutional right, it must be stressed that the duty to refer under EU law provides the same obligation for courts of last instance and for all the courts where a question of validity arises. See also Paul Craig, *The Classics of EU Law Revisited: CILFIT and Foto-Frost*, in *THE PAST AND FUTURE OF EU LAW* 185, 189 (Miguel Poiares Maduro & Loic Azoulai eds., 2010).

¹²⁷ *CARTESIO Oktató és Szolgáltató bt.*, Case C-210/06.

¹²⁸ Morten Broberg & Niels Fenger, *Preliminary references as a right: But for Whom?*, 36 *EUR. L. REV.*, 276–88 (2011); see also BROBERG & FENGER, *supra* note 116, at 327–36.

¹²⁹ *Melki and Abdeli*, Cases C-188/10 and C-189/10. In particular, national courts shall remain free to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, any question which they consider necessary.

stressed that Article 267 TFEU gives national courts the widest discretion in making a reference to the CJEU when questions involving the interpretation of EU law or the validity of provisions of EU law are raised in a case before them.¹³⁰ This must be so even though it implies that the national court will not follow a decision of its Constitutional Court, which set aside its first decision, and even though a national rule obliges the former to resolve the dispute by following the legal opinion of the latter court.¹³¹ Furthermore, in *A v. B and others*, the CJEU dealt with the duty of national courts under Article 267(3) TFEU where national legislation appears to be incompatible with both EU and national constitutional law. More specifically, since the jurisdiction of the Austrian Constitutional Court to review the constitutionality of national legislation covers the provisions of the Charter, Austrian courts could not refrain *ex officio* from applying a legislative provision contrary to the Charter. They had to apply to the Constitutional Court for that provision to be struck down.¹³² The CJEU clarified that EU law requires that the court called upon to apply EU law must be free to set aside national legislative provisions that might prevent EU rules from having full force.¹³³ Moreover, where a national legislative provision is not only contrary to EU law but also unconstitutional, the existence of a national procedural rule establishing a mandatory reference to the Constitutional Court cannot prevent a national court from exercising the right or obligation under Article 267 TFEU.¹³⁴ In addition, where the rights guaranteed by a national constitution and those guaranteed by the Charter apply simultaneously to national legislation implementing EU law, within the meaning of Article 51(1) of the Charter, the jurisdiction of the CJEU to declare an EU act invalid cannot be undermined. Hence, before the review of constitutionality can be carried out in relation to the same grounds which cast doubt on the validity, national courts are required to refer to the CJEU a preliminary question.¹³⁵

What is not clear is whether those considerations concerning the autonomous jurisdiction of national courts under Article 267 TFEU also apply when the national court has declined to make a reference and a Constitutional Court finds that such a reference must be made.

¹³⁰ *Križan and Others*, C-416/10.

¹³¹ Nicolas Cartiat & Arnaud Hoc, *Arrêt « Križan » : dans quelle mesure le juge national est-il tenu de poser une question préjudicielle?*, *JOURNAL DE DROIT EUROPEEN* 97 (2013). It is also interesting to observe that this case law reverses the hierarchy between superior and lower courts in that the lower court enjoys an autonomous jurisdiction concerning the decision to refer to the CJEU and the superior court cannot overturn its ruling and prevent it from referring. BROBERG & FENGER, *supra* note 116, at 328.

¹³² *A v. B and Others*, Case C-112/13.

¹³³ *Id.* at paras. 36–37.

¹³⁴ *Id.* at para. 38.

¹³⁵ *Id.* at paras. 41–43.

If one assumes that the purpose of the abovementioned case law of the CJEU is to preserve the autonomous jurisdiction of the referring court, this will lead to the conclusion that Constitutional Courts cannot intervene against the refusal to refer of a national court, even if the latter court was obliged to refer under Article 267(3) TFEU. Nevertheless, if one reads the CJEU's rulings in *Cartesio*, *Melki and Abdeli*, *Križan*, and *A v. B and Others* as aiming to enhance the effectiveness of EU law, as it indeed seems to be, and that the autonomous jurisdiction of the referring court is a consequence of that, the exercise of the constitutional review on the refusal to refer may be considered consistent with the CJEU's case law. The limits to national procedural law, which prevent a higher court from overruling a lower court's decision to make a preliminary reference, increase the probability that a preliminary question on interpretation or validity will arrive at the CJEU. This serves the purpose of the effectiveness of EU law insofar as a national court will be willing to refer since it does not assume the risk that its decision can be appealed before a higher court and that the latter will prevent it from making a reference.¹³⁶

The effectiveness of EU law and its correct application may benefit from a decision of a Constitutional Court to overturn the decision of a national court for refusing to refer under Article 267(3) TFEU. Moreover, it is convincing that preventing a national court from making a reference to the CJEU is a more significant interference in the jurisdiction of that court than requiring national judges to ask for a preliminary ruling of the CJEU under Article 267(3) TFEU.¹³⁷ This view is also consistent with the *CILFIT* case law, where it seems that the CJEU privileges that national courts make a preliminary question, although the latter is not necessary, rather than that the national courts disregard their duty to refer.¹³⁸

III. Protection of Individuals: State Liability for Judicial Infringement of EU Law and Judicial Review by Constitutional Courts

Although the EU Treaties do not establish any sanction for the failure to refer a question to the CJEU, the latter pointed out in *Köbler* the right of individuals to obtain payment of damages due to State liability for judicial decisions, including the decision not to refer under Article 267(3) TFEU.¹³⁹ Member States could be liable to pay for infringements of EU

¹³⁶ BROBERG & FENGER, *supra* note 116, at 335.

¹³⁷ *Id.*

¹³⁸ *CILFIT*, Case C-283/81 at para. 15. Indeed, after having established the exceptions to the obligation to refer, the CJEU points out that, in all such circumstances, it must not be forgotten that national courts remain at liberty to bring a matter before the court if they consider it appropriate to do so. Moreover, according to Art. 99(1) of the CJEU's Rules of Procedure, the CJEU may decide to rule by reasoned order, where a question referred to it for a preliminary ruling is identical to a question on which it has already ruled (i.e., *acte éclairé*), where the reply to such a question may be clearly deduced from existing case law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt (i.e., *acte clair*). Rules of Procedure of the Court of Justice of 25 September 2012 (O.J. L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013).

¹³⁹ *Köbler*, Case C-224/01; *Traghetti del Mediterraneo*, Case C-173/03; *Commission/Italy*, Case C-379/10.

law concerning the decision of a national judge of last instance where the rule of EU law infringed is intended to confer rights on individuals, the breach is sufficiently serious (within the meaning of a manifest infringement, taking into account the specific nature of the judicial function), and there is a direct causal link between that breach and the loss or damage sustained by the injured parties.¹⁴⁰ In *Traghetti del Mediterraneo*, the CJEU further stressed that Member States cannot adopt or maintain in force legislation that limits or excludes state liability for judicial damages due to a national court's failure to refer a preliminary question to the CJEU. Such legislation, which would render it impossible or illusory to obtain damages, would overlook the principle of *Köbler*.¹⁴¹ The CJEU pointed out that the assessment of the existence of a manifest infringement of EU law, which entails state liability, however, belongs to the procedural autonomy of Member States. Indeed, the CJEU aims at setting a threshold necessary and sufficient to found a right in favor of individuals to obtain redress.¹⁴² It follows that Member States might establish a higher level of protection of individuals' rights by imposing less strict requirements.¹⁴³

Nevertheless, scholars criticize this line of case law for lack of effects. Indeed, on the one hand, it is not probable that a lower court, which is called to decide whether a superior court's decision not to refer infringed EU law in a sufficiently serious way, will assess the liability of the superior court.¹⁴⁴ Similarly, if the matter has to be decided before the very same supreme court which refused to make a reference, it would not be surprising for this court to deny its liability for the infringement of the obligation to refer.¹⁴⁵ On the other hand, it could be hard to demonstrate that the conditions required to be fulfilled are met in practice.¹⁴⁶ In this regard, scholars have suggested that, in order to avoid judicial liability, the national courts should explain why they did not consider that they were under an

¹⁴⁰ *Köbler*, Case C-224/01.

¹⁴¹ *Traghetti del Mediterraneo*, Case C-173/03 at para. 24; cf. *Ferreira da Silva e Brito*, Case C-160/14 at paras. 46-60; Bjorn Beutler, *State Liability for Breaches of Community Law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?*, 46 COMMON MKT. L. REV. 773, 785 (2009); Nicolo Zingales, *Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?*, 11 GERMAN L. J. 419-438 (2010).

¹⁴² Malenovský, *supra* note 13, at 218.

¹⁴³ *Köbler*, C-224/01 at para. 57.

¹⁴⁴ Claus Dieter Classen, *Case C-224/01, Gerhard Köbler v. Republik Österreich, Judgment of 30 September 2003, Full Court*, 41 COMMON MKT. L. REV. 813, 818 (2004).

¹⁴⁵ BROBERG & FENGER, *supra* note 116, at 269-70.

¹⁴⁶ Roger Van den Bergh, *Francovich and its Aftermath: Member State Liability for Breaches of European Law from an Economic Perspective*, in THE PAST AND FUTURE OF EU LAW 423, 430 (Miguel Poiarés Maduro & Loïc Azoulai eds., 2010); Peter J. Wattel, *Köbler, CILFIT and Welthgrove: We can't go on meeting like this*, 41 COMMON MKT. L. REV. 177-190 (2004).

obligation to make a reference or why a reference was not appropriate.¹⁴⁷ Such a condition, which recalls the view of the Czech and Slovenian Constitutional Courts as well as the ECtHR, would enhance the implementation of the principle developed in *Köbler* and, thereby, the effectiveness of EU law and the judicial protection of individuals.

That said, one might query whether the intervention of the Constitutional Courts in question could be regarded as a valuable contribution in terms of judicial protection of individuals. It appears that the case law concerning the constitutional review of the duty to refer under Article 267(3) TFEU reinforces the protection of individuals in that the refusal is subject to an appeal. Moreover, it may be argued that the right to make a constitutional complaint will decrease the probabilities that individuals will also bring an action for damages against the State, since they are already entitled to ask their Constitutional Court for the assessment of the decision not to refer of a national court of last instance. This appeal will lead to a decision, which will validate or overturn the previous ruling, giving Constitutional Courts the opportunity to prevent damages from occurring.¹⁴⁸

It should also be noted that the differing practices of the concerned Constitutional Courts affect the margin of appreciation of the national judges concerning the decision whether to refer to the CJEU by imposing different conditions. This could lead to divergent outcomes as regards the constitutional complaint. Furthermore, in some Member States, it is not even possible to challenge the refusal to refer of a national court of last instance. Stated differently, one may point out the existence of discrimination among individuals on two levels. On the one hand, there is a differentiation of treatment between individuals of those Member States in which it is possible to challenge the decision not to refer to the CJEU by a constitutional complaint, and individuals of the other Member States where this possibility does not exist. On the other hand, concerning the first category of individuals (i.e., individuals of those Member States in which it is possible to challenge the omission to refer to the CJEU by a constitutional complaint), diverging criteria are used in order to assess their appeal on the same matter. Moreover, in Germany, there is a difference concerning the interpretation of the criteria even between the two Senates of the Federal Constitutional Courts. Having regard to such a situation, one may ask whether the diverging interpretations of the Constitutional Courts in question and the fact that the possibility of challenging the refusal to refer under Article 267(3) TFEU before the Constitutional Courts exists only in some Member States might produce unequal judicial

¹⁴⁷ CAROLINE NAOME, *LE RENVOI PREJUDICIEL EN DROIT EUROPEEN: GUIDE PRATIQUE* 49 (2d. ed. 2010).

¹⁴⁸ Malenovský, *supra* note 13, at 218; Classen, *supra* note 144, at 814. Taking the example in *Köbler*, if Mr. Köbler had had the possibility to bring an action for the violation of the right to a lawful judge before the Austrian Constitutional Court, an action for damages against the Republic of Austria would probably not have been brought. However, as mentioned, the Austrian Constitutional Court can exert its constitutional review only on administrative decisions.

protection of fundamental rights in Europe and, in particular, infringe the principle of equality of arms as part of the right to a fair trial at EU level. A claim against this, nevertheless, is that, concerning the national court's refusal to refer to the CJEU, Member States regulates the judicial protection among individuals insofar as they specify the detailed rules to engage State liability for judicial acts according to *Köbler*.

Furthermore, it is interesting to briefly observe that, regarding the duty to provide reasons as to the decision not to refer to the CJEU imposed by Article 6(1) ECHR, the ECtHR's case law may influence the discretion of Member States' courts when deciding not to refer.¹⁴⁹ A reasoned decision seems to be needed only when a party to the proceedings duly requested the national judge to refer. It follows that where a question of interpretation or validity of EU law arises and where, due to the lack of parties' requests, the domestic court should, yet it does not, make a preliminary reference *ex officio*, national judges are not constrained to give reasons as regards the *CILFIT* doctrine. Against this backdrop, it could also be mentioned that this case law of the ECtHR seeks to increase the collaboration with the CJEU by enhancing the obligation to refer under Article 267(3) TFEU, albeit limiting the assessment of the ECtHR to the presence of a reasons without going further to question whether national courts interpret EU law correctly.¹⁵⁰ However, the result is an interference with the CJEU and the functioning of the preliminary reference procedure, which could undermine the autonomy of the EU legal order.¹⁵¹ Furthermore, should this interpretation of the ECtHR be followed by national courts, the role of domestic judges and the nature of the preliminary reference procedure could be affected by giving new light to the procedural rights of the parties to the main proceedings.¹⁵²

IV. Some Considerations on the Relationship between Constitutional Courts and the CJEU Emerging from this Practice

The jurisdiction of these Constitutional Courts over the duty enshrined in Article 267(3) TFEU in light of constitutional rights reveals significant aspects of the interplay between the CJEU and national courts and of the architecture of the EU legal order.¹⁵³ In this regard,

¹⁴⁹ Malenovský, *supra* note 13, at 224.

¹⁵⁰ Christiaan Timmermans, *Will the Accession of the EU to the European Convention on Human Rights Fundamentally Change the Relationship Between the Luxembourg and the Strasbourg Court?*, European University Institute, Centre for Judicial Cooperation, Distinguished Lecture (2014/01), available at <http://cadmus.eui.eu/handle/1814/31932>.

¹⁵¹ Malenovský, *supra* note 13, at 222.

¹⁵² Besides, since Article 47 of the Charter should be interpreted within the same meaning of Article 6(1) ECHR, one may ask whether the former may be violated by the denial to refer to the CJEU without giving reasons. Cf. Clelia Lacchi, *The interference of the ECtHR in the dialogue between national courts and the Court of Justice of the EU: implications for the preliminary reference procedure*, REV. EUR. ADMIN. L., 2/2015 (forthcoming).

¹⁵³ Malenovský, *supra* note 13, at 219.

it has been observed that the intervention of Constitutional Courts may shape the interaction between domestic ordinary courts, Constitutional Courts, and the CJEU in a "triangular relation."¹⁵⁴ In other words, as a consequence of the possibility for individuals to appeal the decision not to refer of a domestic court of last instance, a Constitutional Court might rule on the interpretation of EU law given by that court and assess its admissibility in relation to the question whether the national judge of last instance was obliged to refer a preliminary question to the CJEU. Thus, Constitutional Courts come into the dialogue between national judges and the CJEU, with the task of supervising ordinary courts.

In this context, one may ask whether Constitutional Courts accept their role of referring courts under Article 267(3) TFEU. More specifically, do the criteria that these Constitutional Courts have elaborated in order to review the decision not to refer apply to them as well? Since, in the view of these Constitutional Courts, a violation of the obligation to make a reference under Article 267(3) TFEU may infringe a constitutional provision, and since Constitutional Courts, as courts of last instance, are obliged to refer a question to the CJEU, the same considerations should also apply to them. The refusal to refer to the CJEU *via* the preliminary reference procedure could also violate the relevant individuals' constitutional rights due to a Constitutional Court's refusal to refer. Yet, decisions of Constitutional Courts are not subject to appeal.

It appears that the Constitutional Courts in question, with the exception of the Austrian Constitutional Court, are rather reluctant to refer to the CJEU. In fact, the German,¹⁵⁵ the Slovenian,¹⁵⁶ and the Spanish¹⁵⁷ Constitutional Courts made their first reference to the CJEU only recently,¹⁵⁸ while the Czech and the Slovak Constitutional Courts have not yet submitted a request for a preliminary ruling. As regards both the Czech and the Slovak

¹⁵⁴ *Id.*

¹⁵⁵ BVERFG, Jan. 2014, Case No. 2 BvR 2728/13; Case C-62/14, Gauweiler and Others (June 16, 2015), <http://curia.europa.eu/>.

¹⁵⁶ Nov. 6, 2014, Case No. U-I-295/13.

¹⁵⁷ Tribunal Constitucional (Constitutional Court) [T.C.], June 9, 2011, Case No. 86/11 of 9 June 2011; Case C-399/11, Melloni (Feb. 26, 2013), <http://curia.europa.eu/>.

¹⁵⁸ It is worth remembering that the French *Conseil constitutionnel* submitted, for the first time, a preliminary reference to the CJEU in 2013. The *Conseil constitutionnel* was called to assess whether the principle of equality before the law and the right to an effective judicial remedy were violated by the national provisions transposing the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24). In order to reply to the question, the *Conseil Constitutionnel* asked the CJEU to interpret, in essence, the compliance of the relevant provisions with the Council Framework Decision and the right to effective judicial remedy. Case C-168/13 PPU, Jeremy F. (May 30, 2013), <http://curia.europa.eu/>.

Constitutional Courts, scholars have argued that these courts agree that ordinary courts of last instance are bound by Article 267(3) TFEU. However, at the same time they tacitly deny that they are subject to the same requirements, since they reserve for themselves a different role (i.e., supervising the constitutionality) and they stress that their jurisdiction does not overlap with that of the CJEU.¹⁵⁹

One may indeed observe that the obligation to refer under Article 267(3) TFEU has been transformed into a national constitutional obligation. The Constitutional Courts examined here determine whether national judges were constrained to make a preliminary reference.¹⁶⁰ Accordingly, these Constitutional Courts seem to assume the role of supreme supervisors of the effects of EU law in the national legal order. It is true that they are also subject to the obligation to refer to the CJEU. Nonetheless they are their own guardians in that their decision cannot be reviewed. In this regard, it should be noted that some Constitutional Courts, namely the German Federal Constitutional Court and the Czech Constitutional Court, proclaim their capacity to assess whether the EU institutions transgress the limits of their conferred powers and to determine the compatibility of EU law with their legal order in line with the *ultra vires* doctrine.¹⁶¹ These courts point out that the transfer of sovereign powers to the EU did not imply that EU action or the CJEU's

¹⁵⁹ Dumbrovský, *supra* note 38, at 101, 105.

¹⁶⁰ *Id.* at 105.

¹⁶¹ Paul Craig, *The ECJ and ultra vires action: a conceptual analysis*, 48 COMMON MKT. L. REV. 395–437 (2011). Two recent examples are the German Federal Constitutional Court's reaction to *Åkerberg Fransson* (Case C–617/10, *Åkerberg Fransson*, (Feb. 26, 2013), <http://curia.europa.eu/>) in the *Counter-Terrorism Database* judgment (BVERFG, April 24, 2013, Case No. 1 BvR 1215/07) and the order of 14 January 2014 of the German Federal Constitutional Court concerning a request for a preliminary ruling, which raises the question of the legality of the Outright Monetary Transactions (OMT) program. The question was submitted in the context of an *ultra vires* review of EU acts, which might have consequences for the constitutional identity of Germany. In this regard, Advocate General Cruz Villalón in his Opinion of 14 January 2015 pointed out, “if a national court or tribunal were reserved for itself the last word on the validity of an EU act, the preliminary ruling procedure would then be merely advisory in nature.” See Opinion of Advocate General Cruz Villalón at paras. 35–38, Case C–62/14, *Gauweiler and Others* (Jan. 14, 2015), <http://curia.europa.eu/>. As for the German Federal Constitutional Court, see Daniel Thym, *Separation versus Fusion or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the Constitutional Court and the European Court of Justice*, 9 EUR. CONST. L. REV. 391, 391–419 (2013); Jonathan Waltuch, *La guerre des juges n'aura pas lieu. A propos de la décision Honeywell de la Cour constitutionnelle fédérale allemande*, 2 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 329–60 (2011); G. Luebbe-Wolff, *supra* note 24; A. Pliakos and G. Anagnostaras, *supra* note 24, at 109–23. Concerning the Czech Constitutional Court, which in the *Holubec* decision of January 2012 (ÚS 5/12) declared an EU act *ultra vires* in reaction to the *Landtová* judgment of the CJEU (Case C–399/09, *Landtová*, 2011 E.C.R. I–05573), see Jiří Zemánek, *L'arrêt de la Cour constitutionnelle tchèque du 31 janvier 2012, les retraites slovaques XVII : le principe de l'égalité de traitement—Un motif de rebellion contre la Cour de Justice de l'Union européenne?*, 3 C.D.E. 709 (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959–73 (2013).

interpretation can expand the EU competence embodied in the Treaties.¹⁶² Accordingly, they may intervene where this happens and declare an EU act inapplicable.

E. Conclusion

This glimpse at the case law of the Constitutional Courts of the Federal Republic of Germany, Austria, Spain, the Czech Republic, Slovakia, and Slovenia has unveiled a heterogeneous perception of the responsibility incumbent on courts of last instance under the preliminary reference procedure.

The comparative analysis has illustrated a further aspect of the relationship between Constitutional Courts, or at least some of them, and the CJEU, which may be referred to as "indirect cooperation." In other words, the Constitutional Courts in question engage in an indirect dialogue with the CJEU, notably by means of domestic courts. This line of case law, on the one hand, has the capacity to enhance the implementation of the obligation to refer under Article 267(3) TFEU. These Constitutional Courts, on the other hand, do not safeguard the jurisdiction of the CJEU for "good will."¹⁶³ In fact, as has been pointed out, this practice contributes to the avoidance of the risk of State liability for judicial breaches. This also carries an improvement in the effectiveness of the judicial protection of individuals.

Additionally, through this practice, the Constitutional Courts in question impose, to a certain extent, their supremacy. Certainly, the obligation to make a reference for a preliminary ruling under Article 267(3) TFEU is reinforced within the national legal orders. However, through their constitutional review, these Constitutional Courts enjoy the power to monitor the dialogue of national courts with the CJEU. Indeed, the judicial construction linking the preliminary reference procedure to constitutional rights justifies the legitimacy of their review and, above all, gives these Constitutional Courts the last word on Article 267(3) TFEU. Therefore, it appears that this line of case law concerning the obligation for national courts of last instance to make a reference under Article 267(3) TFEU shows a further aspect in which the preliminary reference procedure plays a crucial role in highlighting the existing tension between some Constitutional Courts and the CJEU through their relationship with ordinary courts of last instance.

Overall, one may argue that the implications of this practice are positive for the effectiveness and the primacy of EU law. A possible counterview to this is that the autonomy of the EU legal order could be undermined due to the interference of these

¹⁶² It is interesting to note that the German Federal Constitutional Court developed three lines of case law concerning its constitutional review *vis-à-vis* EU law, namely fundamental rights review, *ultra vires* review, and constitutional identity review.

¹⁶³ Sarmiento, *Reinforcing the (domestic) constitutional protection of primacy of EU law*, *supra* note 59, at 887.

Constitutional Courts in the interpretation of Article 267(3) TFEU. Nevertheless, the Constitutional Courts in question reply to a situation that is characterized by a gap in EU law: there is an obligation to refer but no remedies to enforce or review its implementation.¹⁶⁴ In this context, a reply at national level seems appropriate also in the light of Article 19(1)(2) TEU, according to which “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

¹⁶⁴ EU law leaves this implementation to the margin of appreciation of national judges, according to the indications established in the case law of the CJEU. However, as has been seen, there might be cases where national courts of last instance do not comply with their obligation to refer.

The Return of the Huron, or Naïve Thoughts on the Handling of Article 267 TFEU by Constitutional Courts when Referring to the Court of Justice

By Pierre-Vincent Astresses*

A. Background Information

He was a Huron, but a particular one. Lulled during his childhood by the stories of the public law teacher of his Tribe who had the chance to get a scholarship enabling him to mix with intricacies of the French recourse for misuse of power¹—a real first!—he had seen some of his friends cross the Ocean.²

Some fifty years later, it is difficult to recognize the Huron tribe that Jean Rivero³ reported to us. For some time now, a political change which would trigger new juridical consequences was latent. Wise Hurons had the ambitious project of creating a Union which would bring together surrounding Tribes. However, it was unthinkable for each of these Tribes to lose all their competences. Thus, the project proposed that only some of them would be transferred for the advantage of a new entity – a guarantor of the general interest. If the political part was accepted on the whole, its juridical counterpart proved to be much more complex by contrast. Some legal experts notably worried about the possible case law gap between Member Tribes, as this would be damaging to the objective of the pursuit of the common interest.

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¹ Jean Rivero, *Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir*, 1 RECUEIL DALLOZ DE DOCTRINE, DE JURISPRUDENCE, ET DE LEGISLATION. CHRONIQUE 37 (1962).

² Denys Simon, *Un Huron à Schengen*, 4 EUROPE 1 (2012). In the same way, see Laurence Burgorgue-Larsen, *A Huron at the Kirchberg Plateau or a few naïve thoughts on constitutional identity in the ECJ case law*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION, 275 (Alejandro Sáiz Arnaiz & Carina Alcobarro Llivina eds., 2013).

³ Jean Rivero (1910-2001) was one of the most prominent French Professors of administrative and constitutional law. In his chronicle, mentioned above and widely known among French legal scholars, he brilliantly stages a fictional dialogue between himself and a Huron for the sake of discussing the French recourse for misuse of power. The falsely naïve remarks attributed to the Huron indeed provides a forum for calling into question, or at least raising the issue of, the real effectiveness of this recourse. This method has clearly inspired this present article.

In all its aspects, European integration was often narrated in the specialized gazettes published in the different Tribes. The creation of a Tribunal with jurisdiction on various matters and a preliminary ruling procedure was envisaged. Did all jurists accept the setting up of a preliminary ruling procedure? Some of them, Guardians of the internal order, were not in favor of the establishment of such a mechanism.

One day, our Huron legal expert, keen reader of a Huron law journal, took note of a seminar to be held in the Old Continent related to the preliminary references made by Constitutional Courts to the European Court of Justice (CJEU). He mentioned it to his colleagues in the surrounding Tribes. The attendance of one of them there was unanimously considered as being indispensable. He volunteered to attend this seminar and flew to Rome.

In Rome *Fiumicino*, where I welcomed him, his first words were: "Bring me, *per favore*," he added with a smile, "to the seminar dealing with the use of the preliminary ruling procedure by the Constitutional Courts."

"*Volentieri*," I declared enthusiastically.

"My presence here may seem absurd to you," he started to say. "However, let me explain briefly the reasons to you."

He cited to me with passion the political change which fermented in his faraway lands, and the reluctance provoked by this change. His words were full of wisdom: "Having doubts," he said, "is specifically human. Under these circumstances, it seems to me normal that a judge may rely on the expertise of a specialist before finally settling the issue. How could this attitude hurt?" He had so many questions that he feared that he would not have enough time to find the answers. Finally, he admitted honestly, as only Hurons still could, the huge significance of this seminar, not only for himself, but also and in particular for the future of the project.

"I understand your expectation. Do not worry, I am convinced that you will have enough time to get the answers you need. By the way, how about reducing your legitimate apprehension by sharing some of your questions with me? I will be glad to help you."

"With pleasure," he replied, obviously delighted to begin so quickly such a conversation. "You have to keep in mind," he added, "that my knowledge of your law is significantly lower than yours. I am a novice on the matter, and I apologize in advance for this. What I know is that Article 267 of your Treaty on the Functioning of the European Union (TFEU)⁴

⁴ For convenience, we will refer throughout to Article 267 TFEU, even for preliminary references sent to the CJEU prior to the entry into force of the Treaty of Lisbon.

allows your CJEU to give a preliminary ruling on questions regarding the interpretation and validity of a provision of European Union (EU) law, as well as ex Article 35 of your Treaty on European Union (TEU) for questions dealing with police and judicial cooperation in criminal matters. I also know, according to the third paragraph of Article 267(3) TFEU, that national courts against whose decisions there is no judicial remedy under national law—which include your Constitutional Courts and our Guardians of the internal order—must refer the matter for a preliminary ruling.”

“Even if,” I began, “most of the Constitutional Courts are still reluctant to address preliminary rulings to the CJEU, it is worth noting that a growing number of them are no longer hesitant about activating the preliminary ruling procedure. Up to now, the constitutional judge of Belgium,⁵ the Land of Hesse,⁶ Austria,⁷ Lithuania,⁸ Italy,⁹ Spain,¹⁰ France,¹¹ Germany,¹² Slovenia¹³ and Poland¹⁴ have crossed the Kirchberg Rubicon.”¹⁵

“We have a well-known saying that goes: a collection of Courts means an abundance of overviews,” he said, thoughtfully.

B. A Kind of Unity Behind an Apparent Diversity

“You would not be surprised, then, if I announced to you that a diversity prevails in the handling of Article 267 TFEU between Constitutional Courts, bearing in mind the legal tradition proper to each Member State. What could surprise you more is that such a

⁵ Cour d'arbitrage, 1997, *Fédération belge des chambres syndicales de médecins ASBL v. Gouvernement flamand, Gouvernement de la Communauté française, Conseil des ministres*, Case 6/97.

⁶ Staatsgerichtshof des Landes Hessen, 1997, Case 1202.

⁷ Verfassungsgerichtshof, 1999, Cases B 2251/97 B 2594/97.

⁸ Konstitucinis Teismas, 2007, Case 47/04.

⁹ Corte Costituzionale, 2008, Case 102/2008 (Ord. 103/2008).

¹⁰ Tribunal Constitucional, 2011, Case 86/2011.

¹¹ Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 2013-314P QPC.

¹² Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13.

¹³ Ustavno Sodisce, 2014, Case U-I-295/13-132. In view of the current lack of English version or translation, this case will not be considered in more depth in this article. Just a reference of this ruling is given here.

¹⁴ Trybunał Konstytucyjny, 2015, Case K 61/13. In view of the current lack of English version or translation, this case will not be considered in more depth in this article. Just a reference of this ruling is given here.

¹⁵ Only the first preliminary reference made by the relevant Constitutional Court to the ECJ was quoted in the previous footnotes.

diversity also appears in the case law of a single Constitutional Court. However, such assertions need to be nuanced.”

After a short moment of astonishment, he said immediately: “I can understand that the same wording is not found from one Constitutional Court to the next. I can also imagine that the wording can be slightly hesitant when a Constitutional Court refers to the CJEU for the first time. But, when taking into consideration Constitutional Courts which have a kind of preliminary reference tradition towards the CJEU, your remarks intrigue me. Would you insinuate that it is a waste of time to look for a standard formula in all the relevant case law of the *Cour d'arbitrage*, what am I saying... the Belgian Constitutional Court, I beg your pardon for this anachronism,¹⁶ punctuated by no less than twenty-four decisions to submit a reference for a preliminary ruling?¹⁷ That the same observation also applies, for example, to the four decisions of the Austrian Constitutional Court?”

1. The Belgian Constitutional Court's Example on the Handling of Article 267 TFEU

“Do not be so disconcerted. As I told you before, my wordings must be nuanced and clarified. You have mentioned, and rightly so, what can be seen as, let's say a preliminary reference frenzy on the part of the Belgian Constitutional Court. Let's take this Court as an example. It is the European record keeper on the matter, and it is actually possible to ask whether a consistent jurisprudence appears in the way the Belgian constitutional judge handles Article 267 TFEU. The undeniable advantage of the number of Belgian decisions is that an evolution starts to become visible. In the very first two decisions, the wording is roughly the same.¹⁸ The Belgian constitutional judge simply mentions Article 267 TFEU, before announcing that the case should be referred to the CJEU.”

“So brief,” he sighed, obviously disappointed.

“Do not lose sight of the fact that it was the first time that the Belgian constitutional judge—and more generally that a constitutional judge¹⁹—referred a preliminary ruling to the CJEU. Practice does make perfect”.

¹⁶ The *Cour d'arbitrage* has been known as the *Cour constitutionnelle belge* (hereafter, Belgian Constitutional Court) since the constitutional revision of 7 May 2007.

¹⁷ The inventory of the decisions to submit a reference for a preliminary ruling of the Constitutional Courts was closed on 20 January 2015.

¹⁸ *Cour d'arbitrage*, 1997, *Fédération belge des chambres syndicales de médecins ASBL v. Gouvernement flamand, Gouvernement de la Communauté française, Conseil des ministres*, Case 6/97, para. B.10; *Cour d'arbitrage*, 2003, *Hugo Clerens, b.v.b.a. Valkeniersgilde, v. Gouvernement wallon, Conseil des ministres*, Case 139/2003, para. B.17.

¹⁹ It should be stressed however that, for some Austrian authors, the Austrian Constitutional Court was the first Constitutional Court in Europe to ask the CJEU for a preliminary ruling. See, e.g., Peter Fischer & Alina Lengauer, *The adaptation of the Austrian legal system following EU membership*, 37 COMMON MKT. L. REV. 763, 776 (2000); Heinz Schäffer, *Autriche, in COURS SUPREMES NATIONALES ET COURS SUPREMES EUROPEENNES: CONCURRENCE OU*

“Does the Belgian Constitutional Court become quite perfect?” he asked.

“You will be able to finally judge by yourself,” I answered. “To a certain extent, the approach of the Belgian Constitutional Court changed from the third decision.²⁰ The wording evolved. Admittedly, the perspective is slightly different from the first two cases, since the Belgian constitutional judge did not look for an interpretation of a provision of EU law here, but was confronted with doubts about the validity of such a provision. But never mind. What is important to stress now is that the Belgian constitutional judge went one step further. This case dealt with the implementation into Belgian law of the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States.²¹ To feel compelled to bring the matter before the CJEU, the Belgian constitutional judge not only mentioned the relevant Article (i.e., ex Article 35 TEU since the issue deals with police and judicial cooperation in criminal matters), he also highlighted the jurisdiction of the judge of the Kirchberg plateau,²² justifiably considering that Belgium had accepted it within the provisions on police and judicial cooperation in criminal matters.²³”

I continued. “The construction process of a standard formula truly appeared from the fourth decision. To handle this evolution in the best way, a distinction is to be made between preliminary rulings on interpretation and those on validity. For the first ones, you need to understand that there is generally a same handling of Article 267 TFEU, although the writing is slightly inconsistent. Here is summarily how the Belgian constitutional judge goes: first, he mentions Article 267(1) TFEU. By doing so, he affirms the jurisdiction of the CJEU to give preliminary rulings on matters within the scope of EU law. Then, in view of the fact that he is a judge against whose decisions there is no judicial remedy under national law, he expressly ranks himself under the auspices of Article 267(3) TFEU. Finally, the

COLLABORATION? IN MEMORIAM LOUIS FAVOREU, 95, 111 (Julia Iliopoulos-Strangas ed., 2007); Anna Gamper, Francesco Palermo, *The Constitutional Court of Austria: Modern Profiles of an archetype of constitutional review*, 3 J. COMP. L. 64, 79 (2008)). Although any criticisms of what Roland Drago, another prominent French Professor, once called “nationalisme ombrageux” (shady nationalism), should be left aside here (Roland Drago, *Note de jurisprudence*, 1 REVUE DE DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ETRANGER 214, 216 (1980)), it seems difficult to deny the quality of constitutional jurisdiction to the Belgian *Cour d'arbitrage*, even in 1997 (in this sense, see, e.g., Louis Favoreu, *La Cour d'arbitrage vue de l'étranger. Le modèle belge de justice constitutionnelle*, in REGARDS CROISES SUR LA COUR D'ARBITRAGE 323, 324 (Robert Andersen et al. eds., 1995)). The latter was therefore the first Constitutional Court to use ex Art. 177 EC Treaty.

²⁰ Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005.

²¹ EC Directive 2002/584, 13 June 2002, O.J. 2002 L 190/1.

²² Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005, paras. B.3.2 and B.11.

²³ Information concerning the date of entry into force of the Treaty of Amsterdam, 1 May 1999, O.J. 1999 L 114/56.

Belgian constitutional judge bears all the consequences that his reasoning entails, considering that he shall refer the case to the CJEU. He specifies that he has to do so only when the conditions laid down by *CILFIT* ruling²⁴—that he takes the time to mention explicitly or implicitly, and that, as you probably know it, waive the duty to refer to the CJEU—cannot be met.”

“This attitude seems to me to be more reasonable. You drew a distinction in the wording of the Belgian constitutional judge between preliminary references on interpretation and those on validity. You intrigued me: Is the way of handling Article 267 TFEU so different?” he asked.

“It seems that the Belgian constitutional judge is less eloquent when he refers a question on validity to the CJEU. But, do not over-interpret my words, his approach is not totally different. Faced with doubts as to the validity of a provision of EU law, the Belgian constitutional judge refers to the CJEU, specifying that either the judge of the Kirchberg Plateau has sole jurisdiction to rule on the issue of validity or that the Belgian Constitutional Court does not have competence on the matter. Although a preliminary reference is sent in both situations, I am sure you will agree with me that the approach is different. For claiming that the CJEU has sole jurisdiction does not have the same significance as claiming that the Constitutional Court is not competent. It may explain why this last formulation was used only once.²⁵ In any event, the lack of relevant EU case law explaining the reasons for that situation is deplorable. While the Belgian constitutional judge takes the time to justify his preliminary references on interpretation by mentioning, explicitly or implicitly, that the conditions required by the *CILFIT* ruling are not met to waive his duty to refer to the CJEU, the omission of the reference to the *Foto-Frost* ruling²⁶ in all of the references for a preliminary ruling on validity is almost inexplicable.”

“The way you sound,” he tried to summarize, “the Belgian constitutional judge proves to be quite an excellent pedagogue. He seems to handle with exactness the machinery of

²⁴ Case C-283/81, *CILFIT v. Ministry of Health*, 1982 E.C.R. 3415, paras. 10–20. In this ruling, limits to the national courts’ of last instance duty to submit a reference are set by the CJEU. National courts of last instance are not obliged to make a reference for a preliminary ruling when they consider that “the question is not relevant,” when the “Court [of Justice] ha[s] already dealt with the point of law in question,” and when they “established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.”

²⁵ *Cour constitutionnelle belge*, 2009, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, Case 103/2009, para. B.5.2.

²⁶ Case C-314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, para. 20. In the present case, the Hamburg’s Finanzgericht asked the CJEU, *inter alia*, whether a national court is able to review the validity of a decision adopted by the Commission. According to the CJEU, national courts may consider the validity of a Community act, but—and that is the crucial point—they have no jurisdiction to declare that measures taken by Community institutions are invalid. The CJEU has sole jurisdiction to declare such measures invalid.

Article 267 TFEU and ex Article 35 TEU, as well as, generally, the relevant case law allowing him to refer to the CJEU.”

“I agree with you,” I said. “Let me again point out that a standard formula appears. Only the words change over the decisions to refer to the CJEU. That said, from the twenty-first decision, a standard formula can be seen, and it seems to have fine days ahead. The wording seems to stabilize as follows: ‘According to Article 267 of the Treaty on the Functioning of the European Union, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Union, as well as on the validity of such provisions. By virtue of the third paragraph, a national court against whose decisions there is no judicial remedy under national law—such as Constitutional Court ones—shall bring the matter before the Court of Justice. If any doubts exist about the interpretation or validity of an EU law provision which is of particular importance for the pending case before this court, the latter shall refer a preliminary reference to the Court of Justice, even on its own, without prior request expressed by the parties.’”²⁷

II. An Attitude Shared by the Austrian, Land of Hesse, Italian, and Spanish Constitutional Judges, and the Consequent Emergence of a Minimum Common Basis

“Is this attitude shared by the other Constitutional Courts?” he asked.

“Such a handling tends to be found among the decisions to refer to the CJEU of some other Constitutional Courts...”

“So some similarities exist!” he said with glee.

“That is true,” I went on to say. “In this respect, it is worth noting that the behavior observed of the Austrian constitutional judge in his decisions to refer to the CJEU is approaching that of the Belgian constitutional judge. A wave of teaching emerges from his first decision. In his three decisions to refer a preliminary ruling on interpretation, the Austrian constitutional judge shows that he is a judge against whose decisions there is no judicial remedy under national law. Therefore, by ranking itself under the auspices of Article 267(3) TFEU, the *Verfassungsgerichtshof* (Austrian Constitutional Court) highlights that it shall refer to the CJEU, clarifying at the same time that such a duty cannot be said to

²⁷ “L'article 267 du Traité sur le fonctionnement de l'Union européenne rend la Cour de justice compétente pour statuer, à titre préjudiciel, aussi bien sur l'interprétation des actes des institutions de l'Union que sur la validité de ces actes. En vertu de son troisième alinéa, une juridiction nationale est tenue de saisir la Cour de justice si ses décisions—comme celles de la Cour constitutionnelle—ne sont pas susceptibles d'un recours juridictionnel de droit interne. En cas de doute quant à l'interprétation ou la validité d'une disposition du droit de l'Union qui présente une importance pour la solution d'un litige pendant devant cette juridiction, celle-ci doit interroger la Cour de justice à titre préjudiciel, y compris d'office, sans qu'aucune partie ne l'ait demandé.” (Author's translation.)

exist if the conditions of exemption laid down in the *CILFIT* ruling are met.²⁸ Some similarities again appear when the Austrian constitutional judge refers a preliminary ruling on validity to the CJEU.²⁹ He actually starts to announce that he will bring to the judge of the Kirchberg Plateau cases in which he faces doubts about the validity of an EU law provision. Having cited Article 267(3) TFEU, he refers to the CJEU, but without taking the time to justify his attitude in view of the inherent requirements of the *Foto-Frost* ruling.”

The Huron was listening quite carefully. I continued: “The Spanish and Land of Hesse constitutional judges have equally in common the affirmation of the jurisdiction of the CJEU to give preliminary rulings, more explicitly for the Land of Hesse constitutional judge³⁰ than for the Spanish one.”³¹

“Do both of them mention Article 267(3) TFEU?” he asked.

“Let me answer by distinguishing again between the explicit and the implicit. The constitutional judge of the Land of Hesse explicitly ranks himself under the auspices Article 267(3) TFEU.³² The attitude of the Spanish constitutional judge is somewhat different, notwithstanding that he considers himself to be a judge of last instance.³³ It is therefore possible to assume that the spirit of Article 267(3) TFEU is hiding behind the wording.”

“Is the Spanish constitutional judge an *aficionado* of the implicit style?”

“Please know that, contrary to the Land of Hesse constitutional judge, and in accordance with the behavior of the Belgian and Austrian constitutional judge, the *Tribunal Constitucional* (Spanish Constitutional Court) expressly mentions the *CILFIT* ruling.³⁴ I am ending with the two decisions to refer to the CJEU of the *Corte Costituzionale* (Italian Constitutional Court). In its first preliminary ruling, it is worth noting that the *Sentenza* is much more instructive than the *Ordinanza*.³⁵ The latter only mentions Article 267(3) TFEU, without explicitly making reference to the jurisdiction of the CJEU, nor to the *CILFIT* ruling.

²⁸ Verfassungsgerichtshof, 1999, Cases B 2251/97 B 2594/97, para. IV.2 ; Verfassungsgerichtshof, 2000, Cases KR 1-6/00 KR 8/00, para. III ; Verfassungsgerichtshof, 2001, Case W I-14/99, para. III.

²⁹ Verfassungsgerichtshof, 2012, Case G 47/12, paras. 26–30.

³⁰ Staatsgerichtshof des Landes Hessen, 1997, Case 1202, para. II.B.

³¹ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

³² Staatsgerichtshof des Landes Hessen, 1997, Case 1202, para. III.B.

³³ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

³⁴ *Id.* at para. II.4.d).

³⁵ Corte Costituzionale, 2008, Case (Ordinanza) 103/2008.

By contrast, the *Sentenza* resembled the Belgian attitude. The Italian constitutional judge here affirms the jurisdiction of the CJEU, quoting Article 267(1) TFEU. The same applies to Article 267(3) TFEU, for which the constitutional judge explains that *la Consulta* (another way to name the Italian Constitutional Court) is a court of last instance when seized directly.³⁶ The breaking up of the relevant elements inherent in the handling of Article 267 TFEU as well as the lack of continuity of such an attitude in the second preliminary ruling³⁷ are to be regretted.”

“If I do not misunderstand you,” the Huron tried to summarize, “there would be a common basis formed by the quotation of the third paragraph of Article 267 TFEU.”

“Things can be seen like this, indeed. Some constitutional judges occasionally add other elements to that basis, to confirm the jurisdiction of the CJEU, or to mention the *CILFIT* ruling in order to justify the decision to refer a preliminary reference on interpretation. Some other behaviors are a little more atypical. In this way, take for example, the Spanish constitutional judge who does not hesitate to mention the *Foto-Frost* ruling.³⁸ Take finally again the example of the Spanish constitutional judge, as well as the Italian one. They brilliantly explain in their respective formulations that the *Tribunal Constitucional* and the *Corte Costituzionale* are well and truly “courts” in the sense of the autonomous concept of Community law as interpreted by the CJEU. The Spanish constitutional judge, contrary to the Italian one,³⁹ mentions expressly⁴⁰ the *Vaassen-Göbbels* ruling.⁴¹ Above all, let me give you this advice: a kind of unity is hiding behind an apparent diversity.”

C. Time for Distinctions: About the Lithuanian, German, and French Constitutional Judges' Preliminary References

Following a few seconds of reflection, I heard him say: “Until now, you have mentioned the Belgian, Land of Hesse, Austrian, Italian, and Spanish Constitutional Courts, without saying a word about the decisions to submit a reference for a preliminary ruling of the Lithuanian, French, and German constitutional judges.”

“Things are a bit more complex...,” I said.

³⁶ Corte Costituzionale, 2008, Case (Sentenza) 102/2008, para. 8.2.8.3.

³⁷ Corte Costituzionale, 2013, Case (Ordinanza) 207/2013.

³⁸ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.d).

³⁹ Corte Costituzionale, 2008, Case 102/2008, para. 8.2.8.3; Corte Costituzionale, 2013, Case 207/2013.

⁴⁰ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.e).

⁴¹ Case C-61/65, *Vaassen-Goebbels v. Beambtenfonds Mijnbedrijf*, 1965 E.C.R. 377.

“Was it so purely voluntary on your part?” he stopped me.

I. Making Use of the Correct Article for a Reference for a Preliminary Ruling

“At the start of our conversation, you distinguished between preliminary rulings sent to the CJEU on the grounds of Article 267 TFEU, and those which are sent on the grounds of ex Article 35 TEU. As you know, the latter deals with provisions on police and judicial cooperation in criminal matters. The Framework Decision on the European Arrest Warrant has been the subject of many preliminary rulings, on interpretation or on the validity of some of its provisions. This means that...”

“That it is up to the referring court to place itself on the grounds of ex Article 35 TEU when sending a preliminary ruling to the CJEU on such a matter,” he concluded.

“Exactly,” I confirmed. “The Belgian, Spanish, and French constitutional judges have sent some preliminary questions on this matter. Twice, faced with doubts about interpretation and validity of some provisions of the European Arrest Warrant, the Belgian constitutional judge correctly refers to the CJEU on the grounds of ex Article 35 TEU.”⁴²

“Faced with such a situation, the Spanish constitutional judge acted more originally. His preliminary reference is composed indeed of three questions. The first two concern a request on interpretation and on the validity of some provisions of the aforementioned Framework decision. The third one concerns a request for an interpretation of the EU Charter of Fundamental Rights. He observed very rightly that the two first questions are still within the scope of ex Article 35 TEU,⁴³ in view of the first paragraph of Article 10 of Protocol no. 36 of the Lisbon Treaty on transitional provisions.⁴⁴ However, and despite this recognition, he made the choice to refer to the CJEU on the grounds of Article 267 TFEU,⁴⁵ in all probability because of the nature of the third question. In some way then, the attitude of the French constitutional judge is slightly different. Soliciting only a request for an interpretation of a provision of the Framework decision, he referred to the CJEU on the grounds of Article 267 TFEU...”⁴⁶

⁴² Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005; Cour constitutionnelle belge, 2009, *Exécution d'un mandat d'arrêt européen émis à l'encontre de I.B.*, Case 128/2009.

⁴³ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.a).

⁴⁴ Protocol (no. 36) on transitional provisions, 9 May 2008, O.J. 2008 C 115/322.

⁴⁵ Tribunal Constitucional, 2011, Case 86/2011, para. II.4.a).

⁴⁶ Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 2013–314P QPC, para. 7.

"Since the Spanish constitutional judge has also referred to the CJEU on the grounds of Article 267 TFEU, why does such an attitude differ from the Spanish one?" he asked.

"Although the Spanish constitutional judge used Article 267 TFEU, he was fully aware that, by contrast to his third question, the first two questions came under the provision of ex Article 35 TEU. If you care to take a look at the documentary record made for the decision by the competent services of the French Constitutional Council, you will note that the first paragraph of Article 10 of the aforementioned Protocol is quoted *in extenso*. What is more, the relevant part is put in bold!⁴⁷ When referring to the wording of the decision of the French constitutional judge, and noting that only one question on interpretation of the Framework decision was solicited, it is striking that he referred to the CJEU on the grounds of Article 267 TFEU. Such behavior is difficult to explain. It is significant to note that this mistake has been highlighted in some specialized gazettes."⁴⁸

"I understand a little more now why you have drawn a distinction within the group of Constitutional Courts which have made references to the CJEU."

II. Omission of Quotation of the Third Paragraph of Article 267 TFEU

"Be careful; this may not be the key issue," I pointed out to him. "It is clear indeed that the basis that we were talking about previously formed by the quotation Article 267(3) TFEU is not replicated in the formulation of the Lithuanian, French, and German constitutional judges."

"What exactly do you mean by that?" he asked.

"Keeping in mind the formulation of the other Constitutional Courts, I want to share with you that the one adopted by these Constitutional Courts is in some ways unusual."

"How is it possible?" he asked, worriedly.

"Let's start with the German Constitutional Court. In the decision to refer to the CJEU, the German constitutional judge mentions Article 267 TFEU, but only its first paragraph, and in a more original way, the second point of the third paragraph of Article 19 TEU.⁴⁹ Article

⁴⁷ Documentary record of the Constitutional Council on Case 2013–314P QPC 74–75, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013314PQPCdoc.pdf>.

⁴⁸ Anne Levede, *Premier arrêt sur renvoi préjudiciel du Conseil constitutionnel: ce que la Cour de justice dit... et ne dit pas*, 2 CONSTS. 189, 191 (2013). In the same way, see Marie-Eve Morin, *Extension du mandat d'arrêt européen: trois juridictions pour une abrogation*, 96 REVUE FRANCAISE DE DROIT CONSTITUTIONNEL 992, 995 (2013).

⁴⁹ Pursuant to Article 19(3) TEU, "The Court of Justice of the European Union shall, in accordance with the Treaties: [...] (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions." This quote is rather original since,

267(3) TFEU is nonetheless quoted later in the decision.⁵⁰ However, this point deals with the common practice of the preliminary ruling procedure, without this constituting here the grounds for the reference to the CJEU. The attitude of the Lithuanian Constitutional Court is different. It mentions Article 267 TFEU in so far as it gives jurisdiction to give preliminary rulings on interpretation of EU law provisions.⁵¹ However, note that there is no reference to the *CILFIT* ruling, and above all, no quotation of Article 267(3) TFEU.”

“The handling of Article 267 TFEU is actually restrictive,” he conceded. “What about the attitude of the Constitutional Council?”

“The same applies to it. That is to say, the strict minimum. The French constitutional judge only mentions Article 267 TFEU, according to which the CJEU has sole jurisdiction to give preliminary rulings on interpretation, without any further details.”

D. Thoughts on a Possible French Constitutional Council's Special Position Towards the Other Constitutional Courts

“Are decisions of the Constitutional Council not traditionally known for their conciseness?” he pointed out to me.

“I am sorry, but let me stop you there. Here, the shallow formulation of the French constitutional judge is thought and intentional.”

“Why do we have such differences in the handling of Article 267 TFEU between these Courts and the others? Are there any justifications?”

“Considering the deliberated perfunctory formulation of the French constitutional judge, let me rather see an opposition, not just as to style but also as to belief, between the Constitutional Council and the other Constitutional Courts.”

on the one hand, such reference to this Article is not seen in the other Constitutional Courts' decisions to refer and, on the other hand, it has not only quite the same wording, but also the same scope and spirit as of Article 267 TFEU. The German Constitutional Court clearly stressed the jurisdiction of the CJEU on the matter. One could possibly wonder about the potential reasons of this duplication: was it in order to strengthen the impression of the Constitutional Court's wish to cooperate with the CJEU? Looking more closely, it is striking that there is not much talk of cooperation (in this sense, see Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 EUR. CONST. L. REV. 2, 263 (2014); see also the various contributions in the German Law Journal's Special Issue on the OMT decision of the German Federal Constitutional Court in 15 GERMAN L. J. 2, 107 (2014)).

⁵⁰ Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13, para. 27.

⁵¹ Konstitucinis Teismas, 2007, Case 47/04, para. III.7.

"Is a strong distinction to be made within the group of Constitutional Courts which referred to the CJEU?" he asked.

"At first sight it would appear so," I answered. "In other words, a new *summa divisio* within the latter group would be added to the now common *summa divisio* distinguishing between Constitutional Courts which have not yet crossed the Kirchberg Rubicon and those which have already crossed it."

"What would cause that?" he asked.

"The way in which the Constitutional Courts want to build their relations with the CJEU is not unique."⁵²

"How does this influence the handling of Article 267 TFEU by the Constitutional Council?"

I. The French Constitutional Council's Motivations Not to Quote the Third Paragraph of Article 267 TFEU

"The reason why the French constitutional judge favors a general invocation of Article 267 TFEU, without mentioning the third paragraph, is that he does not consider himself to be an ordinary judge of EU law. Summarily, he applies the following reasoning: Article 267(3) TFEU is used by national judges who are ordinary judges of EU law. As the Constitutional Council is not one of them, reference to this provision is not found in his formulation."

"What relentless reasoning!" he exclaimed.

"I am merely echoing what has been said by the President of the Constitutional Council,⁵³ and by the Secretary-General,"⁵⁴ I informed him.

⁵² This remark also includes the German Constitutional Court's preliminary reference, in which the notion of the cooperation between courts that is inherent to the preliminary ruling procedure seems to disappear in favor of a certain type of legal "diktat." Franz Christian Mayer, *Rebel Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L. J. 111, 119–20 (2014). In what follows however, the debate will mainly focus on the French Constitutional Council's preliminary reference. The aim in this part of the dialogue is to discuss the deliberate lack of reference to Article 267(3) TFEU and its questionable justification that the Constitutional Council would not be an ordinary judge of EU law.

⁵³ Denys Simon, *Le Conseil constitutionnel et le droit de l'Union européenne. Entretien accordé par Jean-Louis Debré* 7 EUROPE 4, 5 (2013).

⁵⁴ Remarks made by M. Guillaume at the conference organized on 4 November 2013 by the European College of Paris and the European Law Center of Paris II on the subject of "Le Conseil Constitutionnel et l'Europe: 55 ans pour apprendre à se connaître."

“Relentless, however,” he continued, “if one wants to consider, as you have just said it, that the French constitutional judge is not an ordinary judge of EU Law. May I also imagine what could have been the reasoning of the other Constitutional Courts?”

“Of course!” I answered.

After a few seconds of reflection, he said: “As the latter quote Article 267(3) TFEU, they considered themselves to be ordinary judges of EU law. I think this is the right way. What do you think about that? Why would the Constitutional Council not be one of them? Is it a vestige of the famous ‘French exception’?”

“Such questions need many clarifications,” I said.

“That is exactly why I came here,” he told me. “Look!” he added, indicating to the heavy traffic. “I am convinced that you will be able to provide me with further details before arriving at the seminar.”

II. An Update of the Notion of Ordinary Judge of EU Law and its Practical Outcomes

“You are right. The question regarding whether or not the French Constitutional Council is an ordinary judge of EU law is quite complex. We need to eliminate the false leads in order to arrive at a better understanding. Does the lack of reference to Article 267(3) TFEU prove that the French constitutional judge cannot be considered as such? It is doubtful, to say the least. Let's, however, admit that at the moment, and let's turn instead towards the documentary record made for the decision by the competent services of the Constitutional Council. Once again, the latter is particularly instructive. It is worth noting that, on the one hand, Article 267 TFEU is entirely quoted, hence including the third paragraph, and that, on the other hand, this third paragraph is put in bold!⁵⁵ The reasoning that you previously qualified as ‘relentless’ loses its glory as soon as Article 267(3) TFEU is taken into account, even if the latter does not explicitly appear in the decision to refer to the CJEU.”

“I understand,” he said. “How should we understand that?”

“Above all,” I started, “attention must be focused on two fundamental issues. First, please note that the French constitutional judge lives and works under the auspices of the *IVG* ruling on the Voluntary Interruption of Pregnancy Act...”⁵⁶

“What is this?” he asked.

⁵⁵ Documentary record of the Constitutional Council on Case 2013-314P QPC, 74, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2013314PQPCdoc.pdf> (2013).

⁵⁶ Conseil Constitutionnel, 1975, *Loi relative à l'interruption volontaire de la grossesse*, Case 74–54 DC.

"In this decision, he highlights that he holds jurisdiction to review the compatibility of any legislative provisions with the Constitution, not to review the compatibility of such a disposition with whatever Convention. The French constitutional judge only verifies the constitutionality of laws; arguments relating to EU law cannot be accepted. The review of the compatibility of legislative provisions with EU law is left to the ordinary courts, that is to say the non-constitutional courts."

"Am I to assume that the French constitutional judge does not take EU law into account when he monitors the constitutionality of laws?" he asked.

"Exactly. So with that, it remains to be seen what an ordinary judge of EU law is. Put forward and analyzed by legal academics,⁵⁷ this expression has the great advantage of conceptualizing a reality. Due to the decentralized nature of EU law, it is the responsibility of national courts to interpret and to apply it. In such circumstances, all judges would be ordinary judges of EU law. In case of any doubts on interpretation or on the validity of an EU law provision, you know that these courts have at their disposal the preliminary ruling procedure. Without altering this expression which shines and will still shine through the legal doctrine papers, I suggest updating it, in order to appreciate the approach of national courts in terms of reception of EU law."

"In terms of reception?" the Huron repeated thoughtfully.

"As soon as a national judge welcomes EU law, in any way, he should be seen as an ordinary judge of EU law," I told him. "Keep that in mind."

III. A Purely Internal Debate also Limited to France

"But what about the Constitutional Courts which have referred to the CJEU? You do not appear to have answered my question," he responded.

"Do not worry, I am coming to that point. However, it seemed to me absolutely essential to give you this information. Now that is done, we can move on. For some legal academics," I went on, "constitutional judges would not be truly ordinary judges of EU law, because they would not apply EU law."⁵⁸

"Is it not too excessive?" he asked.

⁵⁷ See, notably, AMI BARAV, *LA FONCTION COMMUNAUTAIRE DU JUGE NATIONAL* (1983). More recently, see OLIVIER DUBOS, *LES JURIDICTIONS, JUGE COMMUNAUTAIRE. CONTRIBUTION A L'ETUDE DES TRANSFORMATIONS DE LA FONCTION JURIDICTIONNELLE DANS LES ETATS MEMBRES DE L'UNION EUROPEENNE* (2001).

⁵⁸ DUBOS, *supra* note 57, at 5.

"I contend that such an assertion should be nuanced. In view of the jurisprudence of the constitutional judges – let me leave out the attitude of the French constitutional judge for the moment –, in particular when they repeatedly take into account EU law to resolve disputes even without referring to the CJEU, to deny that constitutional judges are ordinary judges of EU law seems to me inappropriate today."

"To reinforce your point," he said, "it seems to me appropriate that this concept is consubstantial with the preliminary ruling procedure. When a judge refers to the CJEU, why would he not be considered an ordinary judge of EU law?"

"I agree with you," I answered. "Such a link is also established by the legal doctrine.⁵⁹ For legal academics or practitioners who comment on the case law of the Constitutional Courts, this qualification does not really appear to require debate. If you meet M. Bossuyt—the former President of the Dutch linguistic group within the Belgian Constitutional Court—and ask him whether the Belgian constitutional judge is an ordinary judge of EU law, his answer will be immediate and clear: 'Of course!'⁶⁰ But do not just take my word for it. The same conclusion is also reached by reading the Belgian Report submitted to the XVth Congress of the Conference of European Constitutional Courts."⁶¹

"Is this attitude unique to the Belgian Constitutional Court?" he asked.

"Not at all. There is plenty of literature on some other Constitutional Courts too. Take, for example, the Austrian Report for the XIIth Congress of the Conference of European Constitutional Courts.⁶² The Austrian constitutional judge 'can be referred to as a European Union judge' without debate.⁶³ I can continue along this path: such an assessment concerns also the Spanish,⁶⁴ the Italian constitutional judge..."⁶⁵

⁵⁹ *Id.* at 29. In the same way, see Eva Bruce-Rabillon, *Question sur la question! Nouvelles déclinaisons du contrôle de la constitutionnalité des lois de transposition*, 23 *POLITEIA* 89, 121 (2013).

⁶⁰ Remarks made by M. Bossuyt at the conference organized on 18 October 2013 by the University of Paris II on the subject of "Les relations entre hautes juridictions: paisibles ou non?"

⁶¹ Belgian Report for the XVth Congress of the Conference of European Constitutional Courts, 41, <http://www.confcoconsteu.org/reports/rep-xvi/LB-Belgique-FR.pdf> (2014).

⁶² Austrian Report for the XIIth Congress of the Conference of European Constitutional Courts, 31–32, <http://www.confcoconsteu.org/reports/rep-xii/Oostenrijk-FR.pdf> (2002).

⁶³ Christoph Grabenwarter, *European fundamental human rights in the case law of the Austrian Constitutional Court*, in *L'EUROPE DES DROITS FONDAMENTAUX. EN HOMMAGE A ALBERT WEITZEL* 59, 69 (Luc Weitzel ed., 2013).

⁶⁴ Pedro Tenorio Sanchez, *Tribunal Constitucional y cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea*, 4, http://www.larioja.org/upload/documents/681076_DLL_N_7520-2010.Tribunal_Constitucional.pdf (2010).

"I am willing to bet that the Constitutional Council will not be part of this list", he said.

"Nothing can be hidden from you," I answered.

"For different reasons, the attitude of the French constitutional judge is as fascinating as the Belgian one. Referring to the CJEU without considering himself to be an ordinary judge of EU law is a tough balancing act."

"For some legal academics, this link remains true. This assumption is not challenged. However, it does not apply to the Constitutional Council."⁶⁶

"Is your CJEU of no assistance in getting a clearer picture?" he asked.

"It is true that if the CJEU gave a special treatment to the Constitutional Council, the discussions would be closed. But nothing in its ruling⁶⁷ allows it to move in this direction.⁶⁸ The latter considers the French constitutional judge to be an ordinary judge, and it is hard to see that things will become any different."

"Could the Constitutional Council not claim respect for its identity at the EU level?" he asked me.

"Your question echoes a number of current conversations dealing with the notion of constitutional identity. From this perspective, it is necessary to bear in mind that in France, the Constitutional Council has arrogated the jurisdiction⁶⁹ to protect this 'relatively mysterious notion'.⁷⁰ It is nonetheless worth adding that the full extent of this notion is thus far undefined.⁷¹ That being said, if one follows the analytical framework outlined by

⁶⁵ Laurence Burgorgue-Larsen, *Chronique de jurisprudence européenne comparée (2008)*, 4 RDP 1245, 1274 (2009).

⁶⁶ Bruce-Rabillon, *supra* note 59, at 121.

⁶⁷ Case C-168/13 PPU, F., (May 30, 2013), <http://curia.europa.eu/>.

⁶⁸ Baptiste Bonnet, *Le paradoxe apparent d'une question prioritaire de constitutionnalité instrument de l'avènement des rapports de systèmes*, 5 RDP 1229, 1235, 1251, 1253 (2013).

⁶⁹ Constitutional Council, 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, Case 2006-540 DC, para 19.

⁷⁰ Edouard Dubout, *"Les règles ou principes inhérents à l'identité constitutionnelle de la France": une supra-constitutionnalité?*, 83 RFDC 451, 453 (2010).

⁷¹ Philippe Blacher, Guillaume Protière, *Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires*, 69 RFDC 123, 134 (2007). According to them, "it is [...] difficult to determine the scope of this notion" ("il apparaît [...] difficile de déterminer le champ de cette notion"). (Author's translation.)

the previous Constitutional Council's President⁷² and also shared by some authors,⁷³ then for a principle to be qualified as inherent to French constitutional identity, it should prove to be crucial and distinctive.”

“Could the constitutionality review of laws as exercised by the French constitutional judge be part of one of those principles? Could he thereby demand respect for this particular situation before the CJEU?” he asked.

“It is necessary to look at what is actually behind these terms,” I answered. “The term ‘crucial’ indicates that all constitutional provisions cannot be considered as principles inherent to French constitutional identity. Therefore, as François-Xavier Millet has cleverly noted, one has to refer to the ‘fundamental [principles] rather than to the peripheral [ones]’.⁷⁴ For him, ‘strictly speaking, the constitutional identity can be construed as being composed only of a core of fundamental constitutional principles and values which do have a special meaning for the State.’⁷⁵ This quality can be attributed to the constitutionality review of laws. As for the term ‘distinctive’, it could be clearly highlighted if the Constitutional Council's preliminary reference was sent to the CJEU in the national context of an *a priori* constitutionality review. But this is not the case here. However, the distinctive character of the *a posteriori* constitutionality review could be emphasized having regard to the *IVG* ruling I already spoke about before.”

“If I ever need an example of a far-fetched argument, here I have it,” he said with a smile.

“I agree with you. But it is by this artifice that the Constitutional Council could have claimed a special status. The question, however, is whether such a claim could have been viewed favorably by the CJEU. You probably know that ‘the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.⁷⁶ That being said, however, it is hard to see why the CJEU, whose aim is, I would remind you, to ‘ensure that in the interpretation and application of the Treaties the

⁷² Pierre Mazeaud, *Voeux du président du Conseil constitutionnel*, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-18/voeux-du-president-du-conseil-constitutionnel-m-pierre-mazeaud-au-president-de-la-republique.51930.html> (2005).

⁷³ Dubout, *supra* note 70, at 456.

⁷⁴ FRANÇOIS-XAVIER MILLET, *L'UNION EUROPEENNE ET L'IDENTITE CONSTITUTIONNELLE DES ETATS MEMBRES* 13 (2013).

⁷⁵ *Id.* at 14 (“*stricto sensu*, elle [l'identité constitutionnelle] peut être interprétée comme étant seulement constituée d'un noyau dur de principes et valeurs constitutionnels fondamentaux auxquels un Etat marquerait un attachement particulier, de nature identitaire.”) (Author's translation).

⁷⁶ Art. 4(2) TEU.

law is observed',⁷⁷ would take into account such a questionable claim by drawing a distinction within the group of courts which fall though under the auspices of Article 267 TFEU. It follows, then, that the discussion of whether the French constitutional judge is an ordinary judge of EU law is, on the one hand, purely internal and, on the other hand, also limited to France because no signs of such a controversy appear elsewhere."

IV. The French Constitutional Council as an Ordinary Judge of EU Law

"Are French legal academics unanimous in denying that the French constitutional judge can be an ordinary judge of EU law?" he asked.

"Far from it," I declared.

"Is there a debate among them?"

"Exactly so," I retorted. "You have caught on. For some, the French constitutional judge cannot be considered as such.⁷⁸ By contrast, for others, he can be.⁷⁹ In this vein, some authors even claim that the Constitutional Council exercises some conventionality review,⁸⁰ but we will have the opportunity to come back to this point later. An intermediate position is ultimately occupied by those who state that the French constitutional judge is not really an ordinary judge of EU law."⁸¹

⁷⁷ Art. 19(1) TEU.

⁷⁸ Bruce-Rabillon, *supra* note 59, at 121. According to her, only judges who exercise a conventionality review are considered ordinary judges of EU law. But, "attached to a strict approach of its specialty," which separates him from this kind of review, the French constitutional judge is not one of them so far. In this sense, see also Pascal Puig, *Vers un nouveau "dialogue des juges" constitutionnel et européen*, 3 REVUE TRIMESTRIELLE DE DROIT CIVIL 564, 570 (2013).

⁷⁹ Florence Chaltiel, *Constitution et droit européen: le Conseil constitutionnel, juge européen? A propos d'un nouveau type de décision: les décisions en "P"*, 568 REVUE DE L'UNION EUROPEENNE 261, 261 (2013). According to her, "due to the French participation in the EU set out in Title XV of the Constitution and its gradual constitutionalisation, the French constitutional judge is required to check the compatibility of national laws with European law. [...] He has therefore built progressively a judicial policy of *conventionnalité constitutionnelle* or *constitutionnalité conventionnelle*. By using the preliminary ruling mechanism, he continues to work in that direction."

⁸⁰ See YANN AGUILA, BERNARD STIRN, *DROIT PUBLIC FRANCAIS ET EUROPEEN* 304–05 (2014); Constance Grewe, *Contrôle de constitutionnalité et contrôle de conventionnalité: à la recherche d'une frontière introuvable*, 100 RFDC 961, 968–69 (2014).

⁸¹ Jérôme Roux, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice et conjonction de dialogues des juges autour du mandat d'arrêt européen*, 3 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 531, 540 (2013). According to him, the Constitutional Council is admittedly a court under the auspices of Article 267 TFEU, but in view of its tightened jurisdiction on EU matters, the chances of a new preliminary ruling are very low.

“All the possible different views are there,” he noted. “What conclusions can be drawn from this?”

“The circumstances leading to the first preliminary reference sent by the Constitutional Council need to be firstly recalled. A British teacher, Jérémy F., left England with one of his 15 year old students. He was transferred to the British authorities following his arrest, in Bordeaux, on the basis of a European Arrest Warrant, which was issued against him on grounds relating to child abduction. He was questioned about sexual intercourse with a minor.”

“Yet it was not what had motivated the issue of the European Arrest Warrant,” he noted.

“It is precisely for this reason, and by virtue of the specialty rule, that an extension of the European Arrest Warrant was asked for by the British authorities. The Investigation Chamber of Bordeaux accepted this request. In such circumstances indeed, according to the fourth paragraph of Article 695–46 of the French Criminal Procedure Code, the Investigation Chamber shall ‘rule within one month from the receipt of the request without appeal.’ Some serious concerns have emerged in connection with the constitutionality of such a provision, with regard to the principle of equal justice, on the one hand, and the right to an effective legal remedy, on the other hand. By the way, the British teacher filed an appeal in cassation, and raised a so-called *question prioritaire de constitutionnalité*.⁸² In accordance with the rules governing the priority of the preliminary reference mechanism on issues of constitutionality, this *question* was referred to the Constitutional Council by the Court of Cassation. Very soon, the French constitutional judge understands the special nature of the ruling submitted to him. The disputed provision indeed followed the transposition of the Framework decision, and notably its Articles 27 and 28 which clarify that the decision to accept or to refuse the extension of the European Arrest Warrant shall be taken no later than thirty days after receipt of the request. According to Article 88-2 of the French Constitution, ‘statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.’ The French constitutional judge deduced that ‘the constituent wanted to break down constitutional barriers that prevents the adoption of legislative provisions which necessarily result from acts adopted by the institutions on the European Union in relation with the European Arrest Warrant.’⁸³ Consequently, if the absence of

⁸² Since the constitutional amendment of 23 July 2008, alongside the traditional *a priori* constitutionality review of laws, an *a posteriori* constitutionality review of laws has been introduced into the French Constitution. Pursuant to the new Art. 61–1, “if, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Council of State or by the Court of Cassation to the Constitutional Council which shall rule within a determined period”. An Organic Law (Organic Law n° 2009–1523 of 10 December 2009 on the application of Article 61-1 of the Constitution) also came to determine the conditions for the application of this Article.

⁸³ Conseil Constitutionnel, 2013, *Jérémy Forrest*, Case 314-2013P QPC, para. 6 (“the constituent legislator intended to remove constitutional barriers precluding the enactment of the legislative provisions that necessarily

appeal results from the Framework decision, no constitutionality review will be exercised by the French constitutional judge. However, if the absence of appeal does not result from the Framework decision, the latter will exercise a constitutional control, because this provision results from the margin of appreciation left to the national legislator. Hence the dilemma is: does the absence of appeal result from the Framework decision? Having doubts, the French constitutional judge referred to the CJEU.”

“I understand better the reason why the French constitutional judge has chosen to handle Article 267 TFEU,” he told me. “Having said that, how did he welcome EU law?”

“Before referring to the CJEU, in his preceding work, the French constitutional judge touched on inherent issues connected with EU law,” I answered. “At least inadvertently.”

“Do you mean that the French constitutional judge is an ordinary judge of EU law who does not know this himself?” he asked me.

“By using a body of evidence, such a conclusion can be reached. What I mean is that the French constitutional judge has been called on to handle tools of EU law. He has had to appreciate that EU law is real for the resolution of the dispute. Thus he has admitted the applicability of the Framework Decision to resolve the dispute. In order to avoid a situation in which the judge of the Kirchberg Plateau declares the action inadmissible – which would have truly been a poking at the Constitutional Council – the French constitutional judge has had to question whether the Constitutional Council is actually, and not only theoretically, a ‘court’ in the sense of the autonomous concept of Community law as interpreted by the CJEU. What that follows may convince you more: in some ways, the French Constitutional Council had also interpreted the Framework decision. Professor Dominique Rousseau has clearly underlined this attitude: by ‘making the choice to interpret the Framework decision as unclear, the Constitutional Council puts himself under the auspices of the preliminary reference procedure.’⁸⁴ Note also that he decided to pronounce a stay of proceedings pending the ruling of the CJEU.”

“Is such an attitude so atypical?” he asked.

“Not as such,” I answered. “However, the fact that no provision in his domestic law allowed him to act like that is much more atypical.”⁸⁵

follow from the acts adopted by the institutions of the European Union relating to the European arrest warrant.” (official translation).

⁸⁴ Dominique Rousseau, *L'intégration du Conseil constitutionnel au système juridictionnel européen*, 127 LA GAZETTE DU PALAIS 13, 14 (2013) (“en choisissant d'interpréter la décision-cadre comme imprécise, le Conseil choisit de se mettre en situation de “devoir” saisir la Cour de Luxembourg.”) (Author's translation).

⁸⁵ *Id.* at 16. In the same way, see Jean Rossetto, *Le mandat d'arrêt européen à l'épreuve du renvoi préjudiciel*, 23 LA SEMAINE JURIDIQUE ADMINISTRATIONS ET COLLECTIVITES TERRITORIALES (JCP A) 29, 32 (2013).

“What was his motive?” he asked, intrigued.

“No explicit motivation underlies his decision to submit a preliminary reference to the CJEU. To get a better understanding of his attitude, it must be borne in mind that the relevant legal text provides that ‘the Constitutional Council shall give its ruling within three months of the referral being made to it.’⁸⁶ Notably, in order to respect the time limit, the Constitutional Council requested from the CJEU the granting of the urgent preliminary ruling procedure. Nevertheless, knowing that a delay would be quite inevitable, it decided to pronounce a stay of proceedings, with the immediate consequence of this being a suspension of time pending the ruling of the CJEU. The French constitutional judge was fully aware that the quite constitutional requirement to respect the deadline could not be considered such as to prevent a national court from referring to the CJEU. Therefore, the French constitutional judge had to go beyond that.⁸⁷ It is difficult not to see in this procedural adjustment an application of EU law and, in particular, of the *Internationale Handelsgesellschaft*⁸⁸-*Simmenthal*⁸⁹-*Melki and Abdeli*⁹⁰ judicial trilogy. Indeed, from this case law, it follows that, on the one hand, a national court must, of its own motion, put any provision of national legislation – and *a fortiori* even a constitutional provision – that conflicts with EU law aside,⁹¹ and, on the other hand, that ‘imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question’.⁹² Although the latter requirement concerns preliminary rulings on validity, it is worth noting that the same applies to preliminary rulings on interpretation.⁹³ With this in mind, we can only agree with authors who point out that the French constitutional judge ‘cannot simply overlook this kind of warning’⁹⁴ and that ‘he cannot claim the respect of a national time-limit as an excuse for

⁸⁶ Art. 23–10 of the Organic Law n° 2009-1523 of 10 December 2009 on the application of Art. 61-1 of the Constitution (“le Conseil constitutionnel statue dans un délai de trois mois à compter de sa saisine.”) (Author’s translation).

⁸⁷ Denys Simon, *Conventionnalité et constitutionnalité*, 137 *POUVOIRS* 19, 29 (2011).

⁸⁸ Case C–11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125.

⁸⁹ Case C–106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629.

⁹⁰ Joined Cases C–188/10 and C–189/10, *Melki and Abdeli*, 2010 E.C.R. I–5667.

⁹¹ Case C–11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125, para. 3; Case C–106/77, *Amministrazione delle finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, para. 21.

⁹² Joined Cases C–188/10 and C–189/10, *Melki and Abdeli*, 2010 E.C.R. I–5667, para 56.

⁹³ Bruce-Rabillon, *supra* note 59, at 119.

⁹⁴ *Id.* at 119.

not fulfilling its obligations to refer a preliminary ruling on interpretation of a EU act to the Court of Justice.”⁹⁵

“Why, then, is the French constitutional judge not considered to be an ordinary judge of EU law?” he asked.

“For the purpose of assessing whether he is an ordinary judge of EU law when handling Article 267 TFEU, it is also appropriate to consider how the Constitutional Council takes into account the ruling of the CJEU. In essence, for the judge of the Kirchberg Plateau, the Framework Decision does not prevent appeal. The French constitutional judge deduced that the expression ‘without appeal’ does not result from the Framework Decision, but from the margin of appreciation left to the national legislator. With the inherent impediment of Article 88-2 of the French Constitution lifted, the French constitutional judge was able to review the compatibility of the disputed provision with the Constitution. Under these circumstances, as some legal academics have pointed out, ‘the Constitutional Council is in a rather curious situation: he sends a ruling on interpretation to the Court of Justice [...] to review in fact the compatibility of the above provision with the Constitution.’”⁹⁶

“Could this undermine efforts to consider the French constitutional judge as an ordinary judge of EU law?” he asked.

“Not on paper, at least. Here are the reasons. First, it is worth noting that the French constitutional judge was able to review the compatibility of the provision of the French Criminal Procedure Code with the Constitution thanks to the way the CJEU ruled. Then, some legal academics stated that the French constitutional judge had taken no risk referring to the CJEU.⁹⁷ Such an assertion needs, however, to be nuanced. On the one hand, many legal academics wondered why no preliminary ruling on the validity of the provision of the European Arrest Warrant had been sent to the CJEU.⁹⁸ In his interview with Professor Denys Simon, the President of the Constitutional Council justified this attitude by arguing that the French constitutional judge is not an ordinary judge of EU

⁹⁵ Agnès Roblot-Troizier, *Chronique de droits fondamentaux et libertés publiques. Renvoi préjudiciel sur renvoi prioritaire: le droit au recours théâtre d'une collaboration inédite entre juges constitutionnel et européen*, 41 LES NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL, 245, 250 (2013).

⁹⁶ Laurent Coutron & Pierre-Yves Gahdoun, *Premier renvoi préjudiciel du Conseil constitutionnel à la Cour de justice de l'Union européenne: une innovation aux implications incertaines (à propos de la décision “mandat d'arrêt européen” du Conseil constitutionnel du 4 avril 2013)*, 5 RDP 1207, 1228 (2013).

⁹⁷ Roux, *supra* note 81, at 534.

⁹⁸ Coutron, Gahdoun, *supra* note 96, at 1223. In the same way, see Denys Simon, *Il y a toujours une première fois. A propos de la décision 2013-314 QPC du Conseil constitutionnel du 4 avril 2013*, 5 EUR. 6, 10 (2013).

law.⁹⁹ However, as he admitted himself, the CJEU does not hesitate to switch the nature of the preliminary rulings. In other words, it is not impossible for the CJEU to turn a preliminary ruling on interpretation into a preliminary ruling on validity.¹⁰⁰ In this context, it would be worth appreciating the attitude of the French constitutional judge. Even without switching the nature of the preliminary reference, the CJEU could have offered an answer which would have been liable to trouble the Constitutional Council. By referring to the CJEU, the latter expected to receive two possible answers: either the CJEU considers that the Framework decision precludes appeal, in which case there is no chance for the French constitutional judge to review the compatibility of the disputed provision with the Constitution with respect to Article 88–2 of the French Constitution, or the CJEU considers that the Framework decision does not constitute an obstacle to appeal, paving the way for a constitutionality review. It seems that the Constitutional Council does not imagine a third possible way, which would consist in considering the appeal as mandatory.¹⁰¹ In such circumstances, it is worth noting that the position of the Constitutional Council would be uncomfortable to say the least. In the light of such a ruling of the CJEU, the French constitutional judge would find himself in front of an incorrect transposition law.”

“What could the attitude of the French constitutional judge have been?” he asked.

“There are two ways of looking at this. Either the Constitutional Council considers that there is no constitutional problem, and leaves the issue to be determined by the Court of Cassation.¹⁰² Or the French constitutional judge puts himself under the auspices of Article 88-1 of the French Constitution, which provides that ‘the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.’ A constitutional duty to transpose directives into the national legal order stems from this Article. The French constitutional judge could join the French legislator to change the meaning of the disputed provision in conformity with the interpretation provided by the CJEU. By the way, such a provision would be set aside by the French constitutional judge, not because it is incompatible with EU law, but on the grounds of Article 88-1 of the French Constitution. He would easily claimed that this approach results from the constitutional duty to transpose directives, but such an attitude would not fool anyone.”

⁹⁹ Simon, *supra* note 53, at 5.

¹⁰⁰ Case C–16/65, *Schwarze v. Einfuhr-und Vorratsstelle Getreide*, 1965 E.C.R. 877.

¹⁰¹ Coutron & Gahdoun, *supra* note 96, at 1225.

¹⁰² Pursuant to the rules governing Priority Preliminary rulings on the issue of constitutionality, the Court of Cassation stays proceedings pending delivery of the Constitutional Council's judgment. Assuming that there is no more constitutional cloud as may be the case in the scenario presented, the jurisdiction of the Constitutional Council therefore stops: it is then up to the Court of Cassation to pass judgment on the substance of the case.

"May the review of a provision with whatever Convention be considered as a mortal sin for the French constitutional judge?" he asked.

"Such an attitude has stemmed from the *IVG* ruling, constant since 1975," I answered. "Most legal academics highlight that the first preliminary ruling sent to the CJEU does not question this case law; the French constitutional judge does not review a provision with whatever Convention, even indirectly.¹⁰³ However, some voices have argued otherwise.¹⁰⁴ One of them tends to highlight that Constitutional Courts mix review of a provision with the Constitution and with a Convention when they refer to the CJEU; then a distinction is drawn between a *contrôle de conventionnalité direct* and an *indirect* one.¹⁰⁵ The first one appears when the constitutional judge reviews the conformity of a national law with a directive. For its part, the *contrôle de conventionnalité indirect* describes the situation where the interpretation of EU law controls the interpretation of constitutional provisions on fundamental rights."

"May a parallel be drawn between this so-called *contrôle de conventionnalité indirect* and the preliminary ruling sent to the CJEU by the French constitutional judge?" he asked.

"It seems actually that it is the interpretation of EU law which controls the interpretation of constitutional provisions, because it is EU law which is going to point out the margin of appreciation of the French constitutional judge," I said.

"To deny the expression of ordinary judge of EU law to the French constitutional judge is not so obvious," he summed up.

"More than that," I said. "In view of these different elements, qualifying him as such when referring to the CJEU does not seem groundless."

"Like the other Constitutional Courts!" he said, believing that the conversation could thus end.

¹⁰³ Myriam Benlolo Carabot, *Mandat d'arrêt européen (Décision-cadre n° 2002/584/JAI du Conseil): Première question préjudicielle du Conseil constitutionnel à la CJUE*, in *Lettre Actualités Droits-Libertés* du CREDOF, 2 May 2013, available at <http://revdh.org/2013/05/02/mandat-darret-europeen-premiere-question-prejudicielle-conseil-constitutionnel/>.

¹⁰⁴ Coutron & Gahdoun, *supra* note 96, at 1217. In the same way, see also Cyril Nourissat, *Première question préjudicielle du Conseil constitutionnel à la Cour de justice de l'Union européenne: Live and let die...*, 6 *Procs.* 1, 2 (2013).

¹⁰⁵ Catherine Haguenu-Moizard, *Le contrôle de constitutionnalité du droit dérivé de l'Union européenne: la fin d'une exception française?*, available at www.law.uj.edu.pl/spf/referaty/Catherine%20Haguenu-Moizard.doc (2010).

V. A Difference of Degree Between Constitutional Courts Rather Than a Difference of Kind

As we were getting closer to the place where the seminar was to be held, I added: “Let me, however, not entirely share your enthusiasm. Although qualifying the French constitutional judge as an ordinary judge of EU law does not seem so incongruous in such circumstances, by contrast ranking the Constitutional Council at the same level of the other Constitutional Courts is excessive. Rather than a difference of kind between the Constitutional Courts, there would be a difference of degree. Is the Constitutional Council ready to refer a preliminary ruling on the validity of an EU provision to the CJEU? Such a jurisprudential revolution is clearly not currently on his agenda, by contrast to the Belgian,¹⁰⁶ Spanish,¹⁰⁷ Austrian,¹⁰⁸ and German¹⁰⁹ constitutional judges. More broadly, the French constitutional judge is not entrusted with any European mission, such as to fully ensure a uniform application of EU law,¹¹⁰ unlike the Belgian or the Italian constitutional judge.¹¹¹”

“I am a keen reader of the specialized *Huron* gazette,” he said. “I remember that the first preliminary reference sent to the CJEU by the Italian constitutional judge was made under the jurisdiction held in *via principale*. At that time, expanding this attitude to the jurisdiction he holds in *via incidentale* appeared rather improbable. However, does his second preliminary ruling not prove the contrary? The evolution of the *Corte Costituzionale* may serve as an example to the French Constitutional Council. We have a saying that goes: ‘Cutting a flower not make spring ends.’”

“Your word is full of wisdom. May the future prove you right.”

¹⁰⁶ Cour d'arbitrage, 2005, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Case 124/2005; Cour d'arbitrage, 2005, *Ordre des barreaux francophones et germanophone, Ordre français des avocats du barreau de Bruxelles, Ordre des barreaux flamands, Ordre néerlandais des avocats du barreau de Bruxelles v. Conseil des ministres*, Case 126/2005; Cour constitutionnelle belge, 2009, *Association Belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v. Conseil des ministres*, Case 103/2009; Cour constitutionnelle belge, *Exécution d'un mandat d'arrêt européen émis à l'encontre de I.B.*, Case 128/2009; Cour constitutionnelle belge, 2012, *Institut professionnel des agents immobiliers (IPI) v. Geoffrey Englebert, Immo 9 SPRL, Grégory Francotte*, Case 116/2012; Cour constitutionnelle, 2014, Case 165/2014. In these three last rulings, questions on interpretation and on validity were mixed.

¹⁰⁷ Tribunal Constitucional, 2011, Case 86/2011.

¹⁰⁸ Verfassungsgerichtshof, 2012, Case G 47/12.

¹⁰⁹ Bundesverfassungsgericht, 2014, Case 2 BvR 2728/13.

¹¹⁰ Coutron & Gahdoun, *supra* note 96, at 1222–23.

¹¹¹ Corte Costituzionale, 2008, Case 102/2008, para. 8.2.8.3. In the same way, see Karine Roudier, *L'évolution des rapports entre la Cour constitutionnelle italienne et le droit communautaire: le dialogue direct entre les juges finalement instauré*, 21 CIVITAS EUROPA 145, 156–59 (2008).

Preliminary Reference and Dialogue Between Courts as Tools for Reflection on the EU System of Multilevel Protection of Rights: The Case of the *Data Retention Directive*

By Ludovica Benedizione & Eleonora Paris*

A. Introduction

The aim of this Article is to analyze the peculiar jurisdictional reaction that originated at the level of both the European Union (EU) and the Member States following the introduction, on 15 March 2006, of Directive 2006/24/EC of the European Parliament and the Council, “on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communication networks.”¹

The act, briefly named the *Data Retention Directive* (DRD or ‘the Directive’), amended the previous Directive 2002/58/EC.² The need for such a legislative intervention on the part of the EU originated in the aftermath of the terrorist attacks that struck some European cities after the major attack in New York City on 11 September 2001. The Directive was in fact aimed at increasing the security of the Member States (and therefore, ultimately, of the EU) by strengthening the powers of the security agencies and police forces in prosecuting and preventing criminal acts of terrorism. A lively debate immediately arose around the adoption of the Directive; at first it focused on whether it should be based on the First or the Third pillar, and following its entry into force, on the serious potential clash of its contents and prescriptions with some fundamental rights protected by both the Charter of Fundamental Rights of the EU (CFR) and the European Convention on Human Rights (ECHR), especially the right to privacy. In reflection of these concerns, from 2008 onwards

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¹ EC Directive 2006/24 of 15 March 2006, O.J. 2006 L 105/54.

² EC Directive 2002/58 of 12 July 2002, O.J. 2002 L 201/37.

several national courts³ of the EU Member States started declaring the internal laws transposing the Directive to be unconstitutional.

A crucial turning point finally came in 2012, when the Irish High Court⁴ and then the Austrian *Verfassungsgerichtshof* (Constitutional Court) raised doubts about the compatibility of the Directive's transposition laws with the EU normative framework on fundamental rights, and decided to make preliminary references to the Court of Justice of the European Union (CJEU). Some months later, in September 2013, a similar issue was brought to the attention of the Slovenian Constitutional Court, which, having ascertained the correspondence of the pledges presented by the Irish and Austrian plaintiffs with those submitted to its consideration, decided to suspend its proceedings, waiting for the CJEU to pronounce on the two other references. The decision of the CJEU was finally delivered on 8 April 2014. It was a milestone judgment, declaring void the entire Directive (an approach that strikingly differs from the Court's general case law, which tends to simply rule against specific legislative provisions)⁵ on the grounds of its incompatibility with fundamental rights.

There are several aspects of utmost interest in this complex series of judgments, starting from the suddenly extensive use of the preliminary reference to the CJEU. From a first point of view, the DRD case cast a new light over the multilevel system of protection of rights, highlighting the importance of balancing fundamental individual rights (privacy, protection of personal data, freedom of expression, personal freedom) with the unavoidable need to provide for common security measures, in order to prevent and counter the threats to the collective right to security caused by the re-emergence of international terrorism. In particular, the entire experience put into evidence the crucial role of the CJEU in verifying the conformity of the balancing solutions elaborated in the law-making process—in which the role of State interests and claims, enhanced by their representation in the European organs, can have a chance to prevail—with the intangible fundamental rights of individuals and the common normative framework provided by EU law.

A second relevant issue is the one related to judicial interaction, intended as the cooperation among national Courts, as the dialogue between them and the CJEU, and

³ Namely, the Bulgarian Supreme Administrative Court, in 2008, the Romanian Constitutional Court, in 2009, the German Federal Constitutional Tribunal, in 2010, the Czech Constitutional Court, in 2011, and the Cypriot Supreme Court, in 2011.

⁴ According to the system of constitutional review of legislation in place in Ireland, the High Court is, together with the Supreme Court, the judicial authority empowered to check the compliance of the legislation enacted with the Constitution.

⁵ See Franziska Boehm & Mark D. Cole, *Data Retention after the Judgment of the Court of Justice of the European Union* 41 (2014), available at <http://www.greens-efa.eu/>.

finally as the complex relationship between the CJEU and the European Court of Human Rights (ECtHR). In this sense, the peculiar position assumed by the Constitutional Court of Slovenia, that—conditioning its final decision not only to the one of the CJEU, but ultimately also to the Irish and Austrian proceedings—showed a new and potentially groundbreaking openness to the dialogue, could lead the way to the strengthening of a “healthy” and fruitful collaboration among national judges. In addition to the evident importance of this phenomenon *per se* for the development and the application of EU law, it is necessary to consider its potentially decisive role in relieving the burden of pending procedures before the European judges.

It is therefore in such a twofold perspective that this contribution will consider the use of the preliminary reference procedure in the DRD case. Following an analysis of the Directive itself, and an *excursus* of the legal proceedings that led to its referral before the CJEU, an overview of the issues relating to the protection of the involved fundamental rights and to the interpretation of the Treaties raised by the Irish and Austrian preliminary reference rulings and by the Slovenian Court’s decision to suspend its proceedings will be provided. This will be followed by a focus on the related answers and solutions offered by the CJEU in its decision. Although not all the concerned national courts have concluded their proceedings, in order to complete the broader picture an attempt to analyze the effects of the CJEU’s ruling at the national level will then be briefly undertaken. This will then lead to the concluding remarks on the value of this complex judicial experience for the development and the improvement of both the multilevel protection of fundamental rights and the dialogue among national courts, between them and the CJEU and, potentially, between the CJEU and the ECtHR.

B. The Directive

The EU’s DRD establishes an obligation for providers of publicly available electronic communications services and also for providers of public communication networks to retain traffic and location data for a period of time ranging from six months to two years “for the purpose of the investigation, detection and prosecution of serious crime.”⁶ The provisions of this Directive, as we are going to see, caused significant concerns within the EU. These concerns related to the compatibility of the Directive with fundamental rights such as the right to privacy and to the protection of data. According to the Preamble of the Directive, its adoption was strongly conditioned by the particular political climate of those years; in fact, as is pointed out in the Preamble, the terrorist attacks on Madrid and London (in March 2004 and July 2005, respectively) “reaffirmed [...] the need to adopt

⁶ “This Directive aims to harmonize Member States’ provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.” EC Directive 2006/24, *supra* note 1, at Art. 1.

common measures on the retention of telecommunications data as soon as possible.”⁷ The European Commission officially proposed its adoption in September 2005, urged by the European Council following the Madrid terrorist bombing and the London terrorist attacks. However, although EU institutions, security agencies, and police forces consider the retention of traffic data to be a crucial tool in the fight against terrorism, this Directive has also been considered to be one of the most privacy-invasive instruments ever adopted in the EU’s framework, and one of the most controversial too.

As anticipated, a debate on the Directive had arisen also prior to its adoption. This was focused on whether the issue of data retention should be regulated by one of the instruments covered by the First Pillar or one of those that fall under the Third Pillar,⁸ thus namely if it should be a directive or a framework decision. In 2006, Ireland, supported by Slovakia, appealed to the CJEU⁹ asking for the annulment of the Directive on the grounds that “it had not been adopted on an appropriate legal basis.”¹⁰ Ireland argued that the correct legal basis for data retention was to be found in “the provisions of the EU Treaty concerning police and judicial cooperation in criminal matters” rather than in the provisions on the internal market.¹¹ Therefore, it argued, the issue should have been regulated under the Third Pillar’s legal bases, that is to say with a framework decision. By contrast, however, in February 2009, the CJEU stated that the DRD regulates operations which:

are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonizes neither the issue of access to data by the

⁷ *Id.* at Preamble, para. 10.

⁸ The Treaty of the European Union, adopted in Maastricht in 1992, introduced a new institutional structure for the EU, which remained until the adoption and the entry into force of the Treaty of Lisbon. This institutional structure was composed of three “pillars”: the first, so-called Community pillar, which corresponded to the three Communities: the European Community, the European Atomic Energy Community (EURATOM), and the former European Coal and Steel Community (ECSC); the second pillar devoted to the common foreign and security policy (Title V of the Treaty on European Union); finally, the third pillar devoted to police and judicial cooperation in criminal matters (Title VI of the Treaty on European Union).

⁹ Case C–301/06, *Ireland v. European Parliament and Council of the European Union*, 2009 E.C.R. I–00593.

¹⁰ Press Release, Court of Justice of the European Union, No 11/09, 1 (10 February 2009), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/cp090011en.pdf>.

¹¹ “Ireland submits that the choice of Art. 95 EC as the legal basis for Directive 2006/24 is a fundamental error. Neither Article 95 EC nor any other provision of the EC Treaty is, in its view, capable of providing an appropriate legal basis for that directive. Ireland argues principally that the sole objective or, at least, the main or predominant objective of that directive is to facilitate the investigation, detection and prosecution of crime, including terrorism. Therefore, the only legal basis on which the measures contained in Directive 2006/24 may be validly based is Title VI of the EU Treaty, in particular Articles 30 EU, 31(1)(c) EU and 34(2)(b) EU.” *Ireland*, Case C–301/06 at para. 28.

competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. [...] It follows that the substantive content of Directive 2006/24 is directed essentially at the activities of the services provided in the relevant sector of the internal market, to the exclusion of State activities coming under Title VI of the EU Treaty. In light of that substantive content, Directive 2006/24 relates predominantly to the functioning of the internal market.¹²

According to the CJEU, the Directive was, therefore, correctly adopted as a First Pillar legal instrument, under Article 95 of the EC Treaty. As we noted earlier, the Directive, adopted with the purpose of harmonizing the legislation of EU Member States on the conservation of personal data collected through electronic communication services, requires operators to retain certain categories of data, that is: “[...] the source and the destination of communications; the data, time and duration of communication; the type of communications; user’s communication equipment and the location of mobile communication equipment [...]”.¹³ Data must be retained for a period of time ranging from a minimum of six months to a maximum of two years. Each Member State could establish the exact duration as well as the conditions under which data may be accessed. Moreover, Member States should make the data retained available, on request, to law enforcement authorities for the purposes of investigating and prosecuting serious crime.

1. The European Legal Framework

Coming to the analysis of the legal framework in which the Directive has been adopted, it is necessary to underline that at EU level, the issue of retention and use of data for the purposes of law enforcement was first established in Directive 97/66/EC concerning “the processing of personal data and the protection of privacy in the telecommunications sector.”¹⁴ For the first time, the Directive provided for the possibility to adopt measures similar to those covered later on also by the DRD for the maintenance of public order and the protection of public security.¹⁵ Following Directive 97/66/CE, its provisions were developed in the so-called *e-Privacy* Directive,¹⁶ which provides for the possibility for

¹² *Id.* at paras. 83–85.

¹³ See EC Directive 2006/24, *supra* note 1, at Art. 5 for further technical details.

¹⁴ EC Directive 97/66 of 15 December 1997, O.J. 1998 L 024/01.

¹⁵ In particular, the Directive prescribed that traffic data had to be deleted or made anonymous at the very end of each communication; it also generally prohibited the extensive retention of data.

¹⁶ EC Directive 2002/58, *supra* note 2.

Member States to adopt legislative measures for public order and public security purposes, including in some cases the retention of data. In fact, Article 15 of the *e-Privacy* Directive allows Member States to restrict privacy rights and obligations “when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defense, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorized use of the electronic communication system.”¹⁷ Article 15 of the *e-Privacy* Directive has been amended by the DRD,¹⁸ establishing that Article 15 does not apply to data retained under the DRD. Thus, Member States could still derogate from the principle of confidentiality of communications under the provisions established in the *e-Privacy* Directive, because the DRD governs the retention of data only for the purpose of investigating, detecting, and prosecuting serious crimes. Moreover, in both of the Directives mentioned, the definition of the notion of ‘serious crime’ is completely absent, making it difficult to distinguish measures taken by the States under the DRD from measures taken in application of the more general data retention regime regulated by Article 15 of the *e-Privacy* Directive.

In addition, the DRD left it to Member States to specify the procedures to follow in order for the national authorities to access the retained data. What has to be stressed here is that these procedures have to be defined in accordance with the requirements of necessity and proportionality, in the light of the ECHR and the CFR.¹⁹

The process of the transposition of the DRD allows us to consider one of the most controversial aspects of the whole data retention issue. Member States were required to transpose the provisions of the Directive into national law by 15 September 2007, with the option of postponing the implementation of retention obligations relating to internet access, internet email, and internet telephony until 15 March 2009.²⁰ From the beginning, the transposition of the Directive met with considerable resistance in several countries and its application has proved problematic and lengthy in many Member States. Even with the possibility of postponing the application for internet data retention, six EU Member

¹⁷ *Id.* at Art. 15.

¹⁸ EC Directive 2006/24, *supra* note 1, at Art. 11 (“the following paragraph shall be inserted in Article 15 of Directive 2002/58/EC: 1a. Paragraph 1 shall not apply to data specifically required by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks to be retained for the purposes referred to in Article 1(1) of that Directive.”).

¹⁹ *Id.* at Art. 4.

²⁰ This option was adopted by Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Sweden, and the UK. For the specific legislation through which Member States transposed the Directive see the EUR-Lex register, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX>.

States²¹ found themselves subjected to infringement proceedings brought by the European Commission due to the failure to implement the Directive within the time allowed.

II. Critical Aspects

The difficulties experienced in the application of the DRD are mainly due to the question of its compatibility with certain fundamental human rights, first of all the right to privacy (Article 7 CFR²²), the right to protection of personal data (Article 8 CFR²³), and the right to freedom of expression (Article 11 CFR²⁴). The Directive also seems to be incompatible with Article 16 of the Treaty on the Functioning of the European Union (TFEU), which enshrines everyone's right to the "protection of personal data concerning them."²⁵ When dealing with the legality of the Directive with regard to fundamental rights, it is important to stress that the Directive's provisions did not establish anything about the conditions under which access to the retained data may be granted. The Directive only provides that the purpose of data retention is the "investigation, detection and prosecution of serious crime."²⁶

Before analyzing the critical aspects of the Directive that emerged in the sentences of some of the national constitutional courts, which had the possibility of pronouncing on the limits that national constitutions establish for the supremacy of EU law over national law, it seems important to underline that the protection and the defense of the right to privacy in the framework of the EU is no more an exclusive prerogative of Member States. With the entry into force of the Lisbon Treaty on 1 December 2009, the CFR was introduced in the EU normative sources. Article 6 of the Treaty on the European Union (TEU), as amended by the Lisbon Treaty, states that "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties." The Charter is part of EU primary law and, therefore, all

²¹ Namely, Austria, the Netherlands, and Sweden in May 2009; Greece and Ireland in November 2009; and Germany in May 2012.

²² Art. 7 CFR: "Respect for private and family life - Everyone has the right to respect for his or her private and family life, home and communications."

²³ Art. 8 CFR: "Protection of personal data - 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority."

²⁴ Art. 11 CFR: "Freedom of expression and information - 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]."

²⁵ TFEU Art. 16, para. 1.

²⁶ See EC Directive 2006/24, *supra* note 1, at Art. 1.

acts of secondary EU law, directives in particular, have to comply with it. Consequently, national constitutional courts do not enjoy the power to check the accordance of EU directives with fundamental rights.

Prior to the aforementioned proceedings of the national courts, the European Commission itself, in submitting its proposal for the Directive in 2005, had highlighted the possible impact of data retention on the rights to privacy and protection of personal data. As reported in the Proposal for a directive on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC,²⁷ the Commission noted that the Directive could have consequences for the rights to privacy and protection of personal data, as set out in Articles 7 and 8 of the CFR. However, the Commission considered interference with these rights to be justified in the light of the provisions of Article 52 of the Charter.²⁸ Therefore, the measures provided for in the DRD were considered to be proportionate and necessary in order to pursue the objective of combating terrorism.

Criticism concerning the Directive, however, has been highlighted by the judgments of national supreme and constitutional courts, which have detected the inconsistency of domestic legislation implementing the Directive with national Constitutions. More specifically, since 2008, some Member States' Supreme Courts have declared unconstitutional provisions of the national laws transposing the DRD, due to alleged infringement of the right to privacy and the right to protection of data. These national Courts include: the Bulgarian Supreme Administrative Court (2008),²⁹ the Romanian Constitutional Court (2009),³⁰ the German Constitutional Tribunal (2010),³¹ the Czech Constitutional Court (2011),³² and the Cyprus Supreme Court (2011).³³ Moreover, a similar case—that is extremely interesting for our purposes—was pending before the Constitutional Court of Slovenia. Finally, when the CJEU gave its judgment on the DRD last April, other cases were pending in Member States. For example, in Hungary, a case was

²⁷ COM(2005) 438 final, 21 September 2005.

²⁸ Art. 52(1) CFR: "1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

²⁹ Bulgarian Supreme Administrative Court, No 13627, 11 December 2008, at http://www.capital.bg/getatt.php?filename=o_598746.pdf.

³⁰ Romanian Constitutional Court Decision no. 1258 of 8 October 2009, R.O.M. No. 789, 23 November 2009.

³¹ German Constitutional Court, 1 BvR 256/08, Judgment of 2 March 2010.

³² Czech Constitutional Court, Decision of 22 March 2011, Official Gazette of the Czech Republic 1 April 2011.

³³ Supreme Court of Cyprus, Civil applications 65/2009, 78/2009, 82/2009, 15/2010, 22/2010, Judgment of 1 February 2011, available in Greek at <http://www.supremecourt.gov.cy>.

initiated in 2008 by the Hungarian Ombudsman, but after the adoption of the Fundamental Law, which entered into force in January 2012, the procedures before the Hungarian Constitutional Court changed and pending cases, submitted by entities that were not entitled under the new provisions, were removed from the docket.³⁴

As has been remarked,³⁵ the main criticism of the DRD underlined by national courts was related to the violation of fundamental rights of privacy and free correspondence, because of the collection of data of persons that were completely unaware about the storing of their personal data. Moreover, another aspect that has emerged from the judgments is the one linked to protection of personal data and to the circumstance that a mass data retention may cause the feeling of being constantly observed, thus limiting the freedom of expression and communication.

Taking into consideration the above-mentioned Constitutional Courts' judgments, it could be observed that the Courts basically highlighted the same critical points of the Directive. First of all, blanket data retention measures have been considered problematic in view of fundamental rights guarantees in most of the Courts' pronunciations. Furthermore, the main criticisms concerned both the vagueness and imprecision of the national legislative provisions with regard to who could access the retained data and for which purposes, the lack of a specific cause to justify the retention, and the fact that the retention could be applied to all the people using electronic communications. These aspects have been seen as a reason for a finding of incompatibility with constitutional requirements.

However, surprisingly, none of these Courts have decided to involve the CJEU by way of the preliminary reference procedure. They have rather chosen to concentrate fully on the critical aspects of national transposition acts, highlighted in some courts' pronunciations in a very detailed way. The preliminary reference procedure would have allowed the CJEU to rule earlier on the Directive and has, as a result, led to disappointment.

[...]Therefore the decisions – albeit after lengthy considerations – of first the Irish High Court and subsequently the Austrian Constitutional Court were welcomed with relief as they gave the CJEU the chance to revisit the fundamental rights questions left open in its initial (competency) judgment on the DRD. In view of the fact that the Court clearly and without room for interpretation stated that “by adopting Directive

³⁴ For more detailed information about the Hungarian case and other pending ones on the DRD, see Eleni Kosta, *The way to Luxemburg: national Court decision on the compatibility of the Data Retention Directive with the rights to privacy and data protection*, 10/3 SCRIPTED, 339 (2013).

³⁵ Boehm & Cole, *supra* note 5, at 14.

2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of articles 7, 8 and 52(1) of the Charter” it is, retrospectively speaking, an even stronger disappointment that the national Courts did not act earlier and thereby contributed to a more swift clarification of the validity (or actual invalidity) of this important piece of EU secondary law.³⁶

Through the examination of the rulings of the Courts, it can be noted how these have primarily emphasized the impact of the legislation transposing the DRD on the fundamental rights to privacy and protection of personal data. As regards the fundamental right to privacy, the first court to underline its violation by the domestic measure transposing the DRD was the Bulgarian Supreme Administrative Court.³⁷ In the opinion of the applicants, Article 5 of the concerned Regulation³⁸ constituted a violation of the right to privacy, as it allowed passive technical access to all retained data for broad purposes through a dedicated computer terminal. Access to data was permitted for operative investigation activities, and allowed investigation, prosecution, and judicial authorities to access the data for trials. It also allowed security services to access the retained data for national security reasons. These provisions were formulated in a very vague and imprecise way; thus the NGO argued that sufficient safeguards for the protection of the private lives of citizens were not provided by the Regulation, as required by Article 32 of the Bulgarian Constitution.³⁹ The Court found that the provisions of Article 5 violated the right to privacy as enshrined in Article 32 of the Bulgarian Constitution and in Article 8 of the ECHR, and annulled it because of the lack of any guarantees provided.⁴⁰ The Court highlighted the

³⁶ *Id.* at 19.

³⁷ Bulgaria transposed the Directive in the Regulation No. 40 of the Ministry of Interior of 7 January 2000 (available at <http://lex.bg/laws/ldoc/2135577924>). The NGO “Program Action to Information” filed a complaint at the Bulgarian Supreme Administrative Court, after the transposition of the Data Retention Directive, claiming the violation of the right to privacy caused by the Regulation.

³⁸ Art. 5, Regulation No.40 of the Ministry of Interior of 7 January 2000 (note 37).

³⁹ Art. 32, Constitution of the Republic of Bulgaria, Jul. 1991, SG 56/13: “(1) The privacy of citizens shall be inviolable. Everyone shall be entitled to protection against any illegal interference in their private or family affairs and against encroachments on their honour, dignity and reputation. (2) No one shall be followed, photographed, filmed, recorded or subjected to any other similar activity without their knowledge or despite their express disapproval, except when such actions are permitted by law.”

⁴⁰ As it has been pointed out, “[...] the decision is important, as it was the first decision of a national court that examined data retention in relation to the right to privacy of citizens, albeit on an issue that the Directive left to the Member States to regulate. Moreover, the direct reference to Art. 8 ECHR rather than merely to the relevant provision of the Bulgarian Constitution illustrates the importance of data retention aspects with regard to the right to privacy.” See Kosta, *supra* note 34, at 346.

importance of the procedure for receiving access to the retained data and declared the act to be in breach of the Constitution,⁴¹ partly because it did not specify this procedure sufficiently. As a result, the Court declared void some provisions of the Bulgarian data retention act, but not the act as a whole.

Another important reaction to the transposition of the DRD could be seen in the Decision of the Romanian Constitutional Court of October 2009,⁴² which annulled in total the national transposition act⁴³ on grounds of unconstitutionality. The Court, referring to the case law of the ECtHR,⁴⁴ found the scope and purpose of the transposing law to be ambiguous and lacking sufficient safeguards, and it highlighted the incompatibility of the legal obligation to retain all traffic data for six months with the rights to privacy, referring to Article 8 of the ECHR.⁴⁵ In addition to this violation of the right to privacy (as enshrined in Article 26 of the Romanian Constitution),⁴⁶ the Court found a number of reasons as to why the transposition act was not in conformity with the Constitution, namely the inviolability of domicile (Article 27), the right to free development of human personality (Article 1(3)), and the right to secrecy of communications (Article 28).

The violation of the fundamental right to privacy by a national provision implementing the DRD was also underlined by the German Federal Constitutional Court,⁴⁷ which annulled essential parts of the German telecommunications law amendments transposing the

⁴¹ Bulgarian Supreme Administrative Court, Decision No 13627 (note 29).

⁴² Romanian Constitutional Court Decision no. 1258 (note 30).

⁴³ Law No. 298/2008, Official Monitor No. 780 of 21 November 2008.

⁴⁴ Eur. Court H.R., *Rotaru v. Romania*, Judgment of 4 May 2000, Reports of Judgments and Decisions 2000–V; Eur. Court H.R., *Sunday Times v. UK*, Judgment of 26 April 1979, Series A, No. 30; Eur. Court H.R., *Prince Hans-Adam of Liechtenstein v. Germany*, Judgment of 12 July 2001, Reports of Judgments and Decisions 2001–VIII.

⁴⁵ Art. 8, ECHR, “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

⁴⁶ As underlined by the Court: “[...] the continuous limitation of the privacy right and the secrecy of correspondence makes the essence of the right disappear by removing the safeguards regarding its execution. The physical and legal persons, mass users of the public electronic communication services or networks, are permanent subjects to this intrusion into their exercise of their private rights to correspondence and freedom of expression, without the possibility of a free, uncensored manifestation, except for direct communication, thus excluding the main communication means used nowadays.” Romanian Constitutional Court Decision no. 1258.

⁴⁷ “The adoption of a law implementing the Data Retention Directive in Germany faced immense public outcry. After the transposition of the Directive into German law, the German Constitutional Tribunal was called upon to decide on the compatibility of specific provisions of the legislation with the right to the secrecy of communications and the right to informational self-determination.” See Kosta, *supra* note 34, at 349.

DRD,⁴⁸ but not the legislation entirely. More precisely, the Court considered the act under scrutiny to violate Article 10 of the *Grundgesetz* (Basic Law for the Federal Republic of Germany)⁴⁹ which protects the privacy of correspondence, post, and telecommunications. In the opinion of the Court, “Data Retention for LE⁵⁰ purposes is not per se incompatible with this provision of the Constitution [...] but the measures to protect citizens against massive infringement of their fundamental rights were seen to be insufficient.”⁵¹ As underlined by the Court, through the data collected it is possible to establish the profiles of all citizens and therefore to know all their movements and habits, thereby violating the fundamental right to privacy. Such a restriction on the right to privacy could only be admissible under particular and strictly limited circumstances that “would necessitate very high standards for data security, transparency of the processing and legal protection against violations including the possibility of effective sanctions.”⁵²

In February 2011, the Supreme Court of Cyprus also focused on the issue of access to the retained data, stressing the importance of the right to private and family life and the right to the protection of secrecy of correspondence.⁵³ The court had to decide on the validity of orders for access to retained data based on Articles 4 and 5 of the Cypriot law 183(1)/2007 about the retention of telecommunications data for investigation of serious crimes, adopted in order to transpose the DRD. The applicants questioned the compatibility of the abovementioned Articles 4 and 5 with the right to private and family life and with the right to the protection of secrecy of correspondence, protected under Articles 15 and 17 of the Cypriot Constitution, respectively.

In its reasoning, the Court focused on the legal provisions that were put in place with the law 183(1)/2007 and the transposition of the Directive in the national legislation, and stated that the Directive “does not impose any obligation of the Member States to set down provisions on the access to the retained telecommunications data of the citizens or

⁴⁸ German Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 256/08, Judgment of the of 2 March 2010, <http://www.bverfg.de/pressemitteilungen/bvg10-011en.html>

⁴⁹ Art. 10 Basic Law for the Federal Republic of Germany: “(1) The privacy of correspondence, posts and telecommunications shall be inviolable. (2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.”

⁵⁰ Law Enforcement.

⁵¹ Boehm & Cole, *supra* note 5, at 17.

⁵² *Id.*

⁵³ Civil Applications 65/2009, 78/2009, 82/2009, 15/2010 and 22/2010, *supra* note 33. See Christiana Markou, *The Cyprus and other EU court rulings on data retention: The Directive as a privacy bomb*, 28 *COMPUTER L. & SECURITY REV.* 468 (2012).

on their transmission to the competent authorities.”⁵⁴ Thus, the issues of access to the retained data, and of the transfer of these data to the authorities, were left to the Member States to regulate in national legislation and did not fall within the scope of the DRD. The provisions of Articles 4 and 5 of the Cypriot Law in question were not covered by Article 1A of the Constitution of Cyprus.⁵⁵ The Court, having clarified that it did not have competence to question the validity of the DRD and the Cypriot law adopted to implement it, examined whether the orders for access to retained data based on Article 4 and 5 of the Cypriot Law transposing the DRD were compatible with Articles 15 and 17 of the Cypriot Constitution. In three of the four cases on which the Court had to rule it found that there was actually an interference with the rights to privacy and secrecy of communications, as protected in the Constitution and, consequently, it annulled the relevant order for access to retained data. In the fourth case, the Court found that there was an interference but that this was justified on the bases foreseen in the Constitution.

Finally, and again in 2011, the Czech Constitutional Court annulled the DRD’s transposition law because of its insufficient precision and insufficient clarity in its formulation, the law being a measure which interfered with fundamental rights. Considering the scope of the data retention provisions, the Court criticized the purpose limitation of the Directive as being insufficiently detailed. According to the Court, in the Directive there are insufficient guarantees and safeguards against the possibility of abuses of power by public authorities. Furthermore, in an *obiter dictum* doubts are expressed about the necessity, efficiency, and appropriateness of the retention of traffic data as an instrument to fight against serious crime, taking into account the emerging phenomenon of new methods of criminality, such as, for example, through the use of anonymous SIM cards.

However, although some of the decisions presented above were very precise and strict in judging the unconstitutionality of domestic legislation transposing the Directive, none of these Courts, as we said before, made a reference to the CJEU about the possibility that the original DRD itself was not in conformity with EU fundamental rights. This happened only with the preliminary reference to the CJEU made by the Irish High Court and the Austrian Constitutional Court which, rather than proceeding directly to the judgment of

⁵⁴ See *Kosta*, *supra* note 34, at 353. For a complete analysis of the issue see Supreme Court of Cyprus, Decision of civil applications 65/2009, 78/2009, 82/2009, 15/2010, 22/2010, 1 February 2011, available at <http://www.supremecourt.gov.cy>.

⁵⁵ Art. 1A of the Constitution of Cyprus was amended in 2006 and provides that: “[n]o provision of the Constitution shall be deemed as overriding any legislation, acts or measures enacted or taken by the Republic that are deemed necessary due to its obligations as a Member State of the European Union, neither does it prevent Regulations, Directives or other Acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty of the European Union, from having legal effect in the Republic.”

national laws transposing the Directive, considered preventive cooperation with the CJEU as being a necessary step to solving the cases.

C. Questioning the *Data Retention Directive*: The Three Core Judgments of the Irish, Austrian, and Slovenian Courts

The “judicial domino” of preliminary references regarding the DRD had its origins in 2006, when Digital Rights Ireland—an Irish company committed to the promotion and protection of civil and human rights in the field of modern communication technologies—filed a complaint before the High Court of Ireland⁵⁶ against the Minister for Communication, Marine and Natural Resources, the Minister of Justice, Equality and Law Reform, the Commissioner of the Irish Police Force, Ireland, and the Attorney General. The Company, that had had a major role in the public debate on the updating of Ireland’s national laws in the telecommunications, interceptions, and metering areas,⁵⁷ claimed that the acquisition

⁵⁶ Irish High Court, *Digital Rights Ireland Ltd. v. Minister for Communication & Others*, Judgment of 5 May 2010, [2010] IEHC 221.

⁵⁷ The proposal for an updating of the EU legislation in the matter of data retention and security provisions to counter terrorism, from which the DRD eventually originated, was put forward by Ireland during its turn of Presidency of the EU in April 2004. In submitting its proposal for a Framework Decision on Data Retention (Council Document 8958/04, ADD1, of 28 April 2004), the Irish Government was both officially pushing for a concrete response to the terrorist attacks that occurred in Madrid a month earlier and searching for a supranational normative solution to a critical situation that had arisen in its internal legal order. Ireland had set up a comprehensive telecommunication law relatively early, in 1983 (*Postal and Telecommunication Services Act*, 1983. For the complete text of this and the other quoted Irish laws, see <http://acts.oireachtas.ie/en.toc.decade.html>), and then perfected it with the *Data Protection Act* of 1988, (approved in order to harmonize the Irish normative framework with the requirements of the Convention for the protection of individuals with regard to automatic processing of personal data, signed in Strasbourg on 28 January 1981), that regulated the management of communication data and instituted the Data Protection Commissioner, in charge of the supervision and monitoring over the respect of the Convention. The effectiveness of these normative efforts was seriously impaired by the absence of a comprehensive discipline of metering, that is to say the collection and disclosure of telephonic traffic and location data. In particular, although the access of public security authorities to communication data in case of State security and offence prosecution needs was somehow limited and subdued to formal prescriptions, no preemptive independent authorization was prescribed for collecting the data, nor specific monitoring over their use established; such use was not bound to necessity or proportionality requirements, and it was not circumscribed to serious offences; no time limit was furthermore set for the collection and retention of traffic and location data (see T.J. McIntyre, *Data retention in Ireland: Privacy, policy and proportionality*, in 24 *COMPUTER L. & SECURITY REP.* 326, 327 (2008)). The parallel development of the then European Community’s discipline in the field of telecommunication, with the approval of the Directive 97/66/EC, *supra* note 14, gave Ireland a chance to complete its legislative coverage of metering, but again no transposing law was passed until 2002, thus substantially leaving telecommunication operators free to decide whether to retain traffic data; the only requirements were that the retained information to be somehow relevant and by no means excessive, and their storage was generally allowed for no longer than necessary to its purpose. In late 2001, an enquiry revealed the Irish mobile telephone companies would retain traffic and location data for a period of six years, making them available to the public security authorities when requested (see *Irish, know where you’ve been*, *WIRED NEWS*, Nov. 9, 2001). The issue was brought to the attention of the Data Protection Commissioner, who concluded that the length of the storage period was inconsistent with both the *Data Protection Act* and the relevant EU normative framework, and set it to a maximum of six months. The Commissioner’s decision was opposed by the institutions (and in particular, by the Department of Justice, which

and retention, on the basis of national norms and Directions (namely, the 2001 Direction issued by the Minister for Public Enterprise,⁵⁸ the *Criminal Justice (Terrorist Offences) Act* of 2005, and the subsequent Direction of the Commissioner of the Police Force to the telecommunication service providers, ordering them to retain data),⁵⁹ of data belonging to it, its members, and other users of mobile phones, had been conducted by the Defendants in breach of several law provisions, both at the national and at the EU level. In particular, the processing and storage of data that were related to Digital Rights Ireland, its members, and other mobile phone users were allegedly not consistent with Articles 40.3.1, 40.3.2, and 40.6.1 of the Irish Constitution, protecting the rights to privacy, to travel, and to

rather sustained that the maximum retention period should have been established at three years in case of security exigencies), that in an attempt to circumvent it, relying upon section 110 of the *Postal and Telecommunication Act* 1983, created a secret direction in which the said companies were ordered to instead keep any kind of traffic data for three years. The provision, severely limiting the right to privacy, was in manifest contradiction with both the dispositions of Directive 97/66/EC and Art. 8 of the ECHR, stating that any interference by a public authority with the exercise of the right to respect for private and family life, home and correspondence is only admissible when it happens in accordance with the law. A character of the said direction was evidently missing, in this—moreover—illegitimately overstepping the powers and prerogatives of the Irish Parliament and, as a consequence, also those of the judiciary in the exercise of its power of reviewing legislation. Eventually informed of the direction, the Data Protection Commissioner challenged it on the basis of these legal standpoints, obtaining the commitment of the Minister of Justice to submit to the Parliament a Bill properly regulating the issue within some months, by the end of 2002. In the meantime, the direction would have worked as a provisional measure. The originally proposed deadline of late 2002 was eventually missed, and the Irish Government decided to postpone the whole proceeding, “lifting” it within the EU context with the proposal of a Framework Decision on Data Retention. In parallel, an unrelated Bill translating into law the content of the 2002 direction through an amendment to the *Criminal Justice (Terrorist Offences) Act* 2005, was surreptitiously introduced at the Irish Parliament, and finally approved in 2005, also as a response to the activism of the Data Protection Commissioner, who had in the meantime at first ordered telecommunication providers to delete any traffic data in their possession that had been stored for longer than six months, and then raised the issue in front of the Irish Courts (See Irish Court of Criminal Appeal, *People (DPP) v. Murphy*, 2005 IE CCA 1). In its Part 7, the so-approved *Criminal Justice (Terrorist Offences) Act* officially established that traffic and location data transmitted through a fixed line or mobile phone had to be retained by the competent providers for a period of three years upon request of the Commissioner of the police force, in order to allow—as stated by Section 63—“(a) the prevention, detection, investigation or prosecution of crime (including but not limited to terrorist offences), or (b) the safeguarding of the security of the State.” Such data could, as per the previous legislation, be acceded and disclosed upon authorization (that had to be countersigned by a senior member of the police or military force), the disclosure being mandatory for the providers once requested (see Eleni Kosta & Peggy Valcke, *Retaining the Data Retention Directive*, 22 *COMPUTER L. & SECURITY REP.* 377 (2006)). Meanwhile, on the EU front, the former Proposal for a Framework Decision, that Ireland wished to be approved within the Third Pillar, had instead been passed as a First Pillar Directive; after its coming into force, the Irish Government challenged its legal basis in front of the CJEU (at the time still named European Court of Justice), under Article 230 Treaty on the European Community (TEC) (now Article 263 TFEU. See *Ireland*, Case C-301/06). Later on in 2009, the CJEU ruled against the Irish Government, confirming that the Directive had been properly approved under Art. 95 TEC (now Art. 117 TFEU). After the entry into force of the Directive, the Irish society witnessed the start of a new and feverish phase of debate that led to the referral of both the Directive and the national legislation in the field of retention of data to the Irish High Court.

⁵⁸ That was in fact the predecessor of the Minister for Communication, Marine and Natural Resources.

⁵⁹ See *supra* note 57.

communicate. They furthermore were against Articles 6(1), 8, and 10 of the ECHR, insofar as they limited the Plaintiff's right to private life, family life, and privileged communication. For this reason, Digital Rights Ireland claimed that Article 63(1), contained in Section 7 of the *Criminal Justice (Terrorist Offences) Act 2005* and disciplining the retention of data was invalid, and that Directive 2006/24/EC was not consistent with the CFR and the ECHR. In seeking due remedies, the Plaintiff not only asked for declarations to the effect that the Defendants had acted in breach of the domestic and EU laws and that the *Criminal Justice (Terrorist Offences) Act 2005* was null and void as incompatible with the Constitution, EU law, and Ireland's obligations under the ECHR. More relevantly, in fact, Digital Rights Ireland asked for a Declaration that the EU DRD was null and void for violating the EC Treaty and had been adopted without any legal basis, and sought an Order of the High Court under Article 267 TFEU, referring several questions to the CJEU.

In particular, the CJEU was first of all to be asked to verify the validity of the Directive considering the content of Articles 6(1) and 6(2) TEU (that recognize the CFR as having the same value as the Treaties and prescribe the accession of the EU to the ECHR). Secondly, Articles 3a TEU (now Article 4(3), 1) and 21 TFEU, expressing, respectively, the due commitment of the Member States to absolving the duties and obligations set on them by the Treaties, and recognizing the right to free movement, were raised as parameters, as also was Article 5 TEU (with explicit reference to the principle of proportionality). Finally, and perhaps most significantly, there was a request regarding the compatibility of the Directive with the CFR, with special reference to Article 7 (the right to private and family life, home, and communications), Article 8 (the right to the protection of personal data and establishing *inter alia* they "must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law"), Article 11 (protecting freedom of expression, information and communication from the interference of public authorities), and Article 41 (the right to good administration).⁶⁰

In May 2010, the Irish High Court, having recognized that it lacked the legal capacity to rule on the validity of EU law, that the case raised "important constitutional questions," and that it was furthermore relevant for almost the whole Irish population, ruled in favor of the appellant, granting it also the application for a preliminary reference to the CJEU.⁶¹ The questions to be submitted, the Court decided, were to be defined at a later stage, through further consultations in which the parties were invited to participate in presenting any suggestions and opinion they deemed to be relevant.⁶²

⁶⁰ Originally, the Plaintiff also asked for the CJEU to specify whether the Directive was lacking the correct legal basis in EU law, but the question was dismissed during the proceedings after the delivery of the recalled *Ireland*, Case C-301/06.

⁶¹ Irish High Court, *Digital Rights Ireland Ltd.* at para. 109.

⁶² It must not be forgotten that, notwithstanding the judicial proceedings, the Irish Government still had to fulfill its duty to enact Directive 2006/24/EC, whose content was transfused in the *Communication (Retention of Data) Act 2011* introducing the necessary modifications to the recalled national pre-existing legal framework on the

The reference was finally filed in June 2012, asking the CJEU to verify the conformity of Articles 3, 4, and 6 of the Directive first of all with Article 5(4) TEU, in their imposing of disproportionate and unnecessary or inappropriate restrictions on the Plaintiff's rights in order to achieve the legitimate aims of ensuring the access to certain data for the purposes of investigation, detection, and prosecution of serious crime and/or ensuring the proper functioning of the internal market of the EU. The CJEU was then called on to ascertain whether the Directive was compatible with the right to free movement (protected by Article 21 TFEU), to privacy (Article 7 CFR and Article 8 ECHR), to protection of personal data (Article 8 CFR), to freedom of expression (Article 11 CFR and Article 10 ECHR), and to good administration (Article 41 CFR). As a last—and somehow revealing—question, the Irish High Court asked to be indicated to what extent the principle of loyal cooperation (Article 4(3) TEU) sets on national courts the duty to make sure that the internal legislation transposing the DRD is consistent with the guarantees set by the CFR.

In that same period of time, between April and June 2012, the Austrian Constitutional Court received three major applications questioning the validity of the newly approved legislative measures implementing the DRD.⁶³ The first of the appellants was the

matter; the intervention was quite limited, basically consisting in the establishment of a new mandatory retention period, that was set to two years for the telephonic traffic data and one year for the internet ones. The implementation of the new provisions was characterized by a peculiar attention to the judicial evolutions of the case in front of the EU Court.

⁶³ After the entry into force of the Directive, Austria was among the most reluctant Member States in transposing its content. Once implemented, in fact, the DRD would have significantly overturned the Austrian internal legislation in this matter (contained in the Austrian Code of Criminal Procedure, in the *Telekommunikationsgesetz* (Telecommunication Act, hereinafter TKG) 2003—Federal Law Gazette I No. 70/2003 and in the *Datenschutzgesetz* (Data Protection Act) 2000, DSG, BGBl. I 165/1999, as amended by BGBl. I 112/2011), originally extremely cautious in allowing the retention and processing of communication data, establishing the requisite of the users' consent as unavoidable in order to store any data relating to them, and imposing the shortest possible retention period. This explains the fierce opposition showed by the Austrian society at the entry into force of Directive 2006/24/EC that was the main cause of the delay in transposing the Directive into this legal order. Such an opposition had evidently been foreseen by the Austrian Government (on its side skeptical about the DRD's content), that had in fact declared, pursuant to Art. 15(3) of the Directive, that it was going to postpone its application for 18 months after the deadline of September 2007. The very first transposition bill, introduced to the Austrian Parliament in 2007, was repeatedly put off due to the massive public resistance, causing the missing of the prescribed March 2009 deadline. The European Commission consequently brought an action against Austria before the CJEU for an infringement of the EC Treaty (Case C-189/09, *Commission v. Austria*, 2010 E.C.R. I-00099), and on 29 July 2010, the CJEU predictably ruled against the Austrian State. Urged to remediate, the Federal Ministry for Transport, Innovation and Technology hence published a new Bill for transposition, consisting in a series of cautious amendments to the TKG, aimed at limiting any interference with fundamental rights as much as possible. In order to appease the internal climate of criticism, the public was involved in the Bill's drafting before its presentation to the Parliament, through the possibility to submit any observations on its content by February 2010. The amended TKG released by the Austrian Legislature on 18 May 2011 therefore aimed at complying with the minimum requirements of the Directive: the maximum data retention period for telecommunication services providers was set to six months after the termination of a communication, admitting it "solely for the purpose of investigating, identifying and prosecuting criminal acts whose severity justifies an order pursuant to art 135 par. 2a Code of Criminal Procedure." This latter provision introduced the admissibility of

Government of the *Land* of Carinthia that, with an appropriate decision, resolved itself to apply to the Constitutional Court,⁶⁴ alleging that the amendments to the national law (the *Telekommunikationsgesetz* of 2003, TKG) adopted in order to comply with the DRD, in their disposing the storage of communication data with no need of any prior suspicion, were determining a “massive interference with explicitly stated fundamental rights”. In particular, the Appellant made several criticisms. First, it noted that even though the storage of the content of communications was expressly forbidden by the law, the content itself could in some cases be easily inferred by examining the other lawfully stored data. This, together with the awareness on the part of users that a system of data retention was in place, was likely to alter the communication behavior. Second, it noted that, on the one

the transmission of information on retained communication data, in case the same was deemed to be useful in order to investigate on the commission of serious criminal acts carrying a sentence of more than one year (or in some listed cases six months) imprisonment, acts among which a specific mention was made for “committed or planned” crimes related to terrorism. The data to be retained consisted, as required by the Directive, in phone, internet and email traffic data (with the exclusion, of the content of such a kind of communications); in particular, as to telephone traffic the providers had to retain, *inter alia*, the phone numbers of the caller and called person (including call-forwarding related data), the names and addresses of both the caller and the called, the start date and time and the duration of the communication, the type of service used (whether call or message), and in case of use mobile phones the location in which the caller and called were at the start of the communication; as to internet traffic, the relevant data were name, address, and identifier of the subscriber to whom a public IP address was assigned, the date and time of the assignment and revocation of a public IP address for an Internet access service, the calling telephone number for dial-up access and the identifier of the line over which Internet access was established; finally, for e-mail communications, the providers were to store the identifier assigned to a subscriber, the IP address of the sender and of each recipient of the e-mail, and the time of each login and logout of an user to an e-mail service, the date, time, identifier and public IP address of the subscriber. In order to do so, the providers of telecommunication services were obliged to “make available all facilities necessary for monitoring communications and for providing information on data in communications”; due to the cost of such an undertaking, the obligation to retain data was restricted to the operators of public communication networks, the private (and therefore generally smaller) ones being left out in order to keep them from being forced to bear disproportionate cost. Public security Authorities and Tribunals could access the stored data upon a court-approved order, issued by the public prosecutor’s office pursuant to Article 135.2a of the Code of Criminal Procedure. Upon receiving the access request from the Court and having checked its validity, the providers had to extract the indicated data without delay, encrypt them, and transmit them to the requesting authority, making sure at the same time to store the request’s log data (that is to say, to keep trace of the received request and of the actions that followed it) for a period of three years and to transmit them to the Federal Minister of Justice (that in its turn has the duty to report them to the EU Commission and the Austrian National Council), and to the Austrian Data Protection Commission and Data Protection Council (established and disciplined by Sect. 7 of the cited *Datenschutzgesetz* 2000), charged with supervising the protection of data, granting their security and monitoring the compliance to the cited provisions. To guarantee the security of the stored data, the providers had to take the appropriate technical measures to ensure that they could “be accessed only by authorized persons with due adherence to the principle of dual control”; moreover, the storage had to be performed in such a way that a distinction could in any moment be made among the different data, and that the “unlawful destruction, accidental loss or unlawful storage, processing, access and disclosure” of the same were prevented. Albeit carefully formulated, and involving society and the interested organization to construct a comprehensive system of guarantees and control over the retention of communication data, and declaredly adopting the lightest of the measures prescribed by the Directive, it nevertheless led to profound public criticism after its coming into force in April 2012.

⁶⁴ Application G 47/12.

hand, the normative provisions were deprived of part of their effectiveness by the fact that they were actually easy to circumvent, through the simple use of prepaid mobile phone cards; and, on the other hand that, as a consequence, the information extrapolated from the retained data was not to be considered fully reliable. The scope of the DRD was hence not correctly fulfilled by the Austrian law, and a disproportionate sacrifice of and interference with fundamental rights was imposed. This sacrifice, the Appellant further alleged, was imposed with no certainty of a practical return, since no evaluation of the objective need (or the possible success) of the system of data retention for criminal investigations had ever been carried out. Last but not least, from an EU law perspective, the Government of Carinthia sustained that an individual right to data protection, of which the Directive and its transposition laws were clearly in breach, was to be acknowledged by the EU. For this reason, the Appellant was asking for the annulment of a list of provisions of the TKG 2003.

The second Appellant was Mr. Michael Seitlinger, an employee who had filed an individual complaint⁶⁵ under Article 140(1) of the Austrian Constitution, arguing that the unconstitutional dispositions contained in the TKG had brought about the infringement of his rights (namely Article 8 of the CFR), since the storage of his traffic data not only lacked a reasonable cause and exceeded the billing necessities, but was also against his personal will. Similarly to what was alleged by the Government of Carinthia, Mr. Seitlinger lamented that the analysis of the stored data enabled the deduction of information on “the behavior, habits and whereabouts of the users of communications services and therefore to draw up ‘movement profiles.’”⁶⁶ Furthermore, since operators of non-public communications services and networks (such as corporate networks) were not subject to the obligation of storing data, there was still a chance for operators of public internet access services to allow for an anonymous use of their services; likewise, operators of public telephone services were able to offer prepaid cards without having to record user data. Therefore, the Applicant claimed the Directive was in breach of Articles 7, 8, 11, and 20 of the CFR; furthermore, he argued, the Austrian legislator was not under an obligation to implement the Directive, since the latter lacked any direct legal effects, and a primacy of application of these rules over Austrian constitutional law was not to be assumed. For these reasons, Mr. Seitlinger asked the *Verfassungsgerichtshof* to bring the issue before the CJEU, seeking a preliminary ruling according to Article 267 TFEU, in order to ascertain the validity of the Directive.

The last claim⁶⁷ was filed via a series of petitions, through which over 11,000 applicants, as subscribers of the telecommunication services interested by the data retention provisions,

⁶⁵ Application G 59/12.

⁶⁶ *Id.*

⁶⁷ Applications G 62,70, 71/12.

lamented that the preventive blanket data storage, in absence of any concrete suspicion, was to be considered disproportionate (also in consideration of the lack of due remedies), and determined a violation of their rights under Articles 7 and 8 CFR and Article 1 of the *Data Protection Act*, 2000. The Applicants consequently asked for the annulment of Article 102a of the TKG 2003.

In expressing its concerns over the validity of the DRD, recognizing its doubts on the interpretation of the provisions of the CFR recalled by the Appellants, and considering the two issues of fundamental relevance for its decision on the complaints, with its sentence of 28 November 2012 the Austrian Constitutional Court decided to suspend its proceedings and submit a request for a preliminary ruling to the CJEU.⁶⁸

The fall of the third “tile” of this complex judicial domino was determined by the initiation before the Constitutional Court of Slovenia,⁶⁹ on 5 March 2013, of a constitutionality review proceeding on the national law provisions implementing the DRD,⁷⁰ promoted by

⁶⁸ *Request of a preliminary ruling from the Verfassungsgerichtshof (Austria)*, Case C-594/12 of 19 December 2012.

⁶⁹ As is known, Slovenia is a parliamentary democratic republic; it became an independent State after the disintegration of Yugoslavia in 1991; on 23 December 1991, after the plebiscite on the sovereignty and independence of Slovenia of 23 December 1990, the Constitution of the Republic was adopted. Slovenia has a bicameral Parliament, composed of the National Assembly and the National Council. The Slovenian Parliament is characterized by an asymmetric duality, because the Chambers do not have equal powers. The National Assembly (*Državni zbor*) is comprised of ninety deputies, elected for a four-year term, with one representative of each of the Hungarian and Italian minorities. The National Assembly exercises legislative power, voting, and monitoring functions. The National Council (*Državni svet*) is the upper house of the Slovenian Parliament and represents social, economic, professional, and local interests. The President of the Republic is the head of State and is elected by the people for a five year term. It represents the unity of the nation and is the head of the armed forces. It is the head of government and holds the executive power with the latter. The Government consists of the President and the Ministers. As regards their responsibilities, the Government and individual Ministers are autonomous and responsible to the National Assembly. As regards the Slovenian judicial system, the unified system of courts consists of courts with general jurisdiction and courts with specialized jurisdiction; they all act in accordance with the principles of constitutionality, independence and the rule of law. Courts with general jurisdiction include forty-four district, eleven regional, four higher courts, and the Supreme Court; four labor courts and social court- that rule on labor-related and social insurance disputes- and the Administrative Court, which provides legal protection in administrative affairs and has the status of a higher court, composed the specialized courts. A special place in the justice system is held by State prosecution, as it is an independent authority, but also part of the executive branch of power. The National Assembly appoints the General State Prosecutor. The Constitutional Court represents the highest authority with regard to the protection of constitutionality, legality, human rights, and basic freedoms. The National Assembly, following nominations from the President of the Republic, appoints the judges. Nine judges are elected for a period of nine years, with no possibility of a further term. The offices of constitutional judge and judges of specialized and general courts are incompatible with other offices in state bodies. The Court judges the conformity of laws with respect to the Constitution and the conformity of laws and regulations with respect to international treaties ratified and to the principles of international law.

⁷⁰ Slovenia implemented the DRD in 2007 with regard to telephony data and in 2009 with regard to data relating to the Internet, transposing the provisions in its Act on Electronic Communications that was amended in 2012, with the new provisions entering into force in January 2013. Such a new set of norms imposed on operators the obligation to preventively retain the traffic and location data of all users (having no regard to whether the users

Slovenian Information Commissioner.⁷¹ In his application,⁷² the Commissioner requested the Court to verify the constitutionality of Articles 162 to 169 of the *Electronic Communications Act*, claiming that, besides being in breach of the principle of proportionality, their disposing the preventive retention of data evidently entailed interferences with the rights to the protection of personal data (Article 38 of the Slovenian Constitution) and communication privacy (Article 37), and consequently also with the right to freedom of movement (Article 32), the right to freedom of expression (Article 39), and with the principle of the presumption of innocence (Article 27).

Although not excluding its competence to rule on the constitutionality of laws implementing EU sources,⁷³ in its ordinance of 26 September 2013 the Court stated that the question of the constitutionality of the Slovenian law depended directly on the compatibility of the DRD with Articles 7 and 8 of the CFR, corresponding to Articles 37 and 38 of the Slovenian Constitution. However, as stated by the same Court of Slovenia, “on the basis of point b) of the first paragraph of Article 267 TFEU), the Court of Justice of the European Union has exclusive competence to review the validity of the Directive.”⁷⁴

The conditions to make a preliminary reference to the CJEU were therefore all recurring; however, considering that the appeals for the preliminary references raised by the Irish and Austrian Courts in relation to the Directive were already pending before it, the Slovenian Court decided to simply suspend its proceedings and await the decision of the CJEU.⁷⁵

In this sense, the Court of Slovenia took a particularly relevant further step which was important not only in terms of the evolution of the relations between EU law and domestic

themselves gave the impetus for this interference with their rights) for a duration of fourteen months for data regarding publicly available telephone services and of 8 months for other kinds of data.

⁷¹ An autonomous and independent body, instituted on 31 December 2005 on the basis of the *Information Commissioner Act (ZInfP)*, entitled of the supervision over the protection of personal data and the access to public information. The Commissioner is appointed by the National Assembly at the proposal of the President of the Republic. For more references on the point, see the Commissioner’s institutional website, www.ip-rs.si/?id=195.

⁷² The text of the complaint can be found in Slovenian at www.ip-rs.si/fileadmin/user_upload/Pdf/ocene_ustavnosti/ZEKom__Zahteva_za_oceno_ustavnosti_data_retention_.pdf

⁷³ Slovenian Constitutional Court, No. U-I-113/04, Judgment of 7 February 2007, Official Gazette RS No. 16/07 and OdlUS XVI, 16; No. U-I-37/10, Judgment of 18 April 2013, Official Gazette RS No. 39/13.

⁷⁴ Full text of the ordinance available at www.us-rs.si/media/u-i-65-13.-.order.pdf.

⁷⁵ “The Constitutional Court cannot adopt a decision on the matter at issue until the CJEU, which has exclusive competence to assess the validity of the above-mentioned Directive, decides on its validity. Consequently, the Constitutional Court stayed the proceedings for the assessment of the constitutionality of the challenged provisions of the ECA-1 until the CJEU adopts a decision in the above-mentioned cases.” Slovenian Constitutional Court, No. U-I-37/10.

law, but also in terms of the dialogue between Courts, both on a vertical base (CJEU—national Supreme Courts) and horizontally (as for the dialogue between Member States' Courts). This is one of the issues of greatest relevance in the context of EU law, and it is perfectly mirrored by—and also has to be connected to—another aspect. It must be underlined that the remaining two of the three recalled national Courts (the Irish and Austrian ones) not only submitted their preliminary reference requests to the CJEU in order to obtain clarification on the compatibility of the Directive with the European system of protection of rights, but also manifested their need for some guidance about the interpretation of the Treaties, in order to properly adjudicate the cases brought to their attention. The range of the interpretative questions addressed by the CJEU on this occasion encompasses several areas of EU law—but unfortunately, as it is clarified in the following, it was largely left unanswered by the CJEU—showing another shade of the dialogic approach that characterized the national courts involved in the Data Retention case.

Furthermore, the questioning of the DRD has opened an interesting confrontation on another major front. The three cases presented before the Irish, Austrian, and Slovenian Courts cast a light on the likely infringement of a wide set of fundamental rights protected both at the national and the EU level. Among them, it is possible to discern a common core of rights that have a parametrical value, and a series of “ancillary” rights that not all the Applicants and the Courts decided to call into question.

The Irish High Court was the one claiming the violation of the most rights, namely, as recalled, the right to privacy (Articles 7 CFR, 8 ECHR), to protection of personal data (Article 8 CFR), to freedom of expression (Articles 11 CFR, 10 ECHR), to free movement (enshrined in Article 21 TFEU), and to good administration (Article 41 CFR). It also questioned the infringement of the proportionality principle (Article 5(4) TEU) and referred one question about the interpretation of the Treaties.

The *Verfassungsgerichtshof's* submission to the CJEU meanwhile showed a more “essential” approach. This Court limited its request to checking the compliance of the Directive with the rights to privacy, protection of personal data, and freedom of expression, deciding in parallel to address to the CJEU a detailed series of questions of interpretative nature.

A hybrid stance was finally that of the Slovenian Court, which, while refraining from issuing a preliminary reference to the CJEU, basically limited its interest to privacy and protection of personal data, asserting that they represented the actual core of the Data Retention case, even though it had received complaints lamenting the infringement of a wider set of rights (including those to freedom of expression, freedom of movement, and presumption of innocence).

Notwithstanding these different approaches, the three courts, in their reasoning, adopted a similar position in recognizing a predominant importance to the infringement of the rights to privacy and protection of personal data. The courts concentrated their focus and concerns on these two rights, using the alleged violation of the others as an ancillary argumentation aimed at confirming the thesis of a disproportionate sacrifice imposed by the Directive's dispositions on the exercise of fundamental rights. In other words, the three Courts highlighted how the need to balance such rights with the collective right to security (in the framework of countering terrorism) had brought about a debatable normative solution, including in terms of the application of the principle of proportionality.

The following parts of the article will therefore be devoted to an analysis of the Courts' positions on two key issues: the Directive's impact on privacy and protection of personal data (with its supposed overstretching of the contents of the principle of proportionality), and the interpretation of the Treaties.

1. Endangered Rights? The Rights to Privacy and to Protection of Personal Data as Alleged Standards for Review of the Data Retention Directive

The recent judgment of the CJEU on data retention is of crucial importance, as it recognizes that the protection of privacy plays a strategic role with respect to any other right or freedom of the person.⁷⁶

As has already been said, the Irish High Court decided to make a reference for a preliminary ruling to the CJEU on the compatibility of the DRD with fundamental rights. The CJEU was asked to decide on the compatibility of the Directive with the right to privacy, as protected in the EU Charter and in the ECHR, and with the right to the protection of personal data, as enshrined in the EU Charter. A few months later, a similar decision was issued by the Austrian Constitutional Court, which sought a preliminary ruling on the compatibility of data retention with, among other rights, the right to privacy and the right to data protection.

With respect to the fundamental right to privacy, it is at the center of the arguments presented in the orders for a preliminary reference by the Irish High Court and the Austrian Constitutional Court. Furthermore, it can also be found in the order of the Slovenian Constitutional Court, in the more specific form of the right to privacy of communication and information.

⁷⁶ Oscar Prevosti, *Tutela della privacy come presupposto della libertà: due recenti sentenze della Corte di Giustizia dell'Unione Europea a difesa della riservatezza individuale*, 3 OSSERVATORIO COSTITUZIONALE (2014), <http://www.osservatorioaic.it/>.

As was noted earlier, in the immediate aftermath of the entry into force of the DRD into the Austrian legal order, several complaints were filed before the *Verfassungsgerichtshof*, asking the Court to verify the constitutionality of certain provisions of the law transposing the DRD. The Court, in recognition of the similarity of the three complaints that were filed before it, decided to join the three applications together.

Before pronouncing on the complaints, and in the light of the importance of the issues raised, the Constitutional Court decided to suspend its proceedings and to submit a request for a preliminary ruling to the CJEU. It asked whether Articles 3 to 9 of the Directive were to be considered compatible with the rights to respect for private and family life (Article 7 CFR), to protection of personal data (Article 8 CFR), and to freedom of expression (Article 11 CFR). The importance of the right to protection of personal data in the Austrian legal order is strongly emphasized by the Constitutional Court in its reasoning.⁷⁷ The Federal Act on the Protection of Personal Data, in fact, establishes in Article 1 that “restrictions to the right to secrecy are admissible only to safeguard an overwhelmingly justified interest of another person, and in the case of interventions of state authorities only on the basis of the law, if necessary for the reasons set out in Art. 8 para. 2 ECHR.”⁷⁸ The provision stipulates that “even in the case of permitted restrictions, any intervention with the fundamental right shall be carried out using the least intrusive of all effective methods.”⁷⁹

The Austrian Constitutional Court also underlined that the main concerns about the Directive concerned the lack of an objective cause prescribed for the retention period and the fact that the decision about the length of this period remained at the discretion of Member States.⁸⁰

Following the Court’s reasoning, concerns also derived from the scope of the retention activity “as to its conformity with the Charter of Fundamental Rights.” In particular, the retention of communication data:

⁷⁷ The Court refers to Art. 1 of the *Datenschutzgesetz*.

⁷⁸ See the English translation of the *Verfassungsgerichtshof*’s decision at https://www.vfgh.gv.at/cms/vfghsite/attachments/1/4/5/CH0007/CMS1363699922389/vorlage_vorratsdatenspeicherung_english.pdf

⁷⁹ *Id.*

⁸⁰ “[...] concerns prevail regarding the retention of data without cause as such and the related consequences. The applicants’ concerns are largely based on the high degree of intervention of data retention, and that for several reasons. First, the directive sets out a retention period ranging from six months to two years. This timeframe is to be assessed in consideration of the data volume to be stored. It is the preliminary view of the Constitutional Court that this retention period gives rise to serious concerns.” *Id.* at 26.

almost exclusively affects persons who do not give cause for their data being stored. At the same time they will necessarily be subject to a higher risk, regardless of any concrete modalities of data use defined in national law, namely that the authorities will record their data, become aware of their content, inform themselves of the private behavior of such persons and then further use this data for other purposes.⁸¹

Furthermore, the Court emphasized the high risk of abuse that could arise from the huge number of people that could have access to the stored data, “given the multitude of telecommunication service providers which exists.” These are the reasons why the Austrian Constitutional Court considered the intervention to be disproportionate, underlining the importance of the right to the protection of personal data in the Austrian legal order.

In the Irish case too, as has already been noted, the request to the Court regarded the compatibility of the DRD with the CFR, with special reference to Articles 7, 8, and 11, and also with Article 41, concerning the right to good administration. The text of the judgment contains a detailed analysis of the nature of the rights claimed by the Plaintiff. More specifically, the Plaintiff argued that the retention of data conflicted with the right to privacy, the right to family life, the right to communicate (and the right to privileged communication), and the right to travel (and the right to travel confidentially).

In its reasoning on the fundamental right to privacy, the Irish High Court showed firstly that the right to privacy can result from a number of sources; in the Irish context, as underlined in the *Kennedy v. Ireland* case,⁸² “it is well established that a person has a constitutional right to privacy.”⁸³ Given the Irish context, in which the sequence of events that led to the preliminary reference to the CJEU was developed and on which we focused earlier in this text, the Irish judge, in its reasoning, put more emphasis on the right to privacy as regards the business transactions. After stating the existence of the right to privacy in business transactions, the Court affirmed that “it is therefore clear that even though it may be accepted that there is a right to privacy in business transactions, that right may be limited by the exigencies of the common good, with the threshold for such interference being relative and being case or circumstance specific.”⁸⁴ However, as pointed out in the text,

⁸¹ *Id.* at 27.

⁸² Irish High Court, *Kennedy v. Ireland* [1987] I.R. 587; [1988] I.L.R.M. 472.

⁸³ Irish High Court, *Digital Rights Ireland Ltd.*

⁸⁴ *Id.*

given the actual nature of the corporate bodies, the mentioned right to privacy is necessarily narrower than that applicable to natural persons. The court anyway highlights that, even though companies as legal entities are to be considered as separated from their members as individuals, the interests of legal persons must as well find forms of protection by courts.

Coming to EU law, the High Court referred to Articles 7 and 8 CFR and Article 8 ECHR, along with some of the cases⁸⁵ in which the CJEU had already defined corporate privacy protection as a fundamental principle for the Community. By grounding its reasoning also on the case law of the ECtHR,⁸⁶ the Irish judge highlighted the importance of the recognition of the right to privacy in business by both Irish law and EU law, and placed privacy with regards to personal data inside the cases provided for in Article 8 CFR. This led the Court to admit the *locus standi* of the Plaintiff, alleging the interference with its right to privacy. Still arguing on the right to communicate, and recalling the *Copland v. UK*⁸⁷ case, in which “[...] the Court considers that the collection and storage of personal information relating to the applicant’s telephone, as well as her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8”,⁸⁸ the Irish judge reaffirmed that the storage of communication data, even without these being used in any way, constitutes an important interference with Article 8 ECHR, and that the retention of the data violates the right to privacy as set out in Article 8 CFR. The Judge therefore welcomed again the Plaintiff’s *locus standi*, although “[...] that is not to say that such interference is not legitimately justified or that the Plaintiff would be ultimately successful in its action.”⁸⁹

As stated in the judgment, the rights whose violation was claimed and the legislation consequently called into question were to be considered “of great importance to the public at large,” demonstrating the existence of a “significant element of public interest concern with regards to the retention of personal telecommunication data, and how this could affect persons’ right of privacy and communication.”⁹⁰

⁸⁵ Joined Cases C-46/87 and C-227/88, *Hoechst AG v. Commission of the European Communities*, 1989 E.C.R.2859; Case 85/87 *Dow Benelux NV v. Commission*, 1989 E.C.R. 3137; Joined cases 97/87, 98/87 and 99/87, *Dow Chemical Iberica SA v. Commission of the European Communities*, 1989 E.C.R. 3165.

⁸⁶ The judge refers to Eur. Court H.R., *Niemietz v. Germany*, Judgment of 16 December 1992, Series A, No. 251-B, and Eur. Court H.R., *Société Colas Est and Others v. France*, Judgment of 16 April 2002, Reports of Judgments and Decisions, 2002-III.

⁸⁷ Eur. Court H.R., *Copland v. the United Kingdom*, Judgment of 3 April 2007, Reports of Judgments and Decisions, 2007-I.

⁸⁸ Irish High Court, *Digital Rights Ireland Ltd.*

⁸⁹ *Id.*

⁹⁰ *Id.*

Finally, the importance and relevance of the right to privacy and protection of personal data also emerges in the aforementioned Slovenian case, although the Constitutional Court did not engage in an open dialogue with the CJEU. According to the Slovenian Court, the alleged unconstitutionality referred above all to the rights to communication (Article 37 of the Constitution) and information privacy (Article 38). The interference with the right to privacy was also underlined, in the opinion of the Court, by the argument that due to the interference with the recalled rights to communication and information privacy, other important rights, like the right to freedom of expression, the right to freedom of movement, and the presumption of innocence, were jeopardized. The Court stated that the protection of fundamental rights enshrined in Articles 37 and 38 of the Slovenian Constitution is equivalent to that of Articles 7 and 8 CFR and that, by consequence, it must be established whether the provisions of the DRD are consistent with these two articles of the Charter.

Pending the case before the CJEU, the position taken by the Slovenian Constitutional Court to suspend the national proceeding shows deference towards the CJEU and an explicit acknowledgment of its jurisdiction. It can also be seen as a first step towards, or a conduct anticipating, the real dialogue eventually established with the CJEU⁹¹ on the occasion of the first preliminary reference ever sent by the Slovenian Constitutional Court on November 2014, in the case of the Commission's Banking Communication.⁹²

The decision therefore shows how, within national frameworks, there is a growing awareness among judges of the necessity and importance of collaboration both among themselves and with the CJEU. This collaboration is important in ensuring the more effective functioning of the EU, especially in very sensitive subjects, such as that governed by the DRD.

The analysis thus far conducted of the Austrian, Irish, and Slovenian cases highlights how deeply the measures provided for in the DRD affect the privacy of individuals, thus in part anticipating some of the contents of the important decision of the CJEU in April 2014.

⁹¹ On the theme of the deferential dialogue between Courts in the EU, see Ioana Pelin-Raducu, *Deferential dialogues between the Court of Justice and domestic courts regarding the compatibility of the EU Data Retention Directive with (higher?) national fundamental rights standards*, available at <http://www.on-federalism.eu/index.php/component/content/article/166-deferential-dialogues-between-the-court-of-justice-and-domestic-courts-regarding-the-compatibility-of-the-eu-data-retention-directive-with-higher-national-fundamental-rights-standards> (2014).

⁹² Slovenian Constitutional Court, No. U-I-295/13, Judgment of 6 November 2014, Official Gazette RS No. 82/2014.

II. Issues About the Interpretation of the EU Treaties

As to the interpretation of the Treaties, the requests submitted by the Irish and Austrian Courts significantly differ one from the other in terms of their nature and legal basis, but are similar in that both recall landmark principles in the evolution of EU law.

The Irish High Court focused on the role accorded by the Treaties to national courts, asking “to what extent,” in the light of the principle of loyal cooperation stated in Article 4(3) TEU, such courts can be considered to be compelled to “inquire into, and assess, the compatibility of the national implementing measures for Directive 2006/24 with the protections afforded by the Charter, including Article 7 thereof (as informed by art. 8 of the ECHR).” As said, because of the entry into force of the CFR in 2009, the Charter now has a fully prescriptive nature and falls within the jurisdiction of the CJEU. Hence, from any legal point of view, the CJEU is now formally the “natural” judge entitled to watch over the respect of the EU’s normative framework also when it comes to the rights protected by the CFR. At the same time, and notwithstanding this, the principle of loyal cooperation imposes on Member States the duty to “take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union,” facilitating “the achievement of the Union’s tasks and refrain[ing] from any measure which could jeopardize the attainment of the Union’s objectives.” This leaves room for an ambiguous situation in which national courts seem to be bound by the Treaties to exercise a competence the Treaties themselves have (from 2009, for what concerns rights) conferred upon the CJEU. A solution to such ambiguity has been provided by the consolidation of the use of the preliminary reference procedure by national courts, which has started to establish a concrete mechanism of coordination and mutual support between national courts and the CJEU. As the latter itself has made clear in well-established case law,⁹³ in fact, “when requested to give a preliminary ruling, [the CJEU] must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the court ensures.”

It is in this context that the Irish Court’s reference must be considered.⁹⁴ The interpretative issue submitted to the CJEU appears to us not to be particularly significant. Although it was

⁹³ See Case C-260/89, *ERT v. DEP*, 1991 E.C.R. I-2925; Case C-299/95, *Friedrich Kremzow v. Republik Österreich*, 1997 E.C.R. I-2629; Case C-309/96, *Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*, 1997 E.C.R. I-7493; Case C-94/00, *Roquette Frères SA v. Directeur general de la concurrence, de la consommation et de la repression des frauds*, and *Commission of the European Communities*, 2002 E.C.R. I-9011; Case C-349/07, *Sopropé - Organizações de Calçado Lda v. Fazenda Pública*, 2008 E.C.R. I-10369; Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 2011 E.C.R. I-11315; Case C-27/11, *Anton Vinkov v. Nachalnik Administrativno-nakazatelna deynost*, 2012 E.C.R. 0000; and Case C-617/10, *Åklagaren v. Åkerberg Fransson*, 2013 E.C.R. 0000.

⁹⁴ The fact that, as said, the questions to be addressed to the CJEU were by will of the Irish High Court not defined in its May 2010 decision, but entrusted to a subsequent public consultation “deprives” us of a powerful

specifically framed in the scope of the principle of loyal cooperation, apparently aiming at receiving clarifications on the implication of it on the national courts' activity, the question had substantially already been answered in general terms by the European case law. This case law confirmed over time the role of national jurisdictions in granting the respect—and, ultimately, the unity and supremacy—of EU law, and set out a series of operative reference principles for performing such an activity in the rights domain.

As to the interpretative questions submitted by the Austrian Constitutional Court, instead, it was first of all asked whether, in order to assess the permissibility of interferences, Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data)⁹⁵ and Regulation (EC) 45/2001 (on the protection of individuals with regard to the processing of personal data by the Community Institutions and bodies and on the free movement of such data)⁹⁶ were to be considered on an equal footing with the provisions of Article 8(2) and Article 52(1) of the Charter, in the light of the explanations on Article 8 CFR.

It furthermore asked what is the relation between “Union law” referred to in Article 52(3) last sentence of the Charter and the Data Protection Directive, and—given that Directive 95/46/EC and Regulation (EC) 45/2001 lay down conditions and limitations on exercising the right to data protection set out in the Charter—whether changes arising from later secondary law should be considered when interpreting Article 8 of the Charter.

In the Austrian legal order, besides, a secondary law provision (that is to say, Article 1 DSG 2000) actually guarantees the fundamental right to data protection to a wider extent than the wording of Article 8 CFR, also drawing narrower conditions for the limitation of such right. Consequently, the *Verfassungsgerichtshof* asked the CJEU to clarify whether, in consideration of Article 52(4) of the Charter, the principle of providing more extensive protection laid down in Article 53 of the Charter meant that the relevant limits for permissible restrictions by secondary law should be drawn more narrowly. In other words, it asked whether the rights recognized by national secondary legislation can take precedence over the limitations that result from the CFR when they afford a wider kind of protection than that which is granted in the CFR. In particular, the Austrian Constitutional Court observed that:

while no one single fundamental right in the
constitution of one individual Member State can set the

instrument for understanding the Court's intentions, as basically no reasoning of it is provided in the order of referral.

⁹⁵ EC Directive 95/46 of 24 October 1995, O.J. 1995 L 281/31.

⁹⁶ EC Regulation 45/2001 of 18 December 2000, O.J. 2001 L 8/1.

standard and remove the unlimited applicability of the fundamental right enshrined in the Charter (cf. SA Bot, 02/10/2012, case C-399/11, *Melloni*, para. 96 et. sequ.), if a comparative legal study of the constitutions of the Member States revealed that they provided a more extensive protection than that of the Charter of Fundamental Rights, such fact may well be relevant and compel Union courts to interpret the said guarantee as laid down in the Charter of Fundamental Rights in such a way that the fundamental rights standard of the Charter will in no case be lower than that afforded by the constitutions of the Member States.⁹⁷

This assumption found a confirmation in Article 52(4) of the CFR, which explicitly declares that “the fundamental rights which are recognized in the Charter as they result from the constitutional traditions common to the Member States shall be interpreted in harmony with these traditions (compare also Art[icle] 6, para[graph] 3 TEU).” Not every Member State’s constitution contains a separate right to data protection, the Court observed. Yet a general assumption could be made—and relying also on the case law of the Constitutional and Supreme Courts of the Member States—that there was actually room to affirm that a fundamental right to data protection was in effect a part of the constitutional traditions of the Member States, but also of human rights and fundamental freedoms within the meaning of Article 53 of the CFR, recognized by the Constitutions of the Member States.

The last question submitted by the Austrian Court was whether, considering Article 52(3) of the Charter, paragraph 5 of the Preamble, and the explanations on Article 7 of the Charter (according to which the rights guaranteed therein are the same as those laid down in Article 8 ECHR), it was possible that the case law of the ECtHR on Article 8 ECHR may influence the interpretation of Article 8 CFR. This question was aimed at clearing any doubt over the role of the jurisprudence of the ECtHR on Article 8 ECHR (that entails several rulings on data protection), and stemmed from the ambiguity in the explanations of Article 7 CFR that left some perplexities as to whether the case law on Article 8 ECHR could be referred to in interpreting Article 8 CFR.

It is evident how the issues raised by the *Verfassungsgerichtshof* touch upon a series of sensitive themes, not yet stabilized following the entry into force of the Lisbon Treaty. Also in this case, as anticipated, the CJEU did not provide an explicit answer to the complex questions raised. Nevertheless, its reasoning, in solving the doubts over the compatibility of the DRD with the CFR, provided some useful tools for addressing the issues.

⁹⁷ Austrian Constitutional Court (*Verfassungsgerichtshof*), Joined Cases G 47/12–11, G 59/12–10, G 62, 70, 71/12–11, Judgment of 28 November 2012, para. 50.

D. The Data Retention Directive Before the Court of Justice of the European Union

It took almost two years for the CJEU to come to what has immediately been recognized as a landmark decision for the EU. Before the Grand Chamber delivered its judgment (on 8 April 2014), in December 2013 Advocate General Pedro Cruz Villalón had issued his Opinion on the joint preliminary reference requests. Notwithstanding the legitimacy of its final objective of making certain data available for the activities related to the countering of serious crime, the Advocate General affirmed that the whole DRD was to be considered incompatible with the conditions set forth by Article 52(1) CFR for the limitations to the exercise of rights and freedoms recognized by the Charter. This was mainly for three reasons.

First, in prescribing providers to collect and retain data, the Directive's content determined a serious interference with the fundamental right to privacy, since from the said data and their use one could easily reconstruct a detailed profile of each individual's private life and identity. Moreover, the risk of unlawful and privacy-detrimental abuse of such data was enhanced by the circumstances that they were not to be retained by public authorities (nor under the control of them), but by private entities, that in addition had no obligation to store them within the territory of the EU, with the consequential possibility of their subjection to different legal regimes than those set by the EU. Besides, considering the described serious interference with a fundamental right, in assigning the task of regulating access to – and use of – the collected and stored data to the Member States, the Directive failed to respect the condition that any limitation to the rights enshrined in the Charter must be provided for by law. Furthermore, the limitations to fundamental rights that were prescribed in the Directive (namely, as an effect of its imposing the storage of personal data) were not backed up by the enunciation of the fundamental principles under which the minimum guarantees for the access to data and their use should have been set. An explicit definition of those principles, the Advocate General argued, would have represented a necessary assumption by the EU of its "share of responsibility" in the regulation of such a delicate matter, as it would at least have contributed to the "definition, establishment, application and review of observance of the necessary guarantees," permitting to "assess the scope of what the interference with the fundamental rights entails in practical terms and which may, therefore, determine whether or not the interference is constitutionally acceptable."

A second main point in the Advocate General's opinion was that the Directive did not fulfill the requirements set by the principle of proportionality (as set out in both the CFR and the TEU). There was in fact no sufficient justification, Cruz Villalón declared, for the maximum data storage period being set at two years, a shorter period of one year or less being perfectly capable of guaranteeing the same results. Article 12 of the Directive, in fact, offers Member States the safeguard-possibility of extending the prescribed term in case of particular circumstances, submitting a related request to the European Commission.

Finally, and considering the complex consequences of a declaration of invalidity in the EU legislation field and, in parallel, the generally moderate approach of the Member States in implementing the Directive, that partly mitigated the serious interference of the latter with fundamental rights, the Advocate General recommended the effects of the declaration of invalidity to be suspended until the approval by the EU legislature—“within a reasonable period”—of new legislative measures aimed at addressing the identified flaws of the DRD.

Absolutely in line with the Opinion of the Advocate General was the judgment of the CJEU declaring the DRD invalid. The Court’s reasoning starts with an assessment of the Directive’s concrete degree of interference with Articles 7 and 8 CFR. The Court then made use of the proportionality test aimed at verifying whether any justification could be validly recognized for the derogations disposed by the Directive to the system of protection of the rights to privacy and protection of data established by the measures contained in both the CFR and the relevant EU legislation (namely, the recalled Directives 95/46 and 2002/58).⁹⁸

As to the first of these aspects, the Court preliminarily underlined that as a general rule, and according to its own case law on the matter,⁹⁹ in order to evaluate whether the right to privacy could suffer limitations or infringements, the “sensitiveness” of the private information involved is not relevant, nor is the material occurrence of a damage or inconvenience. The threshold for the assessment of a legitimate interference is therefore relatively low, since it is sufficient to prove that a normative measure is potentially detrimental in terms of rights protection.¹⁰⁰ Under this preliminary condition, the CJEU considered that the Directive determines a “wide-ranging” and “particularly serious”¹⁰¹ interference with the rights to privacy and protection of personal data. On the one hand, in fact, the provisions of Articles 3 and 6 of the DRD, by imposing over the providers of communication services the obligation to retain data regarding an individual’s private life and communications, are so to put a limit to a person’s right to private life as established by Article 7 of the Charter. Likewise the same must be said for the access of the competent national authorities to the stored data, according to Articles 4 and 8 of the Directive. Such an activity, the Court argues, has already been established as being detrimental for the right to privacy by a vast case law of the ECtHR (based on Article 8 of the Convention).¹⁰²

⁹⁸ As recalled, the two Directives entailed the confidentiality of communication of traffic data and prescribed upon service providers the duty to store such data as long as they are necessary for billing purposes, and to cancel them, or at least make them anonymous, when they are no longer needed for the communication transmission.

⁹⁹ Joined Cases C–465/00, C–138/01 and C–139/01 *Rechnungshof v. Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauerermann v. Österreichischer Rundfunk*, 2003 E.C.R. I–4989.

¹⁰⁰ On the point, see also Boehm & Cole, *supra* note 5, at 30.

¹⁰¹ Joined Cases C–293/12 and C–594/12, *Digital Rights Ireland, Seitlinger and Others*, para. 37 (Apr. 8, 2014), <http://curia.europa.eu/>.

Furthermore, the interference of the Directive with the right to protection of personal data (Article 8 CFR) is confirmed by the Directive's rule on processing personal data.

The width and seriousness of such a twofold interference are for the Court determined by the circumstance that, knowing their data were stored and processed without their prior information and consent, individuals are likely to experience the unpleasant feeling of being subject to forms of pervasive and constant surveillance, which may adversely affect their private lives. The CJEU recalled the Advocate General's analysis on the point, based on the assumption that the huge amount of retained data, their long-term preemptive storage, and the exponential growth and diffusion of electronic communication acted altogether as potential amplifiers of the threat of profiling and scrutiny over private lives that individuals could feel.

Once it had assessed the interference with the recalled rights, the Court considered whether it could be justified in the light of two prescriptions contained in Article 52(1) CFR, that, in addition to establishing that any limitation to fundamental rights must be provided for by law, states that those limitations must also respect the essence of rights¹⁰³ and the principle of proportionality. As is well known, this principle entails that the limiting measures have to be strictly necessary, and have to genuinely meet objectives of general interest recognized by the EU or the need to protect the rights and freedoms of others.

Under the essence of rights analysis, the CJEU stated that, notwithstanding the deep interference with both the right to privacy and to protection of personal data, the Directive does not adversely affect them, respectively because it prohibits the acquisition of the content of electronic communications (as per Article 1(2)) and puts upon Member States the duty to draw a set of principles of data protection and security that providers must comply with. This allows a proper prevention, with the due technical and organizational precautions, of the accidental or unlawful destruction, loss, or alteration of the stored data. The fact that the essence of the rights at stake is not impaired by the DRD provisions does not restrain the Court from expressing concerns about the extent of their interference. Even though the Directive sets rules in order to guarantee the security of data, whose content cannot in any way be stored by providers, such rules are not able to provide an effective degree of protection against abuse, unlawful access and use, and in-

¹⁰² The reference is to cases Eur. Court H.R., *Leander v. Sweden*, Judgment of 26 March 1987, Series A, No. 116, para. 48; Eur. Court H.R., *Rotaru v. Romania* at para. 46; Eur. Court H.R., *Weber and Saravia v. Germany*, Judgment of 29 June 2006, Reports of Judgments and Decisions 2006-XI, para. 79; *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12 at para. 35.

¹⁰³ The aim underlying the "essence of rights" criterion is of preserving the "hard core" (the essence, indeed) of a fundamental right, so as to guarantee that, even when limited by a necessary measure, it is not deprived of its whole content and meaning.

depth information on the content of individuals' communication, and their private lives can in any case be deduced from the lawfully stored data.¹⁰⁴

The DRD is then tested to verify its pursuit of an objective of general interest. Tracing a distinction already highlighted by the Advocate General, the CJEU affirmed that beyond the formally stated objective of harmonizing Member States' legislation in the field of data retention (stated in its Article 1), the Directive is conceived to attain the broader purpose (its "material objective," in the Court's wording) of combating terrorism, since its measures are aimed at making data available for the necessary investigation, detection, and prosecution of serious crimes.¹⁰⁵ What is more, since the Directive aims at preventing and fighting a threatening criminal phenomenon, it is of valuable importance for the guarantee of the fundamental right to public security (Article 6 CFR). Therefore, as already confirmed by a consistent jurisprudence,¹⁰⁶ it basically complies with both the alternative conditions set out by the last line of Article 52, genuinely satisfying an objective of general interest recognized by the EU and protecting a fundamental right such as the one to security. The limitations imposed by the DRD on the fundamental rights recognized by Articles 7 and 8 CFR must therefore be considered as fully justifiable.

Undoubtedly, the most noteworthy part of the decision delivered by the CJEU is the one devoted to the proportionality test over the measures contained in the DRD. In fact, if the Court's analysis has so far found that such measures can be considered acceptable, completely different results come from the test, displaying the Directive's main flaws and an interesting approach of the CJEU towards the case law of the ECtHR. This is particularly relevant for the solution of the recalled collateral arguments raised by the Austrian preliminary reference request in the field of the interpretation of the Treaties.

In recalling the importance of the rights at stake, the Court reminds that whenever an interference with fundamental rights is provided, in considering factors like the nature of the involved right, the interference and its object, the margin of discretion accorded to the EU legislature may be limited, leading to stricter judicial review of the conditions set by the proportionality principle. In doing so, the Court interestingly recalls a landmark case of the

¹⁰⁴ *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12 at para. 66.

¹⁰⁵ The relevance of such data, the Court observes, has been widely recognized as of growing importance for the activities relating to the countering of serious crime and terrorism, due to the increasing diffusion of electronic communication. The reference is to the conclusions of the Justice and Home Affairs Council of 19 December 2002, reported in recital 7 of the DRD's preamble.

¹⁰⁶ Cases C-402/05 P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 E.C.R. I-06351, para. 363; Joined Cases C-539/10 P and C-550/10 P, *Stichting Al-Aqsa v. Council of the European Union and Kingdom of the Netherlands v. Stichting Al-Aqsa*, 2012 E.C.R. 0000, para. 130; C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, 2010 E.C.R. I-1979, paras. 46-47.

ECtHR¹⁰⁷ that first stated the need for more rigid standards for judicial review in case of need to protect the right to privacy from interferences provided for by data retention legislation. As anticipated, the CJEU disregarded all the questions relating to the interpretation of the Treaties contained in the two preliminary referrals by the Irish and Austrian Courts. However, when the CJEU recalled the ECtHR's case law on Article 8 ECHR, while considering the importance of Article 7 CFR, it established an important parallel, connecting the interpretation of the CFR with the ECHR and implicitly responding to some of the interpretative issues posed by the *Verfassungsgerichtshof*.

The first part of the proportionality test is held on the appropriateness of the data retention measures for the attainment of the Directive's objectives. From this point of view, the data stored under the DRD can prove to be a "valuable tool for criminal investigation,"¹⁰⁸ and the fact that several material conditions (such as the existence of a series of means of circumventing the retention of data, leaving some communications systematically unmonitored) could limit the Directive's extent and effectiveness (hence allowing for anonymous communications) is not so to make its measures inappropriate; therefore, they must be considered as compliant with the appropriateness requirement.

There are extremely different considerations in order when it comes to the necessity of the Directive's provisions, which cannot in any way be solely entailed by the "utmost importance" of the purpose of fighting terrorism and preserving the right to security.¹⁰⁹

This is even more important bearing in mind the particular interconnection highlighted by the CJEU between Articles 7 and 8 CFR. The Court warned that even though for sure "the protection of personal data resulting from the explicit obligation laid down in Article 8(1) of the Charter is especially important for the right to respect for private life enshrined in Article 7 of the Charter," the existence of provisions guaranteeing the respect of Article 8

¹⁰⁷ Eur. Court H.R., *S. and Marper v. the United Kingdom*, Judgment of 4 December 2008, Report of Judgments and Decisions 2008-V. The case concerned the conformity of the UK national DNA database with the right to respect for private and family life enshrined in Art. 8 ECHR. The Court was called on to assess whether the retention of fingerprints and DNA data of individuals who had, for a period of their lives, been suspected of criminal offences (but not convicted for having committed the crime) was to be considered compatible with the guarantees offered by Art. 8. In keeping with an already consolidated case law, the Court deemed that the retention of fingerprints and DNA (similarly to those of any kind of data) was not consistent with the right to privacy, interestingly asserting that justifications for the retention of data in light of Art. 8 ECHR should be evaluated considering that, notwithstanding the legitimate aim of preventing crimes, whenever a "right at stake is crucial to the individual's effective enjoyment of intimate or key rights," the margin of appreciation recognized to Member States in enacting data retention legislation must be drawn narrower. On the point, see BOEHM & COLE, *supra* note 5, at 23.

¹⁰⁸ *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12 at para. 49.

¹⁰⁹ The fundamental nature of these rights, and of the rights to privacy and protection of personal data, the Court seems to sustain, cannot in fact automatically lead to the prevalence of the former over the latter, it being crucial to carefully balance the scope and extent of the three rights in such a way that interferences to them are restricted to cases of strict necessity. *Id.* at para. 51.

does not inevitably determine the existence of sufficient measures of protection of Article 7. In order to comply with both, the Directive should have set a clear system of safeguards, so that the limitations to Articles 7 and 8 are balanced by due guarantees against abuse, unlawful access, and use of the stored data, and by rules on the scope and application of the limitations. As testified by the jurisprudence of the ECtHR on Article 8 ECHR that the CJEU, once again, recalls,¹¹⁰ these limitations are of crucial importance when the data are subjected to automatic processing and may be exposed to the risk of unlawful access.

The review on the necessity requirement (that, as anticipated, gives fully negative results)¹¹¹ is led by the CJEU under three main themes: the scope of the interferences determined by the Directive, their limitations, and the definition of the retention period.

As to the first of the three, the CJEU points out that the Directive exceeds the principle of proportionality in the scope of its interferences, for two main reasons. On the one hand, it imposes the storage of all traffic data derived from all means of electronic communication, and from all the subscribers and registered users. This means that the interferences with fundamental rights it determines practically affect the entire population of the EU, regardless of the users' effective implication in situations "liable to give rise to criminal prosecutions,"¹¹² or of their being obliged by relevant national legislation to professional secrecy. It hence requires the storage of data relating to people that are by all means unsuspecting, and it substantially violates the lawfully established domain of professional secrecy, lacking prescribed specific exceptions for the recalled circumstances. Furthermore, in failing to explicitly require a relation between the data to be stored and a threat to public security, the Directive does not draw the necessary restrictions to data retention, in terms of time periods, geographical zone, and the person or group of people likely to be involved in criminal activities or "to contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences."¹¹³

As to the necessity of purpose limitations, the Court observes that the Directive cannot be considered compliant with EU law standards for three reasons. First of all, it does not directly provide for any limit whatsoever, and nor does it set any criteria for the limitation of access to/use of retained data by public authorities. It only makes general reference to serious crime, but it must be recalled that no definition of this is provided for in EU law, meaning that it is therefore left to Member States' law. This, in the Court's opinion, is insufficient. The lack of homogeneity stemming from the conferral on Member States of the duty to discipline in detail parts of the content of the Directive is also at the core of the

¹¹⁰ Eur. Court H.R., *S. and Marper*; Eur. Court H.R., *M.K. v. France*, Judgment of 18 April 2013 (not final).

¹¹¹ *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12 at para. 65

¹¹² *Id.* at para. 58.

¹¹³ *Id.* at para. 59.

second argument on the basis of which the Court strikes down the poor limitations system set up by the DRD. In asking the Member States to define the procedures to be followed and the conditions to have access to retained data, the Directive only binds them to do so “in accordance with necessity and proportionality requirements.” By contrast, the Directive does not prescribe them to keep the prevention, detection, and investigation of precisely defined crimes as a parameter for the restriction of such access and to use it for what is strictly necessary. This is likely to bring about the establishment of an “unacceptably extensive regime”¹¹⁴ at the national level, but also entails, in our opinion, another important consequence. This is that it seriously impairs the fulfillment of the stated purpose of the Directive, that is to say the harmonization of national legislation in this matter. Thirdly, the limitations set by the DRD do not meet the necessity requirement in that they lack criteria for limiting the number of subjects having access to/permission to use the data to what is strictly necessary. Furthermore, in the Court’s opinion, the Directive should have either prescribed itself or at least demanded the Member States to prescribe the access and use of data to be dependent upon the decision of a judicial organ or an independent authority, so as to have a further form of guarantee.¹¹⁵

Additionally, the definition of the retention period, for the Court, fails to meet the necessity requirements. In fact, even in this case, no mention is made in the Directive of any objective criteria to be followed for the limitation of the retention period to what is strictly necessary. The retention period is, furthermore, unlawfully indiscriminate, being generally fixed at six to twenty-four months regardless of the distinction as to the different categories of data contained in Article 5 of the Directive—a distinction that would logically imply that different kinds of data may be used for different kind of purposes, not necessarily requiring the same storage time.¹¹⁶

Having assessed the substantial failure of the DRD in the proportionality test—which would, in itself, have been largely sufficient to declare it invalid—the Court decided to address a short series of important technical flaws in the law. The CJEU held that the system set up by the DRD does not comply with the additional requirement of providing for sufficient safeguards under Article 8 CFR. Indeed, it does not put in place specific rules for the huge amount of stored data, their sensitive nature, and the risk of their unlawful seizure. Thus, it does not guarantee the effective protection of the stored data against abuse, unlawful access, and unlawful use.¹¹⁷

¹¹⁴ BOEHM & COLE, *supra* note 5, at 38.

¹¹⁵ *Digital Rights Ireland*, Joined cases C–293/12 and C–594/12 at para. 62.

¹¹⁶ As said *supra* (note 63), this condition had been foreseen by the Austrian Legislature, that in implementing the Directive had in fact conjugated the retention period along with the different categories of data.

¹¹⁷ Furthermore, the Court remarks, by permitting the providers to “have regard to economic considerations when determining the level of security which they apply, as regards the costs of implementing security measures” the Directive does not guarantee that the said providers respect sufficient security measures, and particularly the

As a final important remark, the CJEU pointed out that the lack of a provision imposing an obligation for retention servers to be physically located within the territory of the EU substantially subtracts them to the control mechanisms prescribed by Article 8(3) CFR, that states that an independent authority should be established to oversee compliance with the requirements of protection and security of personal data. Such a compliance control, which is evidently essential for the protection of individuals in the matter of their personal data, could obviously only be performed in terms of EU law, which would logically not be applicable to services taking place outside the EU and therefore under foreign legislation.

The CJEU thus stated conclusively that the substantial exceeding of the extent of the proportionality principle, in the light of Articles 7, 8, and 52(1) of the CFR, was such as to make Directive 2006/24/EC invalid *ab initio*.

E. The Impact of the Court of Justice of the European Union's Decision on the National Level

Following the CJEU's judgment on Data Retention and the consequent annulment of the Directive, EU Member States are now facing important consequences. As has been shown in detail above, the immediate result of the Court's judgment is the invalidity of the Directive, for the Court stated that the entire directive violated the Charter and declared it invalid *ab initio*. Consequently, the original obligation to introduce regimes of data retention no longer exists, but national measures adopted to implement the DRD are still in place. As has been pointed out:

[...] the declaration of invalidity of the EU act does not have a direct impact on national law which is why it remains valid - even though possibly under the threat of being declared void on the first opportunity a court can seize - until concrete steps for amendment or revocation by the national legislatures are taken or a court rules on the validity of its applicability.¹¹⁸

As a consequence of the CJEU's ruling, Member States are no longer obliged to retain data as mandated by the DRD; they are now free to modify their national legislation on this issue, or even to annul it.¹¹⁹

one of the permanent erasing of data at the end of the retention period. *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12s at para. 67.

¹¹⁸ BOEHM & COLE, *supra* note 5, at 49.

¹¹⁹ "If States do not react and change their data retention regime that were based on the now void DRD, claims before national courts and/or proceedings in front of the ECtHR (after having exhausted domestic remedies)

The immediate consequence of the CJEU's ruling at EU level was the decision of the European Commission to end proceedings against EU Member States which did not transpose the Directive within the given time limits. Recently, the European Parliament legal services presented an opinion on the CJEU's ruling and its consequences, answering specific questions raised by its Committee on Civil Liberties, Justice and Home Affairs.¹²⁰

Shortly after the CJEU's judgment, the Constitutional Courts of several Member States were called to rule on the validity of the national data retention legislation, in the light of the important statements of the CJEU in the DRD ruling. In Austria,¹²¹ Slovenia,¹²² and Romania¹²³ the national legislation was declared invalid by Constitutional Courts. In Poland, too, the Constitutional Court declared various provisions relating to the access and processing of the retained data by police and other authorities to be unconstitutional.¹²⁴ Finally, on 23 April 2014, after the CJEU's ruling on the DRD, the Slovak Constitutional Court suspended the effectiveness of the Slovak implementation of the Directive. This means that the Court suspended only the provisions that mandated data retention; other general provisions on access to this information are left intact.¹²⁵

remain possible within the constraints of the respective national procedural laws. Individuals, NGOs as well as companies may initiate such proceedings claiming a violation of Arts. 7 and 8 CFR, 8 ECHR and the respective provisions of national constitutions. National courts confronted with such claims would then be obliged to review national data retention measures and take EU law, in particular the respective guarantees stemming from Art. 7 and 8 CFR, into account. Therefore, there is a high chance that courts of Member States will also declare the national transposing act void, as it can be seen in first proceedings (e.g. in Austria and Slovenia) on this issue." BOEHM & COLE, *supra* note 5, at 49, 57.

¹²⁰ European Parliament Opinion on the CJEU's ruling on the Data Retention Directive, https://s3.amazonaws.com/access.3cdn.net/27bd1765fade54d896_l2m6i61fe.pdf.

¹²¹ Austrian Constitutional Court (*Verfassungsgerichtshof*), Joined cases G 47/2012–49, G 59/2012–38, G 62/2012–46, G 70/2012–40 and G 71/2012–36, Judgment of 27 June 2014.

¹²² The Slovenian Constitutional Court abrogated Arts. 162–169 of the Electronic Communication Act and ordered the deletion of all the retained data. Slovenian Constitutional Court, Case U-I-65/13-19, Judgment of 3 July 2014, Official Gazette RS No. 54/2014.

¹²³ The Romanian Constitutional Court also declared unconstitutional, in an unanimous decision, the Romanian Data Retention Law which was introduced in 2012, after the declaration of unconstitutionality of an earlier data retention act transposing the Directive, in 2009. Romanian Constitutional Court, Decision No. 440 of 8 July 2014, Romanian Official Gazette no. 653 of 4 September 2014.

¹²⁴ Polish Constitutional Tribunal, Case K 23/11, Judgment of 30 July 2014.

¹²⁵ See Martin Husovec, *First European Constitutional Court suspends data retention after the decision of the Court Of Justice of EU*, available at <https://cyberlaw.stanford.edu/blog/2014/04/first-european-constitutional-court-suspends-data-retention-after-decision-court>.

More specifically, as regards the three countries analyzed in this paper, it should be stressed that, after the CJEU's decision, Ireland has not yet reacted; the Digital Rights Ireland case continues and the Irish legislation of 2011 remains in force. By contrast, Austria and Slovenia promptly reacted to the decision of the CJEU within days of each other.

Austria was the first country to respond, with the first judicial decision on this matter following the CJEU's ruling. On 27 June 2014, the Austrian Constitutional Court declared the Austrian Act implementing the Directive to be disproportionate, unconstitutional, and void. To annul the act, however, the Court referred to the guarantees of Article 8 ECHR. More specifically, the scope of the act was considered as severely interfering with the right to data protection, in particular as regards the possibility of creating profiles of individuals, the low level of control on access to data, and the security requirements. Therefore, the Austrian Court found that "the Austria telecommunications law, the Code of Criminal Procedure and the *Sicherheitspolizeigesetz* ("Security Police Law") did not contain sufficient safeguards for the retention, access, and security of the retained data."¹²⁶

With a reasoning similar to that of the Austrian Constitutional Court, on 3 July 2014, the Slovenian Constitutional Court also abrogated the national legislation on data retention. The Constitutional Court of the Republic of Slovenia abrogated the data retention provisions of the Act on Electronic Communications (ZEKom-1) in its judgment U–I–65/13–19, following the constitutional request of the Information Commissioner, lodged in March 2013.¹²⁷

More specifically, the Slovenian Constitutional Court abrogated ZEKom-1 Articles 162, 163, 164, 165, 166, 167, 168, and 169.¹²⁸ It also ordered that operators of electronic communications delete retained data immediately after the judgment's publication in the Official Gazette. When ruling data retention to be unconstitutional, the Slovenian Court declared data retention to be disproportionate on the basis that:

Unselective retention of data in its major part constitutes a breach into the rights of a large proportion of population that did not provide any reason for such breaches; blanket data retention does

¹²⁶ See the openrightsgroup table on "Data retention in the EU following the CJEU ruling," https://www.openrightsgroup.org/assets/files/pdfs/reports/Data_Retention_status_EU_Dec_2014.pdf.

¹²⁷ The text of the complaint can be found in Slovenian at www.ip-rs.si/fileadmin/user_upload/Pdf/ocene_ustavnosti/ZEKom_Zahteva_za_oceno_ustavnosti_data_retention.pdf

¹²⁸ For a complete examination of the Slovenian Constitutional Court's decision see Samo Bardutzky, *The Timing of Dialogue: Slovenian Constitutional Court and the Data Retention Directive*, available at <http://www.verfassungsblog.de>.

not provide for anonymous use of communication which is particularly important in cases where untraceable use is necessary to reach certain purposes (e.g. calling for help in mental distress); arguments for selected retention periods (8 months for internet related and 14 months for telephony related data) were not provided nor elaborated in the legislative materials; the use of retained data was not limited to serious crime.¹²⁹

In addition to the countries mentioned above, which have permanently or partially erased the national laws on data retention as a result of the ruling of the CJEU, there are nevertheless some countries that, on the contrary, have decided to confirm the national rules on data retention. This is the case, for example, of Denmark. In Denmark, the Parliament asked the government about the lawfulness of the Danish data retention law and, on 2 June 2014, the government concluded that the national rules on data retention fully respect the proportionality requirements established in the CJEU's ruling.¹³⁰ The Swedish government also ordered a study to be carried out and, in June 2014, a group of experts appointed by the Ministry of Justice came to the conclusion that the national legislation on data retention is lawful and contains clear rules on the conditions of access to retained data. Finally, in the United Kingdom, just a few days after the CJEU's decision, a new data retention law came into force,¹³¹ which re-enacted data retention provisions of the 2009 Data Retention Regulations that were based on the DRD, annulled in April 2014. However, the retention period established by the new Act may change subject to a maximum 12 months, instead of the previously fixed twelve months.

The rapidity and the different ways in which different Member States have reacted to the ruling of the Court highlights the importance and relevance of fundamental rights in the issue of data retention, as well as the central role of this issue in the current historical period that Europe is experiencing.

¹²⁹ Republic of Slovenia Information Commissioner press release, *available at* [https://www.ip-rs.si/index.php?id=272&tx_ttnews\[tt_news\]=1256&cHash=2885f4a56e6ff9d8abc6f94da098f461](https://www.ip-rs.si/index.php?id=272&tx_ttnews[tt_news]=1256&cHash=2885f4a56e6ff9d8abc6f94da098f461).

¹³⁰ Legal analysis from the Danish Ministry of Justice, <http://justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Notat%20om%20logningsdirektivet.pdf> (only in Danish).

¹³¹ *Data Retention and Investigatory Powers Act 2014* (c.27), of 17 July 2014, *available at* <http://www.legislation.gov.uk>.

F. Conclusions

From the analysis so far conducted, two main general trends may be identified in the judicial reaction that took place in Europe after the enactment of the DRD. Both of them are tightly related, in our opinion, to the fundamental nature of the right to privacy, affected by the Directive and its transposition laws, and the need for national security, with which the first must be balanced.

A first trend regards the protection of rights in itself. Under this perspective, the DRD case has posed a milestone for the future developments of EU legislation in two key areas of recent emergence: EU anti-terrorism and security legislation and fundamental rights in the framework of new technologies. This is both true at the methodological level and at the content level. As to methodology, the CJEU has, with this case, decided a landmark case in the field of rights balancing, asserting that the importance, generality, and width of a collective fundamental right such as the one to security is in no case to be considered as allowing for measures disproportionately detrimental to other fundamental rights, such as the ones to privacy and protection of personal data. The proportionality test led by the Court, together with its findings in terms of the respect for the criterion of sufficient safeguards to ensure effective protections, have set out a relevant core for the judicial balancing of rights. At the content level, the Court's decision has opened the way for a re-discussion of the extent of rights emerging from the use of new technologies and of the potential threats to them. In this sense, some have seen in the Data Retention case the origin of an evolving thread that is leading to the gradual judicial articulation of an individual right to "IT-security."¹³²

The second main trend influenced by this complex case is, as already highlighted in the introductory remarks of this article, the trend of both vertical and horizontal trans-judicial dialogue.

From a first point of view, the crucial character of the issues at stake has pushed the national courts to correctly make use of the preliminary reference tool. At the same time, the fact that the majority of national courts that ruled against the constitutionality of the transposition laws did so without making any reference to the compatibility of the Directive itself with their Constitutions shows that the principle of the supremacy of EU law (for which the validity of EU acts with respect to the EU Treaties cannot be questioned by national Courts) is being metabolized by the latter; notwithstanding this, it must be underlined that in principle such Courts, as last instance Courts, should all have exercised their duty to preliminary refer the issue to the CJEU in case of doubts about the validity of provisions mirroring the content of an EU legislative act. A significant exception in this

¹³² Oreste Pollicino, *Interpretazione o manipolazione? La Corte di Giustizia definisce un nuovo diritto alla privacy digitale*, FEDERALISMI.IT – 3 FOCUS COMUNICAZIONI, MEDIA E NUOVE TECNOLOGIE 2, 24 (2014).

sense is represented by the ruling of the Romanian Constitutional Court, which relied on the ECHR more than on EU law, and could in any case be conditioned by the relatively recent accession of Romania to the EU.

The importance of the rights and interests influenced by the Directive and the fact that those interests are shared by all the EU Member States has further stimulated the dialogue between the courts, as was shown by the choice of the Slovenian Constitutional Court to suspend the proceedings and wait for the CJEU's response to the questions referred by its Irish and Austrian counterparts, instead of joining them with its own preliminary reference.

An intensified dialogue among national Courts could possibly inaugurate a positive and useful trend in the appeal to the EU judiciary. If a constant and careful confrontation between national Courts in the matter of implementing, practicing, and enforcing EU legislation was successfully established, the number of proceedings before the CJEU (and eventually the ECtHR?) would dramatically decrease, mirrored by a more interactive and cooperative attitude of national Courts.

But another aspect in the field of horizontal trans-judicial dialogue must be highlighted, since it has experienced an important step forward from the DRD case. The case, in fact, has consolidated an already "blooming" phenomenon of communication between the CJEU and the ECtHR, with the former openly referring to the latter's case law as a valid reference for the adjudication of fundamental rights contained both in the CFR and the ECHR. The phenomenon, that had its motivation in the entry into force of the Lisbon Treaty in 2009 and in the consequent acquisition of the full legal standing for the CFR, was lately supposed to gradually lead to the EU's accession to the ECHR.¹³³ Such a hypothesis has been for the moment excluded by the CJEU, which on 18 December 2014 ruled out the draft accession agreement as incompatible with EU law, determining a serious standstill of the issue.¹³⁴ Whatever the future and final outcome of this yet uncertain process is, the common content of the CFR and the ECHR stays as a fact, establishing a strong and undeniable link between the two Courts of Luxembourg and Strasbourg and highlighting the need for at least an "operational" solution. It seems to us that such a solution could best be found in judicial cooperation, which appears to be the most reciprocally useful and constructive practice to follow. For the time being, at least on the part of the CJEU and notwithstanding the evolution of the accession proceedings of the EU to the ECHR system, such a practice seems to be strengthening.

¹³³ On the point, see, in this same issue, Francesco Cherubini, *The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View to the Accession*.

¹³⁴ Opinion 2/13, Draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Dec. 18, 2014), <http://curia.europa.eu/>.

Constitutional Courts, Preliminary Rulings and the “New Form of Law”: The Adjudication of the European Stability Mechanism

By Samo Bardutzky*

A. Introduction

In 2012 and 2013, we observed how the European Stability Mechanism (ESM) was adjudicated by “EU courts, plural”: a number of high courts of the Member States (among them “Kelsenian” constitutional courts as well as representatives of a more hybrid model of judicial review of constitutionality) and the European Court of Justice (CJEU) were seized by challenges to the mechanism. What attracted attention was the fact that only one court, the Supreme Court of Ireland, decided to submit a preliminary reference to the CJEU, while the other courts, as would appear from their judgments, did not even consider the option. This was a suboptimal example of judicial dialogue in the case of ESM adjudication.¹

There were three possible reasons for this course of events that could be identified. First, the courts of the Member States might have been protective of their own constitutional authority. Second, the time normally necessary for the delivery of a judgment of the CJEU in a preliminary ruling might have served as a deterrent. Third, the innovative legal character of the ESM might be too complex for the existing mechanism of judicial dialogue operating within the EU courts, plural.²

This Article takes into account the new developments in the adjudication of the financial crisis. First, the fact that two more constitutional courts ruled on the ESM: the Austrian *Verfassungsgerichtshof* and the Polish *Trybunał Konstytucyjny*. Second, the recent decision of the German Federal Constitutional Court that, for the first time in its history, submitted a reference for a preliminary ruling to the CJEU in a case connected to the adjudication of

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¹ Samo Bardutzky & Elaine Fahey, *Who Got to Adjudicate the EU’s Financial Crisis and Why? Judicial Review of the Legal Instruments of the Eurozone*, in *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* 341, 352 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014).

² *Id.* at 357.

the ESM is taken into consideration. In addition, the paper takes into account a broader image of legal innovation in the law of the Economic and Monetary Union (EMU) more precisely, and looks at the increased importance of the “new form of law” in devising measures to reform the EMU.

These developments lead the paper to focus on the third possible reason for the suboptimality of the judicial dialogue in the ESM saga: the “new form of EU law” character of the ESM. However, the ESM adjudication represents a case study for how the national high courts might react to the new form of law. The story of the ESM adjudication corroborates the claim that the new form of law represents a challenge to the reference for a preliminary ruling as the existing mechanism of judicial dialogue within the EU courts, plural.

The article first looks at the new form of European Union (EU) law (B). Second, the arguments as to why a well-conducted judicial dialogue is desirable in cases of the new form of law are laid down (C). Third, a brief overview of the “ESM saga” is provided: the mechanism itself and the challenges it faced in EU courts, plural (D). Fourth, the recent events are taken into consideration to reject the more traditional explanation for suboptimal judicial dialogue when it comes to constitutional courts (E). Fifth, the paper briefly discusses the second possible explanation for the flaws of the judicial argument: the issue of urgency and time (F). Finally, a link is established between the new form of EU law and the issues of judicial review by EU courts, plural. In the concluding thoughts, some proposals for possible improvements are laid down (G).

B. New Form of EU Law

What struck an observer of the ESM and its adjudication was the complexity and novelty of the Mechanism’s legal character. The positioning of the mechanism in the area between international and supranational law, via legal measures enacted for its creation and the use of EU institutions outside of EU law, lead to us to label the strikingly post-national, both exceptional as well as problematic character of the mechanism as esoteric.³ But legal structures akin to the ESM are far from being obscure now; in fact, scholarship has suggested that it is becoming the new normal. Steve Peers’ concept of “new form of EU law,” inspired primarily by the Treaty on Stability, Coordination and Governance in the EMU (TSCG), the ESM, the ESM’s predecessor, the European Financial Stability Facility, is defined as “treaties to which some (but not all) EU member states are parties, which are

³ See, *infra* D.I.; Elaine Fahey & Samo Bardutzky, *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in the EU Courts, Plural: A Case Study of the European Stability Mechanism*, MICH. J. INT’L L. EMERGING SCHOLARSHIP PROJECT (2013), <http://www.mjonline.org/wordpress/wp-content/uploads/2013/07/FaheyBardutzky.pdf>.

closely linked to EU substantive law and which confer powers upon the EU institutions.”⁴ Gianni Lo Schiavo has explored the ESM as “a new form of intergovernmental differentiated integration.”⁵ The way these labels attempt to conceptualize the character of recent developments is also a manifestation of the fact that the constitutionally relevant changes in EU law and integration are happening within the elusive field of the Eurozone. As we will show below, the Eurozone appears to stay on the margins of EU law – or, for that matter, the EU institutional framework. As a consequence, the issues related to the operating of the Eurozone had, until recently, not been a matter for the courts. Until recently, the responses to the crisis in the form of legally innovative mechanisms have brought about a recalibrating of powers of sorts. The shift of European integration into the sphere of intergovernmentalism, vehicles of public international law, and even deployment of private (corporate) law arrangements, has given rise to questions of the compatibility of such ventures with EU law (e.g., the *Pringle* case). The prospect of financially vital decisions being made outside national decision-making mechanisms has stirred up the issue of sovereignty (e.g., in the Estonian ESM case).⁶

As the Member States seem to be increasingly relying on solutions from the canon of the new form of EU law, in reforming the EMU, we observe the adjudication of the ESM as a valuable case study. How then has the new form of law been proliferating in the field of the EMU? The ESM Treaty (ESMT) invests several tasks in, most notably, the European Commission (often in liaison with the European Central Bank) and foresees the CJEU as being a forum for dispute resolution. The treaty is *organically* linked to the EU (and the Eurozone), as is revealed from the rules on membership. The Memorandum of Understanding, the principal act upon the basis of which the ESM assists one of its members, “shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union Law...” (Article 13(III) ESMT).

The TSCG, in Article 8, designates the CJEU as its “enforcer” (to use the words of Damian Chalmers),⁷ and contains a whole title (Title II) on the “Consistency and Relation with the

⁴ Steve Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, 9 EUR. CONST. L. REV. 37, 38 (2013).

⁵ Gianni Lo Schiavo, *The ESM Treaty: A new form of intergovernmental differentiated integration to the benefit of the EMU?*, in EVOLVING EUROPE: VOICES OF THE FUTURE, 8–9 July 2013, <http://uaces.org/documents/papers/1340/loschiavo.pdf>. Beukers similarly speaks of new forms of differentiated integration. Thomas Beukers, *The Eurozone Crisis and the Legitimacy of Differentiated Integration*, in THE EURO CRISIS AND THE STATE OF EUROPEAN DEMOCRACY 8 (Bruno de Witte ed., 2013).

⁶ See, *infra* at D.II.1.

⁷ Damian Chalmers, *The European Court of Justice has taken on huge new powers as ‘enforcer’ of the Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinised*, available at <http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/>.

Law of the European Union.” The language it uses is defined in EU law, especially in Protocol 12 on excessive deficit procedures and the Stability and Growth Pact.

Federico Fabbrini discussed the setting up of the second pillar of the European Banking Union: the Single Resolution Mechanism (SRM), which is planned to be composed of two “interwoven legal measures”: a regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a single resolution mechanism, a single bank resolution fund, and an international agreement, that is to be concluded by Eurozone member states, on the functioning of the Single Resolution Fund (SRF).⁸

The international agreement in its draft version foresees dispute settlement by the CJEU (Article 11) and delegates the task of reimbursement co-ordination to the Commission (Article 13). It contains, like the TSCG, a title on consistency and relation with EU Law. EU law, in fact, constructs the entire mechanism; the international agreement is only there to create an obligation for State Parties to raise the contributions to the SRF.⁹

C. Why Judicial Review of the New Form of Law

The courts’ exercise of constitutional oversight over the evolving area of the EMU has been met with criticism. The arguments supporting the critique invoke the traditional abstention of the judicial branch from economic affairs.¹⁰ The claim here is that there are compelling reasons why economic governance through the new form of law is an area where judicial review performs a positive function.

R. Daniel Kelemen’s finding that the legalization of governance through courts is a palpable feature of contemporary EU law can serve as a starting point for the positioning of judicial review and dialogue in the story of the new form of law.¹¹ Also, Rachel Cichowski has shown how courts can provide more legitimate fora for contestation of norms in certain circumstances.¹² The construction of the ESM, again, serves as a useful case study. EU institutions and national participation and contestation were limited, curtailed and—one

⁸ Federico Fabbrini, *On Banks, Courts and International Law: a Critical Analysis of the Draft International Agreement on the Functioning of the Single Resolution Fund*, Centro Studi sul Federalismo Research Paper 4, http://www.csfederalismo.it/attachments/2579_CSF-RP_Fabbrini_Banks-Courts-InternationalLaw_Feb2014.pdf.

⁹ *Id.*

¹⁰ Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 *BERKELEY J. INT’L L.* 64, 103 (2014).

¹¹ R. Daniel Kelemen, *Eurolegalism and Democracy* 50 *J. COMMON MKT. STUDS.* 55 (2012); R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EU* (2012).

¹² RACHEL CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007).

might say—manipulated. Judicial review is practically the only avenue in which the character of the ESM can be checked.

Claims in favor of judicial review (albeit with regard to the *Pringle* case before the CJEU) have been made before, perceiving the review by the courts as a subsidiary option that was rightly availed of after the creators of the ESM avoided, to paraphrase Bruno de Witte and Thomas Beukers, the “cumbersome” involvement of national and European members of parliament.¹³ In the critique of judicial involvement, Daniel Halberstam’s triad of main considerations—expertise, voice, and rights—guiding the allocation of competences among alternative institutions has been applied: The courts, the argument goes, lack both the expertise as well as “voice” (the claim to represent political will), and fundamental rights do not play a fundamental role.¹⁴

The avoidance of parliamentary involvement in the creation of the ESM pushed the “voice” card onto the side of the courts. Through either massive citizens’ participation in triggering judicial proceedings (see below the account of the procedure before the Federal Constitutional Court of Germany; hereafter FCC) or the activity of parliamentarians in search of a second forum of contestation (see, for example, the procedures before the Austrian or the Polish Constitutional Court), the political problematization of the ESM, if anything, was expressed in judicial fora. In the case of the German FCC, the judicial procedure was phrased in the language of fundamental *rights* as enshrined in the *Grundgesetz*, as the claim that a right has been violated is the primary procedural vehicle for citizens to access review of constitutionality.

Again, the ESM serves as a good example of how awkward the relationship of the new form of law is, on the one hand, with the nation state, and on the other hand, with supranational EU treaty law. At this point, we emphasize the concept of *EU courts, plural*. The new form of law is characterized by intertwined legal instruments that originate both inside and outside of EU law. With regard to the latter, the CJEU offers only limited possibilities of review, and it is the Member States’ high courts that can operate as a forum for checks and balances. In this regard, the preliminary reference mechanism is thus not only an important device in the EU treaties linking legal orders, but it also provides a unique forum for the participation of interests.¹⁵

¹³ See Bruno de Witte & Thomas Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, 50 COMMON MKT. L. REV. 805, 827 (2013).

¹⁴ Fabbrini, *supra* note 11, at 116 (citing Daniel Halberstam, *Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD 326, 337 (Jeffrey Dunoff & Joel Trachtman eds., 2009)).

¹⁵ A look at the complainants/applicants in national constitutional challenges reveals a broad spectrum of different actors, such as a regional government, an ordoliberal think tank, politicians, and academics affiliated with the new left movements and Eurosceptic members of the public.

Our claim of EU courts, plural, being a unique participatory forum, may face relevant contestation in light of the fact that all the courts that have ruled on the ESM so far have validated it and thus have delivered “noise around zero”¹⁶ through judicial review. As much as this is an argument that is difficult to prove, we can recognize how possible it is that the courts were reluctant to slow or even strike down the attempts of the Member States’ governments to respond to the financial crisis. But we can just as much recognize that the courts exercised judicial control of the other branches of government. With the final outcome in favor of the ESM, the case law nevertheless drew boundaries for future law making. The (in)famous threat of the IMF’s Christine Lagarde to “leave the room if she hears “Karlsruhe one more time”¹⁷ can also be interpreted as meaning that the constitutional categories (alas, it seems, only from the German constitution) have entered the discourse of decision-makers in international financial institutions, thanks to the constitutional courts.

D. The ESM Saga

1. The ESM

The way the ESM was created was distinctive in a number of ways. The Mechanism itself, which is an international financial institution, was established by a parallel agreement of the Member States outside of the EU Treaties, using the vehicle of public international law: the ESMT.¹⁸ At the same time, it was anchored in Article 136 TFEU, through the device of a European Council decision to amend the treaties. The European Council decision purported to use the simplified revision procedure to achieve the ESMT as the end result.¹⁹

The legal image of the ESM was made more complex as there were national legal measures adopted in order to give validity to the above-mentioned international and supranational legal norms, which, in some of the cases, exposed the ESM to constitutional challenges in the first place. For example, the ESM was subjected to review by the Constitutional Tribunal of Poland, a country which is not a Eurozone country (and hence not a party to

¹⁶ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (2000).

¹⁷ Kay-Alexander Scholz, *Karlsruhe’s constitutional monastery* (11 September 2012), Deutsche Welle, available at <http://www.dw.de/karlsruhes-constitutional-monastery/a-16231161>.

¹⁸ The ESM treaty was signed by the 17 Member States of the Euro-zone on 2 February 2012 and entered into force on 27 September 2012. It is available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.

¹⁹ European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States whose Currency is the Euro, 2011 O.J. (L91) 1. For a detailed account of the creation of the ESM, see de Witte & Beukers, *supra* note 13, at 812.

the ESMT), as the Polish parliament adopted a statute ratifying the European Council Decision that amended Article 136 TFEU.

The ESM is institutionally quite distinctive: it at once creates its own parallel governance structure and borrows EU institutions, most prominently the European Commission, but also the European Central Bank and the CJEU for certain tasks.²⁰ This triggered different scholarly responses, highlighting the questionability of the use of EU institutions.²¹ At the same time, the institutional design of the ESM stayed clear of any control from the European Parliament, which reveals how different the direction of the ESM and similar instruments is from the path taken in the Treaty of Lisbon.²²

The ESM was subject to constitutional challenges in a number of EU Member States: the validity of the different legal acts necessary for the existence of the ESM was adjudicated in the Supreme Court of Ireland (SCI),²³ the Supreme Court of Estonia (SCE),²⁴ the German Federal Constitutional Court (FCC),²⁵ the Austrian Constitutional Court (ACC),²⁶ and the Polish Constitutional Tribunal (PCT).²⁷

²⁰ The ESMT envisages, inter alia, that the Commission will “negotiate, in liaison with the European Central Bank (ECB), the economic policy conditionality attached to each financial assistance” under the mandate given by the ESM Board of Governors (Art. 5(6)(g)). The Commission shall be entrusted with assessment tasks in the process of granting stability support (Art. 13(1)) as well as with negotiating and signing the memoranda of understanding with the ESM member requesting stability support (Arts. 13(2) and (3)) and then take part in the monitoring of the compliance with the memorandum (Art. 13(7)). See also Case C-370/12, *Thomas Pringle v. Gov’t of Ireland*, 2012 E.C.R. I-000, para. 56 (regarding the tasks allocated to the Commission), para. 157 (regarding the ECB). For a comment on the governance system as a curious hybrid, see de Witte & Beukers, *supra* note 13, at 814.

²¹ See Peers, *supra* note 4, for a favorable assessment of the use of EU institutions outside the EU legal framework; *contra* Paul Craig, *Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 EUR. CONST. L. REV. 263 (2013).

²² Matthias Ruffert, *The European Debt Crisis and EU Law*, 48 COMMON MKT. L. REV. 1777, 1790 (2011); Karlo Tuori, *The European Financial Crisis—Constitutional Aspects and Implications*, 36 EUI LAW WORKING PAPER NO. 28, 2012.

²³ *Pringle v. The Government of Ireland*, [2012] IESC 47. Before that, the procedure took place before the High Court. See, *infra* II. 1.

²⁴ Judgment of 12 July 2012, no. 3-4-1-6-12, Judgment of the Supreme Court (en banc).

²⁵ Case 2BvR 1390/12, Judgment of 12 September 2012.

²⁶ Case SV 2/12-18, Judgment of 16 March 2013, http://www.vfgh.gov.at/cms/vfgh-site/attachments/9/1/9/CH0006/CMS1370243386803/esm_sv2-18.12_endg.pdf.

²⁷ Case K 33/12, Judgment of 26 June 2013, http://trybunal.gov.pl/fileadmin/content/omowienia/K_33_12_en.pdf.

II. The Procedures in National Constitutional Courts

This section will sketch the procedures that took place in the five jurisdictions where the ESM was challenged before the courts. As the timelines of the procedures overlap, the order in which they are presented only follows the chronology of the ESM saga to a limited extent. The Irish case, where a preliminary reference was requested on the 31 July 2012, is mentioned first. Second, we turn to the two “earlier” ESM cases (in Estonia, the procedure took place between March and July 2012, and in Germany, the first decision of the FCC was issued in September 2012). In the last part of the section, we look at the two 2013 judgments in the ESM saga, from Austria and Poland.

1. Irish Courts

The member of the lower chamber of the Irish parliament, Thomas Pringle, filed a suit before the High Court of Ireland challenging the validity of the European Council Decision and the ESMT from the perspectives of EU law and the Irish Constitution.²⁸ The plaintiff himself moved for a preliminary ruling to be requested from the CJEU; the High Court judge indicated that a reference would be in order but it was left to the Supreme Court to actually make a reference. The Supreme Court identified two distinct issues. The ruling on whether the ESMT amounts to a transfer of sovereignty incompatible with the Constitution was made by the Supreme Court. With regard to the questions of whether the European Council decision is valid and whether Ireland’s participation in the ESMT is compatible with EU law, the Supreme Court requested a preliminary ruling.

2. Estonian Supreme Court

In the procedure before the SCE, the Chancellor of Justice, an independent public official charged with reviewing the constitutionality of legislation, sought from the SCE a declaration of the unconstitutionality of Article 4(IV) of the ESMT, under his powers to contest treaties that are to be ratified by Estonia.²⁹ Article 4(IV) envisages an emergency voting procedure in the ESM’s own collegial organs of governance, the Board of Governors and the Board of Directors. A number of decisions that they adopt normally require a unanimous vote; however, in certain situations where the Commission and the ECB both think that the failure to adopt a decision would “threaten to a significant extent the economic and financial sustainability of the euro area,” a qualified majority of eight-five percent votes cast will suffice. Given that the votes are proportionate to the state’s capital share (Article 4(VII) ESMT), this effectively means that under the emergency voting procedure, Estonia’s 0.186% vote alone can never overrule a decision.³⁰ The Court

²⁸ *Pringle v. The Government of Ireland* [2012] IEHC 296.

²⁹ Case no. 3–4–1–6–12 at para. 111 of the judgment.

³⁰ *Id.* at paras. 150, 184.

recognized this as an infringement of Estonia's sovereignty and budgetary powers of the parliament, and in the next step, not without controversy, subjected this infringement to a proportionality test.³¹ When juxtaposed with the legitimate aim of preserving the euro, the ESM's voting arrangement passed the test of constitutionality.³²

The issue of the admissibility of the Chancellor's application (and hence the question of whether there would be judicial review at all) was directly linked to the esoteric character of the ESM. The Supreme Court exercises its jurisdiction over international treaties but does not review acts of EU law.³³ The Chancellor was adamant that the ESMT was an international treaty and was not EU law. Even the planned amendment to Article 136 TFEU would not change the fact that within the EU, economic policy is left to the Member States' field of competence, which is where the ESM belongs.³⁴ The position of the respondent government, as recanted (and explicitly rejected) by the dissenting judges, seems to have been that the nature of the ESMT is "dualistic." As the "content and nature" of the ESMT are strongly related to the Estonian membership of the EU and EU law, the Treaty must be assessed based on Estonia's EU membership.³⁵ The Court, in the end, confirmed that the Treaty was not EU law, but at the same time, it "concerns" EU law and Estonia's membership of the EU.³⁶ This was, in part, due to the Treaty's ability to support the stability of the Eurozone as a whole and the Union itself.³⁷

Ginter noticed the disparities in judicial understanding of the Treaty between the ESC and the CJEU and remarked that the perspective on how it should be applied may be very different.³⁸ If the disparities in judicial understanding only apply to the functioning of the mechanism once it has been set in motion, there is probably little that can be illuminated

³¹ Para. 8 of the dissenting opinion of the Justices Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa; the dissenting opinion of Justice Tampuu; Carri Ginter, *Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty*, 9 EUR. CONST. L. REV. (2013).

³² Case no. 3-4-1-6-12 at para. 202 of the Judgment.

³³ Merike Saarmann, 'A cup of financial stability, please!'—The ESM judgment of the Estonian Supreme Court, TIJDSCHRIFTVOOR CONSTITUTIONEEL RECHT 163 (2013), http://www.tvcr.nl/tijdschriftvoorconstitutioneelrecht/download/162A_cup_of_financial_stability_please__The_ESM_judgment_of_the.pdf.

³⁴ Case no. 3-4-1-6-12 at paras. 7 and 8 of the Judgment.

³⁵ Dissenting opinion of the Justices of the Supreme Court Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull, and Lea Laarmaa, para. 2. The dissent supports this conclusion by offering a comparative argument, the fact that the Finnish parliament treated the ESMT as an EU matter when assessing its constitutionality.

³⁶ Case no. 3-4-1-6-12 at paras. 220-21 of the Judgment.

³⁷ *Id.* at para. 218 of the Judgment.

³⁸ Ginter, *supra* note 30, at 353.

in *a priori* reviews by constitutional courts that are seized with questions of constitutionality, even if they engage in a perfect example of judicial dialogue. Nevertheless, the ESC's engagement with the esoteric nature of the ESM can be taken as an indicator of how the new form of EU law can lead different courts to different answers to the same question.

3. German Federal Constitutional Court

The FCC entertained an application lodged by the parliamentary caucus of the *Die Linke* party in a procedure known as *Organstreit* as well as a *massive* constitutional complaint against the statutes ratifying both the ESM as well as the Treaty on Stability, Coordination and Governance in the EMU, lodged, *inter alia*, by *Mehr Demokratie*, a civil association that collected power of attorney from twelve thousand citizens.³⁹ In September 2012, the Court delivered a judgment rejecting the motion for *interim* relief, which set out the bulk of the Court's grounds regarding the constitutionality of the German ratification statutes.⁴⁰

In assessing the ESM, the central yardstick for the FCC was the concept of the "overall budgetary responsibility" of the *Bundestag*. One of the features of the ESM that was reviewed by the FCC and that is relevant to our account was the "possible interplay" between the ESM and the ECB. The Court addressed the concern of the parties that the ESM might become a vehicle of unconstitutional financing of the Member States through the ECB. Whether this would be the case does not depend so much on the interpretation of Article 21(l) ESMT, which may itself prohibit the ESM from borrowing from the ECB. In choosing an approach to the interpretation of the ESMT, the FCC found that the latter was an "internal agreement" between the EU Member States. And as follows from the CJEU case *Matteucci*,⁴¹ an internal agreement needs to be interpreted in conformity with EU law. Hence, the FCC reached for Article 123 TFEU, finding it to prohibit such financing. As the ESMT can only be interpreted in conformity with EU law, the conclusion has to be that it cannot borrow from the ECB.⁴²

The claim presented here is that at this point, when establishing a link to primary EU law and choosing to reach for the Treaty provisions to deal with the contestation of the ESMT, the *Bundesverfassungsgericht* should have referred the issue of interpretation of primary law to the CJEU for a preliminary ruling. Less than three months later, the CJEU presented its own interpretation of Article 123 TFEU in relation to the ESM, in *Pringle*.⁴³

³⁹ See the initiative's website at <http://verfassungsbeschwerde.eu/verfahrensstand.html>.

⁴⁰ The final decision on the ESM of the FCC was delivered on 18 March 2014.

⁴¹ Case C-235/87, *Matteucci v Communauté française de Belgique*, [1988] ECR 5589.

⁴² Case 2BvR 1390/12 at para. 172 of the Judgment.

⁴³ Case C-370/12, *Pringle v. Government of Ireland*, 2012 E.C.R. I-000, para. 123.

4. Austrian Constitutional Court

The ACC was seized by a suit filed by the regional government of Carinthia. The Carinthian Government, among others, advanced a claim that the ESMT “substantially modifies” Article 125(l) TFEU, which is why it would need to be subjected to a different ratification procedure than it was. This legal potential of the ESMT lies within the unusual structure of the mechanism. The argument goes: the amendment to Article 136 TFEU, once it enters into force, may well be interpreted as a *lex specialis* to the no bailout clause of Article 125 TFEU. However, at the time of the ratification of the ESMT, the amendment was not yet part of primary law. Instead, it was the ESMT that was characterized as “complementary to the integration programme of the Union” and at the same time as “public international law that supplements European Union law” (the Carinthian government here quoted the FCC’s ESM judgment). This kind of characterization is substantiated by the way the ESMT resembles Title VIII TFEU, and in the intensive involvement of the EU institutions in the exercise of the Mechanism’s powers. All of this, according to the Carinthian government, leads to the conclusion that the ESMT materially modifies the founding EU Treaties and should thus be subject to a qualified ratification procedure under Austrian constitutional law.⁴⁴

The Court agreed with the Federal Government that the question of the relationship or conformity of the ESM with the no bailout clause was settled by the CJEU in *Pringle*.⁴⁵ As the CJEU had confirmed the conformity, this also deconstructed this particular argument of the Carinthian government. The fact that a ruling of the CJEU on the issue of the ESM was already available to the respondent Federal government and the ACC⁴⁶ meant that the Court was able to rely on the authoritative interpretation of the relationship between the EU and ESMT precisely at the point where the contesters were linking their constitutional challenge to the new form of law.

5. Polish Constitutional Tribunal

While the dominant focus of the proceeding before the PCT, triggered by members of the Polish *Sejm* (lower chamber of the parliament), was on the correct procedural avenue for the ratification of the European Council Decision, the Tribunal also undertook a scrutiny of the use of the Article 48(6) TEU simplified revision procedure in the case of the “ESM amendment” of the TFEU. In fact, even the operative part of the judgment of the PCT declares that the Polish statute ratifying the European Council Decision “is not inconsistent

⁴⁴ Case SV 2/12–18, position of the Carinthian regional government, at 11 of the Judgment.

⁴⁵ *Id.* at 33 (stating the position of the Federal government), para. 52 (for the reasons given by the Court).

⁴⁶ Not, however, to the Carinthians, who filed their suit on the 22 October 2012, before the CJEU’s ruling in *Pringle* was pronounced on 27 November.

with [the Constitution of Poland] *as well as with Article 48(6) of the Treaty on the European Union...*" (emphasis added). In laying down the reasons for this decision, the Tribunal relied, first, on its own position in earlier case law that *in abstracto* the simplified revision procedure does not infringe the Polish Constitution as its use does not constitute a transfer of competences to the EU: the text of the provision itself only allows for the use of the revision method if it does not increase the competences of the Union.⁴⁷ Second, the Tribunal held that "the [CJEU]'s statements [in *Pringle*] were *binding* as regards the fact that the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union... as well as the validity and interpretation of the European Council Decision..."⁴⁸

The Tribunal summarized the position of the FCC in its ESM judgment on the effects of the introduction of Paragraph 3 to Article 136 of the TFEU, remarking that the FCC "drew analogical conclusions to those presented by the [CJEU]." It added that the ACC had taken a similar stance in its ESM judgment.⁴⁹

The PCT relied on the findings of the CJEU in another point that is important for our inquiry: the use of EU institutions by the ESM.⁵⁰ In our account, we recognized the use of the EU institutions as an essential characteristic of the emerging new form of EU law. In the particular Polish constitutional context, the CJEU's ruling that the deployment of the EU institutions in the ESM did not result in an increase in EU competences was of practical significance for the domestic constitutional challenge. And in resolving the question of conformity with the national Constitution, the Tribunal looked to the CJEU for an interpretation of the elements of the new form of EU law.

There were three categories of courts in the ESM saga. The SCI was the only court to request a preliminary ruling from the CJEU, which led to the judgment in the case of *Pringle*. The SCE and the FCC ruled without expressly considering the possibility of a preliminary reference. The ACC and the PCT were the courts that pronounced their rulings following the CJEU judgment in *Pringle*.

Our position is that the national courts, most prominently the courts that delivered their judgments before the *Pringle* case in the CJEU, could and should have requested a preliminary ruling. This would have improved the suboptimal judicial dialogue in the ESM saga. For the remainder of the article, we look at the possible reasons as to why they did not use the preliminary reference procedure.

⁴⁷ Case K 33/12, para. 7.2 of the Judgment.

⁴⁸ *Id.* at para. 7.4.1 of the Judgment (emphasis added).

⁴⁹ *Id.* at para. 7.5 of the Judgment.

⁵⁰ *Id.* at para. 7.4.5 of the Judgment.

E. The Demise of the “Protection of Constitutional Autonomy” Argument

The traditional explanation for the reluctant attitude of constitutional courts towards judicial dialogue with the CJEU is the claim that the constitutional courts are being protective of their constitutional autonomy. Sometimes described as sliding to the margin in the processes of integration⁵¹ and the growing role of judges in Europe, they—the account goes—refuse to make their decision in a particular case dependent on the outcome of the procedure before the CJEU.⁵² Instead, they contribute to the Europe-wide judicial dialogue in other ways, such as through enforcing lower courts’ duty to submit requests for preliminary rulings.⁵³

We reject the claim that the protection of the courts’ constitutional autonomy is a valid explanation. We base the arguments for our rejection on two main factual observations. First, what we can observe is that the two courts that did not submit a reference for preliminary ruling, but delivered their judgment after the CJEU judgment in *Pringle*, referred not only to the CJEU judgment in laying out the grounds for their decision, but also to the judgment of the FCC on the ESM.

Second, the FCC, in a case connected to the issue of the ESM, recently did for the first time in its history refer a question to the CJEU.⁵⁴ This is highly relevant as the FCC was, after recent first submissions of questions for preliminary ruling by the Spanish and Italian constitutional courts—as well as the French Constitutional Council—the most visible constitutional court that had in the past contributed greatly to the development of constitutional dialogue in Europe, but had thus far avoided opening a direct channel of communication with the CJEU.⁵⁵ The abstention of the FCC was also in contrast not only with the recent references originating in constitutional courts of other Member States, but also with the very active participation of other German courts in the preliminary ruling mechanism. In Daniel Thym’s words, “the Judges in Karlsruhe boldly go where almost 2000

⁵¹Jan Komárek, *The Place of Constitutional Courts in the EU*, EUR. CONST. L. REV. 420, 421 (2013).

⁵² Marta Cartabia summarizes this position of “*superiorem non recognoscens*” very well in her account of this “implicit and conclusive reason.” Marta Cartabia, “*Taking Dialogue Seriously*” *The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, NYU JEAN MONNET WORKING PAPER 12/07, 1, 27–29 (2007), <http://www.jeanmonnetprogram.org/papers/07/071201.html>.

⁵³ KOMÁREK, *supra* note 51, at 422.

⁵⁴ We will address this further, *infra* E. II.

⁵⁵ The account of the constitutional courts, preliminary rulings, and the ‘new form of EU law’ that thus takes place is what Giuseppe Martinico refers to as the new era of cooperation between the CJEU and the constitutional courts. Giuseppe Martinico, *Preliminary References and Constitutional Courts: Are You in the Mood for Dialogue?*, in *SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES* 221 (Filippo Fontanelli, Giuseppe Martinico & Paolo Carrozza eds., 2010).

German courts, the regional Constitutional Court of Hesse and highest courts from other Member States had gone before.”⁵⁶

I. Transjudicial Communication in the ESM Saga Post-Pringle

The decisions of the ACC and the PCT that were issued after the CJEU had pronounced its ruling in *Pringle* tempt speculation when discussing the judicial dialogue in the ESM saga. Would the courts have made preliminary references if they had been seized earlier? Were they deliberately waiting for the outcome of the procedure before the CJEU? We will refrain from entertaining these queries. Instead, we will evaluate the role of these two courts in the light of the references they made in their judgments to the judgment of the CJEU and the other constitutional court(s).

Drawing on the work of Anne-Marie Slaughter, there are two main points to be introduced to our discussion. First, a general observation is drawn from the growing trend of global communication between courts: the judges that participate in the “global community of courts” by referring to each other’s judgments “see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders.” This sense of belonging to a professional community stems, *inter alia*, from the fact that they are faced with common problems or issues.⁵⁷ The second point is that there are several different types of transjudicial communication, and one of the ways in which they differ is the extent to which engagement is reciprocal.⁵⁸ Looking at the ACC and the PCT in the ESM saga, we see courts that took the findings of other courts seriously and embedded them in their respective judicial decision-making process. Through this communication, the courts have recognized themselves as members of a community dealing with the same problems and approaching them on a similar set of parameters.⁵⁹ However, we can also observe that while communication existed, it did not take the avenue which would have ensure reciprocal engagement—the preliminary ruling mechanism. This means that the fact that the ACC and the PCT relied on the judgments of the CJEU and FCC supports our claim that the reason for the suboptimal character of the judicial dialogue in the ESM saga was not the protective attitude of the courts with regard to their constitutional autonomy.

⁵⁶ Daniel Thym, *A Spring in the Desert: the German ECJ Reference on the ECB Bond Purchases*, available at <http://eutopialaw.com/2014/02/13/a-spring-in-the-desert-the-german-CJEU-reference-on-the-ecb-bond-purchases/>.

⁵⁷ Anne-Marie Slaughter, *Global Community of Courts*, 44 HARV. INT’L L. J. 191,193 (2003).

⁵⁸ Anne-Marie Slaughter, *Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 112 (1994).

⁵⁹ *Id.* at 125–26 (explaining that there can only be communication when there is a “modicum of common ground,” courts need to recognize that they are operating on similar conceptions and share the commitment to rule of law.). This is a basic threshold; in the context of the EU, the common judicial identity of the courts, if anything, is much stronger.

II. The First Reference for a Preliminary Ruling from the FCC

On 7 February 2014, the FCC took the step of referring its first question for preliminary ruling to the CJEU.⁶⁰ The questions referred originated in the same procedure as the one where the ESM was adjudicated, one of the largest in the entire history of the Court and hence the source of a number of separate decisions (the *interim* and the final decision on the ESM and the TSCG, discussed above; the order for referral, discussed in this section; and the forthcoming decision that will follow the decision of the CJEU).⁶¹ The referral stems from the challenges made by the mass constitutional complaint against the legality of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT), and the accusation that the German Federal Government and the *Bundestag* did not actively prevent the ECB Decision from entering into force. The Court subjected the ECB Decision to *ultra vires* review to assess whether the ECB had overstepped its mandate under the Treaties in adopting the decision. However, as the decision on whether the ECB was within its jurisdiction or not depends on the interpretation of EU law, the Court requested a preliminary ruling from the CJEU. This was based on the Court's jurisprudence in the *Honeywell* decision, where it had held that:

According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the powers of control which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is cautious and friendly towards European law. This means for the *ultra vires* review at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act by European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU.⁶²

⁶⁰ Case 2 BvR 2728/13 et al, Order of 14 January 2014 [hereinafter OMT Reference].

⁶¹ Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 EUR. CONST. L. REV. 263, 267 (2014).

⁶² Case 2 BvR 2661/06 *Honeywell*, BVERFG 126, 286, 303–04 (cited in the OMT reference of the FCC).

The reference was received with mixed feeling among the scholars who contributed the first reactions. In the light of our inquiry, it is particularly relevant that the scholarship saw the OMT reference as being phrased assertively; this could, in turn, be destructive for dialogue. The core of this claim seems to be that the FCC only proceeded with the *ultra vires* review once it had found the decision to be *manifestly* overstepping the mandate. While the requirement of *manifest* breach is, on the hand, a limitation on the *ultra vires* control of acts of EU institutions by the FCC, it means, on the other hand, that the FCC presents the CJEU with anything but an open-ended question on the legality of the contested act.⁶³ The FCC is quite obviously convinced of the illegality of the ECB decision and has also quite vocally expounded the conditions under which OMT operations could nevertheless remain within the ECB's mandate. This earned the decision the label of "clear marching orders, dictated to the Luxembourg Court."⁶⁴

The contrasting accounts of the FCC's assertiveness (or lack thereof) are probably reconcilable by recognizing that the Court has, in its reference, mentioned the possibility of interpreting the ECB Decision and thus accommodating OMT operations within the system of competences.⁶⁵ In this paper, we need not go any further in speculating as to the outcome of the CJEU judgment or even the chapters of the 'OMT saga' that are to follow. It suffices to establish that the language of the reference is open enough for a dialogue to be established between the CJEU and the FCC (and possibly other courts). Additionally, the approach of the FCC is to be interpreted in the context of judge-made law of *ultra vires* review: the FCC's own standards from *Honeywell* command it to respect "the Union's own methods of justice" and the "right to tolerate error."⁶⁶

Given that the reference, as assertively as it may have been worded, is at the same time anticipatory of possible outcomes, we have a basis to conclude that the alleged concern for constitutional autonomy among the constitutional courts of the Member States is an unlikely explanation for the suboptimality of judicial dialogue in the ESM saga.

⁶³Wendel, *supra* note 51, at 277.

⁶⁴ Oliver Gerstenberg, *An End to European Multilateralism: A Comment on the German Bundesverfassungsgericht's OMT decision*, available at <http://eutopialaw.com/2014/02/19/an-end-to-european-multilateralism-a-comment-on-the-german-bundesverfassungsgerichts-omt-decision/>. This was in stark contrast with an initial response which saw the FCC's reference as a surrender of sovereignty, coupled with the conclusion that for the OMT, the FCC's decision to refer the question amounts to nothing less than "dodging a bullet." FINANCIAL TIMES, February 10, 2014.

⁶⁵ OMT Reference, para. 100; Wendel, *supra* note 51, at 271.

⁶⁶Wendel, *supra* note 51, at 305.

F. Was the Judicial Dialogue in the ESM Saga Suboptimal on Account of Lack of Time?

Is it possible that the references for a preliminary ruling were not sent simply because the potential referring courts were reluctant to postpone the passing of their final decision until the CJEU had pronounced its ruling? This is an argument that is very practical in nature, yet dangerous to disregard. This is not least because firstly, it normally takes the CJEU up to 20 months to deliver a judgment in a preliminary ruling case, and secondly, the procedures in the ESM saga were characterized by urgency.⁶⁷

This hypothetical explanation cannot, therefore, be easily discarded. There are, however, reasons for believing that while time was of great importance, it is precisely the ESM saga that can offer a lesson in management of time in constitutional justice.

The first part of the lesson is, of course, the SCI's successful motion for an accelerated procedure, pursuant to Article 104a of the Rules of Procedure of the CJEU on account of "exceptional urgency" and possible damage to the Eurozone from delayed ratification. The CJEU, after setting in motion the accelerated procedure, delivered its judgment after four months.⁶⁸

The second part of the lesson is that the CJEU did so *as a full court*, which of course amounted to a vast mobilization of the Court's resources and was in fact done for the first time in a preliminary ruling case. As per AG Kokott, the Court felt it had to give everything that it had.⁶⁹ This was, for one, as the case dealt with a very specific constitutional question of EU primary law (related to the new form of law), and also because the Court was already facing judicial decisions regarding the ESM from Member States.⁷⁰ This serves as ample evidence of the readiness of the CJEU to mobilize its forces when the Member States' constitutional courts had already been seized by challenges.

The third part of the lesson is the course of the proceeding before the FCC. The judgment on the ESM which the Court delivered in September 2012—a judgment that was anxiously awaited by the press, that visibly assuaged the financial markets, and that received plenty of scholarly attention—was a decision on the *interim* measures on the ratification of the Treaty. The Court held public hearings in June 2013, and it was only in February 2014 that

⁶⁷ Fahey & Bardutzky, *supra* note 3.

⁶⁸ Advocate General Juliane Kokott in her speech offered some insight into fast-track procedure that played out in *Pringle*. Juliane Kokott, *Perspectives on the Role of the Advocate General in the Eurozone Rescue Decision: Advocate General Kokott on Pringle v. Ireland*, <http://www.mjilonline.org/wordpress/wp-content/uploads/2013/07/Kokott1.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.*

the Court announced that it would deliver the main judgment in March 2014. Of course, whether a court can at all afford to pursue such a course of proceedings depends on a number of factors; and most importantly, it is also the parties that are to a certain extent in charge of the proceedings. Nevertheless, the procedure before the FCC speaks of a certain flexibility that courts sometimes enjoy and can deploy to serve different means; our claim is that this flexibility should also be deployed to facilitate judicial dialogue.

G. Concluding Thoughts

Moments of wide mobilization of constitutional courts around Europe on the same subject are relatively rare and are most often linked to a reform of the EU Treaties. With the development of the new form(s) of EU law, it is likely that courts exercising judicial review in several Member States will again be seized with challenges to processes of integration and cooperation. Litigants, of course, tend to adapt their challenges to the rules of access in their respective jurisdictions and challenge the legal acts that are subject to review in the formal sense. It will be for the courts to recognize the bigger picture - the fact that, for example, the international treaty under review is functionally linked to primary or secondary EU law - and accordingly, involve the CJEU in the interpretation of the mechanism as a whole. It is hard to deny that in the ESM saga, there was an element of chance, or rather, a lack of any kind of cooperation or coordination on this issue. The arguments as to why the review of the ESM should have featured a better judicial dialogue have already been presented in this account. In order for future reviews of the new form of law to follow a more dialogic course, certain suggestions that might steer the EU courts, plural, in that direction, should also be sketched.

It is the moments of wide mobilization that open up the question of how to conceptualize the parallel activity of the courts. In 2010, Andreas Voßkuhle, the president of the FCC, suggested the concept of *Verfassungsgerichtsverbund* to explain primarily the relationships between the German FCC and what he referred to as the two 'European constitutional courts' - the CJEU and the European Court of Human Rights. The *Verbund* concept leaves space open for constitutional courts of other Member States, remarking that the communication among national constitutional courts takes place either by means of personal contacts between the judges or by means of mutual reception of their case law.⁷¹ The concept emphasizes cooperation among courts and transcends the 'spatial' logic of hierarchy. It downplays the commonly spread conflict rhetoric of the relationship between the FCC and the CJEU, highlighting that that relationship "is not about superiority or subordination but about appropriately sharing and assigning responsibilities."⁷²

⁷¹ Andreas Voßkuhle, *Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175, 197-98 (2010).

⁷² *Id.* at 183-84. The author admits that the English translation of the word for the concept, "multilevel cooperation of European constitutional courts" is not ideal as it may not convey entirely the non-hierarchical character of the concept.

What is probably missing, despite the presence of transjudicial communication, is the awareness of the individual constitutional courts that they are in moments of wide mobilization, constitutive elements of the Europe-wide *Verbund* of guardians of the constitutions. Perhaps an increased awareness of this role on the part of the courts and the judges would be a sufficient first step towards a better-coordinated approach to judicial dialogue.

The awareness of being part of a *Verbund* of constitutional courts could lead to any number of operationalizations of the concept. One could well argue for the establishment of a court, or court-like body with jurisdiction over competence disputes in Europe. Provided with a flexible enough procedural apparatus, this could well make sure that, in the words of Andreas Voßkuhle, *Multilevel cooperation of the European Constitutional Courts*, responsibilities are correctly assigned and shared. Similarly, the argument could be for legislative change, either in primary law or in national procedural orders (or both), to redefine or rephrase obligations to engage in judicial dialogue.

What strikes as both feasible and sufficient, besides advocating for a raised awareness with regard to the membership of the *Verbund*, is to plead for informal manifestations of the latter. Notably, the concept of network has recently been applied precisely to the horizontal dimensions of judicial dialogue in Europe.⁷³ The networks established between constitutional courts in Europe combine communication through judicial and extrajudicial writings, references to each other's case law, contacts between "people of flesh and blood", and court personnel who meet regularly at congresses. Most important, perhaps, are the triennial congresses of the Conference of European Constitutional Courts, which deal with a selected topic on the basis of a questionnaire and national reports.⁷⁴ It seems that the basic infrastructure is already in place. It would most likely only require smaller modifications, such as informal agreements and a net of liaison officers.⁷⁵ In this way, pertinent questions could reach all members of the *Verbund* and indicate that there is a need for an exchange of views and possibly coordination.

⁷³ Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 *UTRECHT L. REV.* 100, 101 (2012).

⁷⁴ Maartje de Visser, *CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS* 393. The website of the Conference is at <http://www.confconstco.org/>.

⁷⁵ In what is perhaps the most institutionalized connection between European constitutional courts, there are in fact already liaison officers of the constitutional courts charged with horizontal communication via the Joint Council on Constitutional Justice that operates under the auspices of the Venice Commission. *Id.* at 396.

Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling

By Marta Cartabia*

A. Introduction

The European continent has become a space of *constitutional interdependence* and consequently, national Constitutional Courts are now embedded in a constitutional fabric made of national constitutions, European Union (EU) law, European treaties, and conventions. This is all the more evident in the domain of fundamental rights.

This constitutional interdependence affects the national Constitutional Courts' responsibilities: On the one hand, they are charged with new duties, because to some extent they are called to serve as EU law adjudicators; on the other hand, some of their traditional competences are to be adjusted to a more complex legal order.

Moreover, the national Constitutional Courts' mission overlaps in part with the activity of many other judicial bodies and in particular human rights adjudicators, whose decisions impact the work of national Constitutional Courts.

B. How Do Constitutional Courts React to These Facts?

Different reactions can be recorded from the constitutional practice.

(i) *Implementation and promotion*: although it is a common assumption that EU law tends to displace Constitutional Courts at the margin of the European legal order,¹ because it primarily relies on the cooperation of lower national Courts, undoubtedly the Constitutional Courts' mission includes the enforcement of European obligations. National constitutions provide *European clauses*, so that European obligations are to some extent also constitutional obligations. As a consequence, Constitutional Courts decide a number of controversies on European grounds and when they invalidate national legislation that conflicts with European norms and principles—provided they do not have direct effect, according to the *Simmenthal* doctrine—they contribute to rendering EU law more

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¹ Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420 (2013).

effective. At times, some national courts go even further and promote supranational legal concepts well beyond the European mandate: there are a number of cases that could be resolved on purely domestic grounds, but Courts intentionally broaden the scope of their judgments and include EU law. They disseminate the European legal culture through their respective legal orders.

(ii) *Reluctance*: a number of Courts are inclined to contain the use of transnational law to a minimal level in their own decisions and decide cases on domestic grounds rather than on European ones, tend to avoid formal referral to supranational law and case law, and escape all contacts with other national or supranational Courts.

(iii) *Defense*: starting in the 1970s, an increasing number of Constitutional Courts have developed some “safeguard clauses” designed to protect the core *values* of the *national constitutional identity* from all forms of interference from foreign or EU law. A similar concern brings some national Courts to mark the boundaries that cannot be trespassed by EU law, maintaining the control of the *competences* that pertain to the national constitutional order. Suffice to recall here *Solange I* and *II*, *Maastricht*, *Lissabon*, and the following line of decisions in the German Constitutional Court. A similar position was maintained by the Italian Constitutional Court with the “counter limits doctrine”—an expression that refers to the limits to the limitation of national sovereignty accepted to enter the European Communities. Moreover, at the time of the Constitutional Treaty a number of other national Constitutional Courts (the French, Spanish, and some of the Central and Eastern European ones) endorsed similar doctrines. Indeed the core constitutional values and fundamental rights and competences are part and parcel of the aforementioned safeguard clauses that national Constitutional Courts do not want to give up.

(iv) *Challenge*: occasionally some Constitutional Courts have challenged straightforwardly a piece of EU legislation or a decision of the European Court on *ultra vires* grounds or on grounds of conflict with basic principles of the national constitutional order. At times, the challenge has been brought before the European Court, as the Austrian Constitutional Tribunal and Irish Supreme Court recently did with regards to the data retention directive; at other times, divergences have resulted in an unsettled, mute conflict.²

(v) *Participation*: in recent years, an increasing number of Constitutional Courts have contributed to the development of common legal principles, taking an active role on the European stage, interpreting and enforcing European standards and especially making use of the preliminary ruling. Suffice here to recall the Spanish preliminary ruling in the *Melloni*

² GIUSEPPE MARTINICO, THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS: THE FRUSTRATING KNOT OF EUROPE (2012).

case on the right to defense in the European arrest warrant context;³ the French *Conseil Constitutionnel* in the *Jeremy F.* case, equally concerning the European arrest warrant and the right to defense;⁴ the Italian Constitutional Court concerning the interpretation of directive 1999/70/EC on fixed-term employment and its applicability to teachers and other personnel working in public schools;⁵ and the decision of the Austrian Constitutional Court, challenging directive 2006/24 on data retention.⁶

Implementation, promotion, reluctance, defense, challenge, and participation: These approaches often all coexist. The same Court may at times be reluctant, cooperative, defensive, challenging, and so on.

C. What Constitutional Framework for the European Space?

It is worth noting that each of these stances reflects and promotes different understandings of the European public space.

Some of them insist on boundaries, limits, and divisions, and therefore tend to advance a context of *constitutional fragmentation*. In many European countries, this might be a by-product of the traditional dualist approach to international law, based on a sort of “separate but equal” principle.

At the opposite end, and sometimes as a consequence of a monist approach to legal integration, other judicial doctrines foster *uniformity*, implying a sort of top-down relationship between European and national constitutional law and between European and national courts.

Overtaking the old dichotomy between dualist and monist views of European integration, a new *pluralist constitutional approach* can be promoted, in which harmonization does not overlook diversity, standardization does not disregard disparities, and generality does not ignore singularity.

³ The case was about the interpretation of the European Regulation of the arrest warrant in relation to criminal proceedings in absentia and was decided by the CJEU Grand Chamber. Case C-399/11, *Stefano Melloni v. Ministerio Fiscal* (Feb. 26, 2013), <http://curia.europa.eu/>.

⁴ French *Conseil Constitutionnel*, Decision 2013-314P QPC, 4 April 2013, *Jeremy F.*

⁵ Italian Constitutional Court, Order 207/2013 of 3 July 2013.

⁶ VfGH G 47/12-11 G 59/12-10 G 62, 70, 71/12-11, 28 November 2012. Eventually the case was decided by the CJEU. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others* (Apr. 8, 2014), <http://curia.europa.eu/>.

Constitutional pluralism seems to better correspond to the self-understanding of Europe itself, whose identity is defined by “unity in diversity” and is founded on a “subsidiarity framework” that requires a core of common legal principles surrounded by a margin of appreciation wide enough to allow national constitutional cultures to survive.

D. New Questions About the Preliminary Ruling Procedure

The preliminary ruling procedure is one of the more powerful procedural connectors among courts serving the cause of constitutional pluralism. New signs of interest in this procedure are spreading all over Europe.⁷

As has been said above, in the EU context, an increasing number of Constitutional Courts have abandoned their reticence and have started referring questions of interpretation or validity of EU legislation to the Court of Justice of the European Union (CJEU) by means of preliminary rulings.

Moreover, a preliminary procedure is now envisaged in the new Protocol 16 to the European Convention of Human Rights (ECHR), so that the highest court of each Contracting Party may request the Strasbourg Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights protected by the ECHR.

Finally, a special form of coordination between the ECHR and the CJEU is described in the Draft Agreement for the accession of the EU to the European Convention⁸—the so-called prior involvement—so that, if a case has been taken to Strasbourg without the question having been considered by the CJEU, the procedure is to be suspended in order for the CJEU to be given precedence. Even though the fate of the draft agreement is hardly predictable in the light of Opinion 2/13, delivered on 18 December 2014 by the CJEU, the aforementioned provisions indicate that the culture of constitutional judicial dialogue is pervasive in Europe.

All these signs show that the time is ripe for formal interactions among constitutional and European courts.

In a way, whereas a few years ago the question was *whether* Constitutional Courts were to join the judicial dialogues taking place among other courts in Europe, at present this question has been given an affirmative answer. Apparently, Constitutional Courts no

⁷ See, for instance, this *Special Issue on The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts* (Maria Dicosola, Cristina Fasone & Irene Spigno, eds.)

⁸ The Co-respondent and the prior involvement mechanisms are envisaged by Article 3 of the Draft Agreement—Council of Europe CDDH–UE (2011) 16 fin.

longer fear that a preliminary ruling request might raise the expectation of passive obedience to another court. The preliminary ruling procedure is rather seen as an opportunity for national Constitutional Courts to be *agents* rather than passive *recipients* of the European constitutional construction.

This move towards a greater engagement of national Constitutional Courts in European constitutional conversations raises new questions that might be usefully addressed.

For example, in case of double preliminary questions—constitutional and European—*what order of priority* should be followed? The CJEU has addressed some of these questions in the *Melki* case,⁹ concerning a *question prioritaire de constitutionnalité* asked by the *French Cour de Cassation*. However, a number of issues have not yet been clearly answered. Considering the pluralistic constitutional framework of Europe, there might be *equivalence*, but also *diversity* in the interpretation of the same legal principles and fundamental rights by different judicial actors. So the question arises of whether it is more convenient and appropriate that Constitutional Courts decide first on national constitutional grounds before the European Courts pronounce their decisions? Is this always true, both for the CJEU and the European Court of Human Rights? Or is the opposite true? What court should have a “*final say*,” if any? What court should have a “*first say*,” if any?

Moreover, is it possible that, after requesting a preliminary ruling, a Constitutional Court disregards the statement of the CJEU, held to be in contrast with the national constitution or with its core principles? Or, once the question is asked, is the national court definitely bound by the European decision? Or should a margin of appreciation be left for Constitutional Courts? Should the European Courts leave room for a margin of appreciation by national Constitutional Courts in the end?

Does a request for a preliminary ruling sent by a Constitutional Court have an *added value* for the European courts? Does it bring to their attention more arguments that are useful for a better comprehension of the case? Does it enrich their understanding of the national contexts? Is it therefore useful that a Constitutional Court refers to the European courts even when other similar questions have already been sent by lower courts? This last scenario occurred in the aforementioned question relating to the data retention directive, in which the Austrian Constitutional Court joined a previous preliminary ruling sent by the Irish Supreme Court. Similarly, in the case on fixed-term employment the Italian Constitutional Court added a new set of questions to a previous one sent by the Tribunal of Naples.

⁹ Joined Cases C–188/10 and C–189/10, *Melki and Abdeli*, 2010 E.C.R. I–05667.

For the purpose of constitutional pluralism, what kind of preliminary ruling is more effective and useful? In fact, one thing is a preliminary ruling for *interpretation* of EU law, which is the most common one and which usually results in an indirect form of supervision of domestic legislation; another thing is a preliminary ruling for the review of the *validity* of EU measures, that prompts the CJEU to act as a veritable Constitutional Court of the EU (as happened in the Austrian and German cases, respectively about the data retention directive and the powers of the European Central Bank, concerning the Outright Monetary Transaction). Moreover, within the second one, a distinction can be drawn between questions for infringements of *fundamental rights* and question concerning *ultra vires* issues. Should these forms of preliminary ruling be treated differently?

Moreover, so far, in Europe, preliminary rulings typically move from the peripheries to the center. Might it be useful to envisage new forms of preliminary rulings going in other directions, from the center to the peripheries or connecting different peripheries? These possibilities are thus far unknown in Europe. However, the practice of some US federal courts shows that they have asked the state courts for “certification” of the correct interpretation of state legislation implied in the federal case.¹⁰ This is an interesting example of dialogue moving from the center to the peripheries, which is worth exploring in more detail.

Although these questions seem to be highly theoretical at present, it is quite predictable that some or all of them will soon come to the bench. The links among courts are becoming stronger and the need for procedural connection is growing.

Indeed, all these questions might receive different answers depending on the purpose attached to preliminary ruling. The answers to these—and other—questions will shape the form of the European judicial dialogue and will reallocate the positions of the different courts, reflecting, therefore, the understanding of the constitutional space in Europe.

¹⁰ Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1306 (2003).