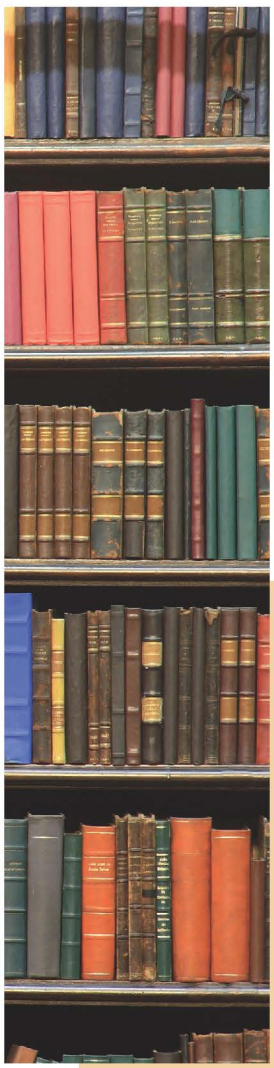
EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

Gender Equality

Legal and Parliamentary Affairs

Petitions

National Constitutional Avenues for further EU Integration

STUDY

EN

2014

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS
CONSTITUTIONAL AFFAIRS

NATIONAL CONSTITUTIONAL AVENUES FOR FURTHER EU INTEGRATION

STUDY

Abstract

This study investigates national constitutional limits to further EU integration and explores ways to overcome them. It includes an in-depth examination of the constitutional systems of 12 Member States (Croatia, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, and the United Kingdom) and a bird's eye view of all Member States. EU integration can be advanced by avoiding substantive constitutional obstacles in various ways. Overcoming the substantive obstacles requires managing national procedural constitutional hurdles. This is possible to the extent that the required broad political consensus exists.

PE 493.046 EN

This document was requested by the European Parliament's Committees on Legal Affairs and on Constitutional Affairs.

AUTHOR(S)

Mr Leonard F.M. BESSELINK
Mrs Monica CLAES
Mrs Šejla IMAMOVIĆ
Mr Jan Herman REESTMAN

RESPONSIBLE ADMINISTRATOR

Mrs Rosa RAFFAELLI
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: rosa.raffaelli@europarl.europa.eu

EDITORIAL ASSISTANCE

Marcia MAGUIRE
Policy Department C: Citizens' Rights and Constitutional Affairs

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in February 2014.
Brussels, © European Union, 2014.

This document is available on the Internet at:
http://www.europarl.europa.eu/studies

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS 7

EXECUTIVE SUMMARY 8

1. INTRODUCTION 14

2. COMPARATIVE ANALYSIS 22

2.1. The situation under the current system 22

2.1.1. Substantive limits 22

2.1.2. Overcoming the substantive obstacles under the current treaties 25

2.1.3. Procedural limits 26

2.1.4. Overcoming procedural obstacles 27

2.2. Further treaty reform 28

2.2.1. Substantive reservations 28

2.2.2. Procedural hurdles for further integration 31

2.2.3. Overcoming the hurdles 33

3. CONSTITUTIONAL AVENUES FOR FURTHER EUROPEAN INTEGRATION: SOME FINAL CONCLUSIONS 35

3.1. Avoiding substantive constitutional obstacles 36

3.1.1. Further integration under the current treaty framework 36

3.1.2. Further integration beyond the current treaty framework 38

3.1.3. Overcoming substantive constitutional obstacles 38

ANNEX I: IN-DEPTH STUDY OF SELECTED MEMBER STATES 41

1. CROATIA 41

1.1. GENERAL CONSTITUTIONAL FEATURES 41

1.2. THE SITUATION UNDER THE CURRENT SYSTEM 42

1.3. FURTHER TREATY REFORM 48

1.4. REFERENCES 51

2. THE CZECH REPUBLIC 53

2.1. GENERAL CONSTITUTIONAL FEATURES 53

2.2. THE SITUATION UNDER THE CURRENT SYSTEM 54

2.3. FURTHER TREATY REFORM 63

2.4. REFERENCES 67

3. ESTONIA 68
3.1. GENERAL CONSTITUTIONAL FEATURES 68
3.2. THE SITUATION UNDER THE CURRENT SYSTEM 69
3.3. FURTHER TREATY REFORM 75
3.4. REFERENCES 80
4. FINLAND 82
4.1. GENERAL CONSTITUTIONAL FEATURES 82
4.2. THE SITUATION UNDER THE CURRENT SYSTEM 84
4.3. FURTHER TREATY REFORM 90
4.4. REFERENCES 92
5. FRANCE 93
5.1. GENERAL CONSTITUTIONAL FEATURES 93
5.2. THE SITUATION UNDER THE CURRENT SYSTEM 94
5.3. FURTHER TREATY REFORM 104
5.4. REFERENCES 109
6. GERMANY 111
6.1. GENERAL CONSTITUTIONAL FEATURES 111
6.2. THE SITUATION UNDER THE CURRENT SYSTEM 111
6.3. FURTHER TREATY REFORM 118
6.4. REFERENCES 125
7. HUNGARY 126
7.1. GENERAL CONSTITUTIONAL FEATURES 126
7.2. THE SITUATION UNDER THE CURRENT SYSTEM 127
7.3. FURTHER TREATY REFORM 133
7.4. REFERENCES 135
8. IRELAND 136
8.1. GENERAL CONSTITUTIONAL FEATURES 136
8.2. THE SITUATION UNDER THE CURRENT SYSTEM 137
8.3. FURTHER TREATY REFORM 145
8.4. REFERENCES 146

9. ITALY 147
9.1. GENERAL CONSTITUTIONAL FEATURES 147
9.2. THE SITUATION UNDER THE CURRENT SYSTEM 147
9.3. FURTHER TREATY REFORM 154
9.4. REFERENCES 157
10. THE NETHERLANDS 158
10.1. GENERAL CONSTITUTIONAL FEATURES 158
10.2. THE SITUATION UNDER THE CURRENT SYSTEM 158
10.3. FURTHER TREATY REFORM 165
10.4. REFERENCES 170
11. POLAND 172
11.1. GENERAL CONSTITUTIONAL FEATURES 172
11.2. THE SITUATION UNDER THE CURRENT SYSTEM 172
11.3. FURTHER TREATY REFORM 180
11.4. REFERENCES 182
12. THE UNITED KINGDOM 183
12.1. GENERAL CONSTITUTIONAL FEATURES 183
12.2. THE SITUATION UNDER THE CURRENT SYSTEM 183
12.3. FURTHER TREATY REFORM 193
12.4. REFERENCES 196
ANNEX II: BIRD'S EYE VIEW 197
1. AUSTRIA 197
2. BELGIUM 200
3. BULGARIA 202
4. CROATIA 205
5. CYPRUS 206
6. THE CZECH REPUBLIC 209
7. DENMARK 212
8. ESTONIA 214
9. FINLAND 216

10. FRANCE 218
11. GERMANY 221
12. GREECE 224
13. HUNGARY 226
14. IRELAND 227
15. ITALY 230
16. LATVIA 232
17. LITHUANIA 234
18. LUXEMBOURG 236
19. MALTA 238
20. THE NETHERLANDS 242
21. POLAND 243
22. PORTUGAL 246
23. ROMANIA 249
24. SLOVAKIA 252
25. SLOVENIA 253
26. SPAIN 255
27. SWEDEN 257
28. THE UNITED KINGDOM 261
ANNEX III: SCHEMATIC OVERVIEW OF THE CONSTITUTIONAL STATE OF AFFAIRS IN THE MEMBER STATES 263
ANNEX IV: GLOSSARY OF TECHNICAL TERMS 274
ANNEX V: LIST OF EXPERTS 277

LIST OF ABBREVIATIONS

BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CJEU	Court of Justice of the European Union
CREAA	Constitution of the Republic of Estonia Amendment Act
EAW	European Arrest Warrant
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFSF	European Financial Stability Facility
ESM	European Stability Mechanism
GG	*Grundgesetz* (Basic Law of Germany)
SAA	Stabilization and Association Agreement
SEA	Single European Act
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

1. The central research question of this study is whether, and to what extent, national constitutions provide guidance for further European integration and reversely how the latter can take place in full respect for national constitutional identities.

2. The research involved an in-depth analysis of a representative selection of Member States: Croatia, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, and the UK; and a bird's eye view of all Member States. The study conducts a cross-national comparative analysis of the national constitutional approaches to EU integration, on the basis of which some final conclusions are offered.

3. This study deals with the relationship between the EU and national constitutions mainly from a national perspective. But there is also another side of the story, taking the EU perspective.

The EU Treaties (TEU and TFEU) acknowledge the central role of national constitutions, for instance when they require ratification by all the Member States 'in accordance with their respective constitutional requirements' for their entry into force, for their amendment and for the accession of new Member States. This presumably implies more than a mere procedural rule and acknowledges that the Treaties should also *substantively* be in accordance with national constitutions, or at least, it grants the Member States the opportunity, if their constitution so requires, to ensure that they do not enter into Treaties which would be unconstitutional.

On a more general level, the EU expects its Member States to comply with the common fundamental constitutional values that all Member States share, and which also apply to the European Union (Arts. 2 and 7 TEU). More specifically with respect to fundamental rights protection, the Treaty, the EU Charter of Fundamental Rights and the CJEU case law explicitly seek to connect EU human rights to the common constitutional traditions of the Member States.

Yet, under the Treaties, the EU is not only bound to respect the *common* constitutional values of the Member States. In addition, Article 4(2) TEU obliges the Union to respect

> 'their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

Accordingly, if the Union should fail to respect these national identities as inherent in their fundamental constitutional and political structures, it would infringe not only those identities, but also the Treaty obligation to respect them. Whether this is indeed the case is, as a matter of EU law, to be decided ultimately by the Court of Justice of the Union, and not unilaterally by the Member States. In addition, the Union must, under Article 4(2) TEU, respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. The Treaty thus recognises that there are 'essential State functions' which remain with the Member States and which the EU must respect. What exactly these functions are is not clear, beyond those mentioned in the provision.

On the other hand, and despite the central role of national constitutions in the EU constitutional edifice, Member States cannot invoke their national constitutions to escape compliance with EU law before the Court of Justice of the European Union. And even before national courts, national constitutional law should not, as a matter of EU law, take priority

over conflicting provisions of national law. Indeed, the *principle of primacy of EU law*,[1] which is firmly settled in the case law of the CJEU, and has been confirmed in Declaration 17 annexed to the TEU, applies to national constitutional law as well. With respect to fundamental rights, more specifically, Article 53 of the Charter does not lead to a different conclusion.

4. Turning the perspective to national constitutions, it can be said that, in general, **constitutions** generally perform the four main functions of

- constituting the polity, which may be understood as expressing the basic social contract;
- organising and structuring the exercise of public authority and dividing powers between the various branches;
- limiting the exercise of public authority, which also includes fundamental rights protection of individuals and
- expressing common values of society and/or carrying its 'national identity'.

As power-organizing tools, two of the main functions of constitutions go in different directions. One is the *enabling* function of constitutions: constitutions constitute the institutions which are to exercise public authority and empower these institutions. A second function is associated with 'constitutionalism' in a narrow sense and concerns the *limiting* function of constitutions: constitutions limit the exercise of public authority, for instance *via* human rights and a division of powers. These different functions of a constitution are also reflected with regard to EU integration: national constitutions help to enable, and limit.

5. In the context of participation in the EU, the **enabling** function of constitutions is illustrated by those constitutional provisions which allow for a 'limitation of sovereignty' or a 'transfer of sovereign powers' to the EU. However, national constitutions not only enable, but also set **limits** to further EU integration. **Membership of the European Union challenges the national constitutions** in various ways: powers, which under the constitution have been attributed to national bodies, are transferred to the EU, and hence they are exercised differently from the way it was intended under the national constitution. The EU is, as such, not bound by those national constitutions, but does indeed require the Member States to apply EU law even if it should infringe the national constitution. Accordingly, the supremacy of the Constitution itself is challenged. Seen in this light, it should come as no surprise that many Member States, while having adapted their constitutions to allow for membership and facilitate it, have at the same time retained constitutional limits and reservations, and impose conditions on EU law.

Moreover, constitutions are not only often considered to be expressions of the will of the people to form a polity (political autonomy) and to be governed under the constitution, but many constitutions also legally and judicially protect this foundational will. This may take different forms, for instance by protecting the sovereignty of the state, statehood itself or the national nature of democracy, or a combination of these.

6. To put the constitutional obstacles to further EU integration in proper perspective, the report draws two main distinctions. The first concerns a distinction between further integration under the current EU treaty framework and further integration by means of new (EU amendment) treaties. The second distinction is that between substantive and procedural constitutional obstacles. **Generally, the substantive constitutional obstacles can be overcome by the adoption of a treaty (amendment), by the adoption of a constitutional amendment or by a combination of both. For the adoption of such amendments, national procedural constitutional hurdles have to be taken**.

[1] Also known as the 'precedence', 'priority' or 'supremacy' of EU law; see the landmark decision Case 6/64 *Costa v ENEL* [1964] ECR 585.

7. Under the current EU treaty framework, substantive constitutional limitations to further EU integration by means of secondary EU law in many Member States relate to respect for national (constitutional) **fundamental rights**, respect for the **limits of the powers** transferred (EU acts must be *intra* vires, i.e. not exceed the competences of the Union, as interpreted under the constitution or the national acts approving the Treaties), and respect for the **constitutional identity** of the Member States (or their fundamental constitutional principles). There is a great variety between the Member States: some have no or at least no specific or clearly articulated substantive obstacles for further integration under secondary EU law, while others are more explicit and develop all three categories of limitations. Also the way in which these are shaped differs from one State to the next.

8. The procedural constitutional obstacles to further EU integration by means of secondary EU law regard participation requirements for the adoption of EU acts. The existence of such requirements is provided for in EU law itself (e.g. ratification or approval in accordance with national constitutional requirements) or in Member States' constitutional law (parliamentary scrutiny systems), or both. The approval requirements themselves vary widely per country and range from approval, whether or not with a qualified majority, by resolution of the national parliament, approval by act of parliament or under the procedure for national constitutional amendment, and sometimes approval by act of parliament and referendum.

9. When it comes to further steps in European integration by way of **amending EU Treaties, or concluding new Treaties**, there is a broad variety among Member States as to the ***substantive* obstacles** which constitutions impose on further integration by treaties. One set of obstacles is concerned with the sheer **volume of powers transferred**, which is then viewed to threaten fundamental principles of the constitution, such as statehood, national democracy or sovereignty. But usually, the substantive limits concern the values and principles that must be respected. Thus, several constitutions (are interpreted to) express the idea that the State can only ratify treaties and participate in the EU or international organisations in so far as these comply with the **core values of the constitution**. To varying degrees, they thus project their basic constitutional principles on the Union, and require the Union to comply with essentially the same principles.

10. With respect to **procedural hurdles for further integration by way of amending EU Treaties or adopting new ones**, it could be said that, as a general rule, the more a treaty impinges on a national constitution and the more it approaches its core values, or is considered to do so, the more difficult it becomes to ratify such a treaty, and the higher the procedural hurdles that need to be overcome. These hurdles concern both the **approval of the relevant treaty**, and, should this be necessary, **amendment of the constitution**. Constitutional requirements on approval of EU Treaties vary from simple majority in parliament, to special majority for some EU Treaties, to special majority for all EU Treaties, to constitutional amendment by referendum (in Ireland).

11. If a **Treaty submitted for approval is found to actually infringe the constitution**, the procedural requirements become more stringent, and ratification will usually have to be preceded by a **constitutional amendment**. The procedural requirements for constitutional amendment vary to a large extent.

12. In some countries certain constitutional principles are considered so crucial that they are protected by **constitutional provisions which are declared unamendable**. If a proposed treaty reaches those constitutional limitations, approval can only be secured through other means and avenues. This is especially the case in Germany, where an infringement of the German constitutional identity can only be overcome by the adoption of a new Constitution.

13. Against this background of national constitutional limitations, the avenues for further European integration can be found in two main strategies: (I) avoiding the existent substantive constitutional obstacles on the one hand, and (II) overcoming the obstacles, and making them disappear.

14. EU integration, both under the current treaty framework and beyond it, can be taken further while **avoiding substantive constitutional obstacles**. However, this has important implications for both Member State actors and EU institutions. Under the current treaty framework, the most important manner to avoid constitutional blockages for the Member States actors is **their abidance by the constitutional rules and principles**. This requires that the Member States should not contribute to the making of EU law that would infringe their own Constitution, or, alternatively, they should negotiate exceptions. For the EU institutions, it requires them to **act in respect of national constitutional limits to integration**. Thus, the issue of the EU remaining *intra vires* requires the legislative, executive and judicial organs of the Union to take seriously the legal basis of EU action. Strict abidance by the principle of subsidiarity can reduce the possibilities of running into constitutional obstacles for further integration. In the context of fundamental rights protection, a mature and truly European system and culture of protection of fundamental rights is developing on the basis of the EU Charter and other mechanisms. While this cannot fully replace national constitutional protection, and conflicts may continue to arise, especially due to differences in the balances struck between fundamental rights and other interests, and the different scope of certain rights, constitutional clashes can often be avoided.

Constitutional sensitivities specific to one or several Member States are sometimes addressed in EU legislation. This is not merely a matter of political sensitivity: there is also a broader obligation of the EU and its institutions under Article 4(2) TEU to respect the 'national identities of the Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government', as well as 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. This can be considered a recognition of the fact that the EU must pay due regard to the constitutional concerns of the Member States. At least as regards national obstacles that can be subsumed under Article 4(2) TEU, prudent decision-making is called for.

Generally, the EU institutions have **several techniques** at their disposal to avoid national constitutional obstacles and to accommodate constitutional diversity while engaging in further European integration within the present treaty framework. We mention the following:

- The choice of legal instrument (the choice for a directive might leave more leeway for implementation in accordance with national constitutional requirements);
- The use of techniques such as the 'open method of coordination' and other benchmarking techniques rather than harmonization;
- The use of minimum rather than total harmonization;
- The use of exemptions or differentiated regulation.

The practices listed above are premised on awareness and sensitivity in the EU institutions of national constitutional obstacles that further integration might run into. This in turn highlights the importance of an honest constitutional dialogue not only between courts, but also between European and national institutions.

15. By now, the state of EU integration has advanced so far, and the competences already transferred are so extensive, that **almost every new transfer of competences in amending EU Treaties or new Treaties is likely to be constitutionally sensitive in at least one of the Member States**. The spectrum of competences whose transfer is constitutionally problematic varies from Member State to Member State. But in its entirety

the spectrum ranges from those competences which historically have formed the nucleus of national sovereignty and statehood (e.g. foreign affairs and defence, criminal law), via economic competences to competences related to national culture and the welfare state (social security etc.).

To a certain extent, national constitutional sensitivities regarding new transfers of competences which are particular to one or a few Member States can be accommodated, be it only at a certain cost. One avenue for further EU integration respecting individual national constitutional sensitivities is to create treaty exemptions for those Member State who are not willing to integrate (further) in a certain area or field. This is actually reflected in EU practice. Various Protocols to the Treaties, from Maastricht to Lisbon, testify to this.

Another avenue for transferring new competences to the EU while respecting individual national constitutional sensitivities regards the way the competences are exercised at the EU level, which can guarantee that the Member State and its parliament remain in a position to exert a decisive influence on European decision-making procedures, i.e. unanimity.

16. Substantive constitutional obstacles, whether arising under or beyond the current treaty framework, can be overcome in different ways. Some issues can be solved via an **informal adaptation of the constitution.**

More often, it will be necessary to adopt a treaty (amendment), a constitutional amendment, a combination of both or even a new constitution. The prescribed route depends on the kind of constitutional obstacle encountered, but in all situations at least certain **procedural constitutional hurdles** have to be taken. Even a (simplified) treaty amendment which does not encounter any substantive constitutional obstacle in the Member States needs to be approved by the national parliaments or in a referendum, or in both, depending on the requirements of national constitutional law. **If substantive constitutional obstacles are encountered, the procedural hurdles become higher.** In nearly all such cases, qualified majorities in parliament are required, or a referendum, or again a combination of both. And in some Member States, proposals for further EU integration might even collide with obstacles deriving from provisions which claim to be unamendable.

These procedural constitutional obstacles should be put in perspective. The history of European integration shows that further integration has often led Member States to amend their Constitution. This has happened typically at times of Treaty amendments which entailed new steps in EU integration (think of, for instance, the Treaty of Maastricht), but also in cases of major steps in EU integration under the Treaties in force (such as in the case of the European arrest warrant).

Moreover, at least in some Member States the provisions which are claimed to be unamendable under the present national constitutional arrangement can themselves be amended. And even were this is not the case, the obstacle is not constitutionally insurmountable, as an entirely new constitution could be adopted.

16. While the procedural constitutional hurdles which need to be managed to overcome substantive constitutional obstacles are certainly not insurmountable, they should not be discounted too lightly. Indeed, they **may reflect deep-seated sensitivities** which are also evident in the current political climate concerning European integration. The **political context** must not be ignored in assessing constitutional possibilities for even relatively small steps on the road to further integration.

17. This is *a fortiori* the case in the context of **moving into a new constitutional order**, for instance by giving the EU the power to decide on its own competences (the so-called

Kompetenz-Kompetenz) or by giving up independent statehood under international law. The perspective of a development towards a situation in which the scope of the constitutional orders of the Member States is formally no longer expression of political autonomy, and such orders no longer derive their powers from the national polity but top-down from the Union, poses challenges which may be - in a technical sense and from a strictly legal perspective - manageable, and can technically be framed in terms of constitutional law. However, at present they must be deemed to be politically unfeasible. Here we are leaving the area of constitutional law and entering the realm of political speculation and assessment. When engaging in further integration beyond the present Treaty framework, it is no longer merely a matter of constitutional sensitivity. Overall political and social realities are more decisive than constitutional rules.

1. INTRODUCTION

The national constitutional foundations of European integration have been subject to extensive transformation in recent years. The most recent catalyst for change has been the entry into force of the Lisbon Treaty on 1st December 2009. Conversely, national constitutional and supreme courts in many countries have delivered important decisions, which addressed key questions concerning the constitutional foundations of EU integration process.

The central research question of this report is **whether, and to what extent, national constitutions provide guidance for further European integration, and reversely how the latter can take place in full respect for national constitutional identities**.

More specifically, the following questions are considered:

- How do the texts of national constitutions deal with EU integration?
- In what manner are the relationships between the EU and the Member States' constitutional orders generally conceptualized in the various Member States?
- What are the ways in which national constitutional adaptation has occurred in the process of accession to the EU, amendment of EU primary law, and in the course of the development of integration within the existent EU framework (e.g. through the adoption of secondary EU legislation)?
- What are the national constitutional limitations to EU integration which have so far been identified in legal and political practice, including case law, and scholarly comment?
- Can the identified constitutional limitations, viewed against the background of the conceptualisation of the relationship between the EU and the Member States' constitutional orders, be overcome, and if so, how?
- Can national constitutions contribute to and support further EU integration? If so, how?

Before entering into the discussion, however, it should be emphasised that these questions deal with the relationship between the EU and national constitutions, and that there are accordingly, different sides to the story. The study concentrates on the national perspective, but it is appropriate here to also introduce briefly the role and status of national constitutions as a matter of EU law.

The EU Treaties (TEU and TFEU) acknowledge the central role of national constitutions in the European constitutional framework. Indeed, the Treaties themselves enter into force only upon *ratification* by all Member States 'in accordance with their respective constitutional requirements' (Articles 54 TEU and 357 TFEU), and their amendment again requires ratification by all Member States 'in accordance with their respective constitutional requirements' (Article 48 TEU),[2] as does the accession of new Member States (Article 49 TEU). This is, supposedly, more than a mere procedural provision, and acknowledges that the Treaties should also *substantively* be in accordance with national constitutions, or at least, it grants the Member States, if their constitution so requires, the possibility to ensure that they do not enter into Treaties which would be unconstitutional. And almost all Member States' constitutions require treaties tabled for ratification to be constitutional.[3]

[2] The exception concerns simplified Treaty revisions under Art. 48(7) TEU. This provision allows the European Council to change the voting procedure in the Council to qualified majority voting where Title V of the TEU (with certain exceptions) and the TFEU prescribe unanimity, or to make the ordinary legislative procedure applicable where the TFEU prescribes a special legislative procedure. The condition is that none of the national parliaments objects to the change within a period of six months.

[3] Only the Constitution of the Netherlands explicitly allows for the approval of unconstitutional treaties, if approved by 2/3 majority in Parliament. The Finnish system has a system of exceptive enactments that similarly allows for the ratification of unconstitutional treaties. The Portuguese Constitution makes a legislative overruling of

The review of the constitutionality of such treaties can be done by advisory bodies (Councils of State or Constitutional Committee in Parliament), (constitutional) courts, or parliament itself.

In addition, *approval* by 'the Member States in accordance with their respective constitutional requirements' is required for the decision to move to a common defence (Article 42(2) TEU); to strengthen or to add to the rights pertaining to European citizenship (Article 25 TFEU); for the entry into force of the decision concluding the agreement on accession of the Union to the ECHR (Article 218(8) TFEU); for the entry into force of provisions laying down a uniform procedure for the European elections (Article 223(1) TFEU); to confer jurisdiction on the CJEU in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights (Article 262 TFEU); and for the adoption of a decision laying down the provisions relating to the system of own resources of the Union (Article 311 TFEU).

On a more general level, the EU expects its Member States to comply with the common fundamental constitutional values that all Member States share, and which also apply to the European Union. Article 2 TEU states that:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

Hence, the so-called 'Copenhagen criteria', which are used as yardstick in the accession process, continue to apply once a country has joined (an enforcement mechanism is provided in Article 7 TEU). But reversely, Article 2 TEU requires the EU to respect the same shared values. These values belong to the core of the national constitutional values, in those countries where such a core has been identified, such as Germany, Estonia, Hungary, Spain and Poland. Essentially, therefore, the EU and its Member States are based on the same constitutional values.

With respect to human rights protection more specifically, Article 6(3) TEU states that:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Here too, the Treaty explicitly seeks to connect EU fundamental rights to the common constitutional traditions of the Member States. This is also reflected in the preamble of the EU Charter of Fundamental Rights, and in its Article 52(4) which states that

> 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'.

Moreover, the EU considers itself bound by international human rights treaties to which all Member States are parties, most conspicuously, the European Convention on Human Rights and Fundamental Freedoms (ECHR). The commitment of the EU to common European values is also evidenced by the fact that the EU shall accede to the ECHR (Article 6 (2) TEU). This close link between EU fundamental rights and national constitutional traditions is also apparent in the case law of the CJEU, which has on numerous occasions held that

(declaration of) unconstitutionality possible (except as regards fundamental principles of democratic State under the rule of law) by two thirds of the vote. For more information, see the country reports in Annexes I and II.

> 'according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71)'.[4]

Yet, the EU is not only, under the Treaties, bound to respect the *common* constitutional values of the Member States. In addition, Article 4(2) TEU obliges the Union to respect

> 'their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

Accordingly, if the Union should fail to respect these national identities as inherent in their fundamental constitutional and political structures, it would infringe not only those identities, but also the Treaty obligation to respect them. Whether this is indeed the case is, as a matter of EU law, to be decided ultimately by the Court of Justice, not unilaterally by the Member States themselves. This is a consequence of the so-called autonomy of EU law: the validity of EU law is a matter of EU law alone, and is ultimately for the Court of Justice alone to decide (the *Foto-Frost* principle).[5] If a national (constitutional) court should find that a provision of EU law infringes its State's national constitutional identity even as defined by Article 4(2) TEU, it cannot, as a matter of EU law, declare it invalid or inapplicable, but rather, it must make a reference for preliminary reference to the CJEU, whose decision is binding.[6]

This notion of respect for national identities and sensitivities is also present in the preamble of the EU Charter, which declares that

> 'The Union contributes to the preservation and to the development of these common values[7] while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels (..)'.

More generally, the EU respects the *constitutional autonomy* of the Member States, in the sense that it leaves it to the Member States to organize themselves (e.g. whether they be a federation or unitary state; have a parliamentary or presidential system; be centralized or decentralized etc.). The Member States are, under the principle of sincere cooperation (Article 4(3) TEU), obliged to assist the Union in carrying out tasks which flow from the Treaties, and to take any appropriate measure, general or particular, to ensure fulfillment

[4] Case C-36/02 *Omega Spielhallen* [2004] ECR I-09609, para 33.
[5] Case 314/85 *Foto Frost* [1987] ECR 4199.
[6] Not all national courts accept the CJEU's monopoly. See further the comparative analysis and the in-depth studies, for instance of Germany. It should be emphasized that various national constitutional courts derive the obligation to respect their state's constitutional identity not from EU law (Art. 4(2) TEU), but from their national constitutions. Conceptually, the question whether an EU act violates a state's constitutional identity in the sense of Art. 4(2) should therefore be distinguished from the question whether it violates the state's constitutional identity in the sense of the national constitution. It is perfectly feasible that a national constitutional court accepts a CJEU judgment that an EU act does not violate the obligation contained in Art. 4(2) TEU to respect the Member States' constitutional identities, but nevertheless declares the EU act inapplicable in the relevant State because the act violates the constitutional identity as derived from the relevant national constitution.
[7] Referred to in the previous sentence of the preamble: "The Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union, and to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. But this leaves unaffected the autonomy of the Member States to organize themselves in order to comply with this obligation. Reversely, the Union must, under the principle of sincere cooperation, assist the Member States in carrying out tasks which flow from the Treaties.

In addition, the Union must, under Article 4(2) TEU, respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. The Treaty thus recognises that there are 'essential State functions' which remain with the Member States and which the EU must respect. What exactly these functions are is not clear, beyond those mentioned in the provision.

On the other hand, and despite the central role of national constitutions in the EU constitutional edifice, Member States cannot invoke their national constitutions to escape compliance with EU law before the CJEU. And even before national courts, national constitutional law should not, as a matter of EU law, take priority over conflicting provisions of national law. Indeed, the *principle of primacy of EU law*,[8] which is firmly settled in the case law of the CJEU, and has been confirmed in Declaration 17 annexed to the TEU,[9] applies also to national constitutional law.[10] As the Court has recently confirmed in *Melloni*, 'rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State'.[11] With respect to fundamental rights, more specifically, Article 53 of the Charter does not lead to a different conclusion. In the same decision, the Court held that

> 'It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised'.

Accordingly, national constitutional rights cannot be invoked before national courts to escape the application of EU law (in *Melloni*, the execution of a European Arrest Warrant), even if they provide a higher standard of protection. And national courts should not set aside EU law claiming that it infringes the Constitution. Again, this is not generally accepted by all national (constitutional) courts, as will become clear in this study.

The preceding should not be taken to mean that national constitutions have no meaning or value for EU law. The EU legal framework provides numerous mechanisms to take national constitutional principles and values into account, to allow for constitutional diversity and to accommodate constitutional sensitivities and peculiarities. An example taken from the Treaties is Article 10 TEU providing that Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens. The alternatives in the article accommodate the divergences between the Member States' constitutional systems. Likewise, the Protocol on National Parliaments presumes that some parliaments are bi-cameral while others are unicameral. Union legislation usually allows Member States the discretion to tailor-make national implementing legislation so as to fit in the constitutional framework. On occasion, EU legislation has specifically provided

[8] Also known as the 'precedence', 'priority' or 'supremacy' of EU law; see the landmark decision Case 6/64 *Costa v ENEL* [1964] ECR 585.
[9] Declaration 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, OJ C 83/344.
[10] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; confirmed recently for instance in Case C-409/06 *Winner Wetten* [2010] ECR I-8015 and Case C-399/11 *Melloni* [2013] ECR I-0000.
[11] Case C-399/11 *Melloni* [2013] ECR I-0000, at para 59.

that Member States must, in the implementing legislation, respect their national constitutions,[12] or that exceptions are allowed for constitutional reasons.[13]

In addition, EU law is flexible and provides for a host of legal instruments, mechanisms and techniques to accommodate diversity and to balance integration, commonality and uniformity on the one hand, and national diversity and respect for national (legal) traditions on the other. Elements of this balancing exercise can be found in the Union's institutional structure, in the principles relating to the division of powers, such as the principles of subsidiarity and proportionality, in the flexibility clause and the differentiation mechanisms, in the concept of public policy, the rule of reason and so forth. This is true even in the core areas of European integration. There are numerous examples. In the field of internal market law, for instance, EU law allows Member States to protect traditional products, such as German beer. EU law offers EU-wide protection for registered designations of origin, geographical indications and traditional speciality food and drinks, such as Greek feta.

And this is true also for constitutional peculiarities and sensitivities. Interferences with free movement resulting from policy choices based on national constitutional values, which deviate from those made in the rest of Europe, may be accepted as justified, as the Court of Justice's judgment in *Omega* famously demonstrates. In that case, the Court held that the fact that conceptions about human dignity and the system of protection differed between Member States did not prevent German authorities from relying on the German conception of human dignity to protect fundamental rights in question even if this lead to a restriction of its obligations under EU law.[14]

That case was handed before the entry into force of the Treaty of Lisbon, which further develops the notion of national (constitutional) identity in Article 4(2) TEU. Since then, the notion of national identity has been used by the Court of Justice to allow Member States to justify restrictions of their obligations under Union law.[15] However, it should be stressed that under EU law, it is for the Court of Justice to decide whether recourse to national identity under Article 4(2) TEU is accepted, and whether the interferences with EU obligations aimed to protect national identity are indeed justified as a matter of EU law. Recourse to national identity may thus be rejected.[16] And there are cases also in which the Court of Justice did not, at least explicitly, pay attention to the fact that the national law at issue, which was at the basis of an alleged infringement of EU law, was of constitutional nature.[17]

This study, however, focuses on the national side of the story. The central research question of this report is **whether, and to what extent, national constitutions provide guidance for further European integration, and reversely how the latter can take place in full respect for national constitutional identities**.

To this aim, the study explores a new territory, by approaching the general question of the position of national constitutions *vis-à-vis* the EU from a new angle. It begins by examining and critically assessing national constitutional conditions and limits to EU integration. Several studies have been conducted into the limits posed by national constitutions to European integration, thus emphasizing the impossibility of further integration. This study moves beyond the classic assessment of national constitutions as restricting European integration, and seeks to contribute to the formulation of constitutional avenues for further steps in the process of EU integration.

[12] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information OJ L175/1.
[13] Article 14 (4) of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L 294, 20.
[14] C-36/02 *Omega Spielhallen* [2004] ECR I-09609.
[15] Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I--3787
[16] See e.g. Case C--202/11 *Anton Las* [2013] ECR I-0000.
[17] See e.g. Case C-285/98 *Tanja Kreil* [2000] ECR I-00069; Case C-213/07 Michaniki [2008] ECR I-09999.

Before we embark on our study, it is important to bring to mind the main purposes, functions and roles of national constitutions (understood both as the legal document and more broadly as the whole set of constitutional arrangements, values, principles and practices) generally, apart from the context of EU integration. Very generally, it could be said that constitutions perform the four main functions of

(1) constituting the polity, which may be understood as expressing the basic social contract;
(2) organising and structuring the exercise of public authority and dividing powers between the various branches;
(3) limiting the exercise of public authority, which also includes fundamental rights protection of individuals and
(4) expressing the shared beliefs and common values of the society, and carrying its 'national identity'.

Constitutions are legal documents and legal tools, but they play the important *political* role of granting stability and legitimacy to the State and the exercise of public authority.

As power organizing tools, two of the main functions of constitutions in a sense go in different directions. One is the *enabling* function of constitutions: constitutions create the institutions which are to exercise public authority and empower these institutions. A second function is associated with 'constitutionalism' in a narrow sense and concerns the *limiting* function of constitutions: constitutions limit the exercise of public authority, for instance *via* human rights and a division of powers. These different functions of a constitution have an impact when it comes to (further) integration in the EU.

In the context of the EU, the enabling function of constitutions is illustrated by those constitutional provisions which allow for a 'limitation of sovereignty' or a 'transfer of powers' to the EU. In several Member States, the relevant provisions do not specifically mention the EU, while other Member States have included so-called 'Europe clauses' or 'Europe provisions' in their constitutions. In many cases, these clauses have been introduced before accession, in order to allow for this accession to be legitimate under the Constitution. Ireland was the first Member State to adapt its Constitution prior to accession in order to remove what were considered as constitutional limits to integration, with a provision specifically geared to the European Union (then European Communities).[18] Most of the Member States that joined in 2004, 2007 and 2013 have equally introduced Europe clauses prior to accession. In other States, though, a Europe clause was included in the constitution only well into membership, typically at the time of the Maastricht Treaty (Germany and France), when the traditional constitutional foundation for membership was no longer considered sufficient. The force of these provisions varies from merely allowing for participation, to directing the State organs to contribute to the aim of a united Europe. This is evident for instance from the 'Lisbon decision' of the German Constitutional Court when it held that

> '[t]he constitutional mandate to realize a united Europe, which follows from Article 23.1 of the Basic Law and its Preamble, means in particular for the German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration'.[19]

However, national constitutions not only enable, but also set limits to further EU integration. Sometimes, the constitutional obstacles to further integration derive from the same clause which enables EU integration. However, more generally obstacles to further integration derive from concepts and norms contained in or underlying the Constitution,

[18] Already in March 1952, an amendment to the Netherlands Constitution was adopted so as to make judicial review of national legislation (in particular acts of parliament) against decisions of international organizations possible having in view also the entry into force of the ECSC.
[19] BVerfGE 123, 267; 2 BvE 2/08 of 30 June 2009, Rn. 225.

and from general conceptualisations of the relationship between the State and the EU. The main constitutional limits to further EU integration are therefore *implicit* in the constitution. They may derive from a specific understanding of concepts such as 'sovereignty', 'democracy' (linked to 'the Nation' or 'the People'), 'statehood' as well as 'constitution' itself. This may include obstacles that may be referred to as 'the core of the constitution' or the 'constitutional identity'. Thus, in order to evaluate limits that are implicit in the constitutions, one needs to look beyond their text, by also studying relevant case law of the constitutional and supreme courts of the Member States, constitutional practice, as well as the academic and public debate.

To put the constitutional obstacles to further EU integration in proper perspective, we make two main distinctions in our country studies. The first is the distinction between further integration under the current EU treaty framework and further integration by means of new (EU amendment) treaties. Although the distinction is not razor-sharp and borderline cases exist, it is important because in several Member States the position of secondary EU law adopted under the current Treaties in constitutional review proceedings is privileged when compared to that of other treaties.

The second distinction we have made is between substantive and procedural constitutional obstacles. The possibilities of further EU integration under the current treaty framework are substantively limited in various ways. Depending on the kind, a substantive obstacle can be overcome through the adoption of a treaty (amendment), of a constitutional amendment or a combination of both. For the adoption of such amendments, there are usually procedural hurdles, such as for instance qualified majority in parliament, a referendum, or both. If the constitutional obstacle derives from constitutional provisions which are deemed to be unamendable, overcoming it might even be more problematic.

This report is structured as follows.

Chapter 2 contains a cross-national analysis and assessment of the national constitutional approaches to EU integration. It aims to address how and to what extent constitutional limitations and obstacles which have been identified can be overcome in view of further EU integration. This chapter is based on our findings in the in-depth studies of a representative selection of Member States (Annex I) and a bird's eye view for all Member States (Annex II).

In Chapter 3 of our report we present some final conclusions on constitutional avenues for further European integration.

Annex I presents an in-depth analysis of a representative selection of Member States, which guarantees a sufficient spread in terms of older and newer Member States, the types of constitutional traditions (i.e. continental European constitutional traditions and the quite different British and Scandinavian traditions) as well as North/South and East/West. The in-depth analysis is conducted for the following countries:

- Croatia,
- the Czech Republic,
- Estonia,
- Finland,
- France,
- Germany,
- Hungary,
- Ireland,
- Italy,
- the Netherlands,
- Poland,
- United Kingdom.

The in-depth analyses aim to offer a deeper insight in the various roles national Constitutions perform in the context of EU integration, and to chart the most salient issues.

Annex II adds a bird's eye view for all Member States. This section aims to offer a more complete view of all the national constitutional attitudes to EU integration, the existing national sensitivities and the mechanisms developed to find a balance between opening up to EU integration and protecting the core values of the national Constitution. To this purpose, an inventory is made of the most relevant constitutional provisions and procedures in the Member States. This overview demonstrates that some constitutions are less open to European integration than others.

Annex III offers a schematic overview of the constitutional state of affairs for all the Member States.

Two caveats are appropriate. First, as has already been hinted at, constitutions perform, besides their legal functions, political functions, and even beyond that, they may express a society's narrative, history and aspirations. At the same time, they are also products of political decision-making, even if of a particular kind. In other words, whether constitutions are adapted and amended depends on the political will to do so, and on the consensus required.

Secondly, questions about constitutions can never be answered for all states alike. Constitutions are designed to solve the problems of the societies they regulate. Constitutions can only be understood in light of the social and political problems facing that society. The particular functions of constitutions, the sensitivities relating to them and the role they play in the public debate are a function of the particular constitutional traditions and the constitutional climate of that particular system.

Both these elements should be kept in mind in order to place the findings of this report in a proper perspective.

2. COMPARATIVE ANALYSIS

The main aim of this study is to evaluate whether and to what extent national constitutions allow for and provide guidance for further European integration, and thus, whether the latter can take place in full respect for national constitutional principles and traditions, and for national constitutional identities. In order to be able to answer this central question, the study has analysed national constitutions, case law and constitutional practices, and identified existing obstacles to EU law and further EU integration. From a legal perspective, further integration is possible when such constitutional obstacles are avoided or overcome.

It should be emphasised that constitutional change in the EU (which is entailed by further integration) involves changes at the EU as well as at the national level. Accordingly, the study is organised along the lines of a double distinction. The main distinction is that between further integration under the current Treaties and further integration by means of new EU (amendment) Treaties. The second distinction is that between substantive and procedural national constitutional obstacles. Generally, the substantive obstacles can be overcome by the adoption of a treaty (amendment), by the adoption of a constitutional amendment or by a combination of both. For the adoption of such amendments, national procedural constitutional hurdles have to be taken.

Following the logic of the first distinction, the in-depth studies (Annex I) and the bird's eye views (Annex II) are divided in two main parts: further integration under the current Treaties and further integration through Treaty amendment. Yet, there are borderline cases as well: some EU decisions, such as simplified treaty revisions under Article 48(6) TEU, require agreement or ratification by all Member States in accordance with their constitutional requirements.

In the typical situation, national constitutions are adapted and amended at the time of accession and Treaty amendment, which are obvious instances of further integration. Yet, this is not always so. There may also be cases of significant progress in integration on the basis of existing treaties, which mark a new step in European integration but collide with constitutional provisions. A good example is the framework decision on the EAW.[20] The programmatic nature of many of the competence-conferring Treaty provisions makes it difficult to predict the constitutional implications that decisions based on them may have.

A study into 'national constitutional avenues for further EU integration' thus requires an analysis of national constitutional obstacles, mechanisms to overcome them, and ultimately, the possibilities and limits of national constitutional amendment.

2.1. The situation under the current system

The constitutional systems of the Member States have on the whole been receptive and responsive to EU law. While several treaties have been found to infringe constitutional provisions, either in the course of the political ratification process or before the (constitutional) courts, in no case has this prevented ratification of the relevant Treaty. In such cases, the relevant State has amended its constitution or adapted the system, so as to enable the ratification of the treaties concerned.

2.1.1. Substantive limits

Under prevailing EU law, as interpreted by the Court of Justice of the European Union, the validity and applicability of EU law in the domestic legal order is a matter of EU law only. National (constitutional) law cannot be invoked to challenge the validity or applicability of

[20] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

EU law. It is only for the Court of Justice to judge the validity of secondary EU law,[21] and to decide whether it complies with higher law, including the EU Treaties,[22] EU general principles and the EU Charter of Fundamental Rights.

From the perspective of national constitutional law, a different picture emerges. Since the effect of EU law ultimately derives from the constitution, that constitution may also impose limits on secondary EU law. In general, further EU integration by means of secondary EU law is considered possible only in so far as:

> (1) it respects national (constitutional) fundamental rights,
> (2) the EU acts *intra vires* as interpreted under the constitution or the national acts approving the Treaties, i.e., it acts within the boundaries of the competences which the Member States have conferred on it, and
> (3) it respects the constitutional identity of the Member States (or their fundamental constitutional principles).

These obstacles have been identified and developed in the case law of the constitutional and supreme courts of the Member States. Limitations to further integration have also sometimes been laid down in the constitution. Examples include Article 23 of the German Basic Law, Article 7(6) of the Portuguese Constitution and Article 6 of Chapter 10 of the Swedish Instrument of Government.

The three obstacles have been developed over time. Initially, the focus was on fundamental rights protection (the *Solange* line of cases in Germany), either independently or related to the core principles of the constitution (Italy). This is a factor that has contributed to the development of the fundamental rights jurisprudence of the Court of Justice and the adoption, ultimately, of the EU Charter of Fundamental Rights as binding primary law. Over time, attention paid to protection of fundamental rights in the EU has improved, and constitutional resistance has decreased. In the context of fundamental rights, the focus has shifted from the insufficiency of fundamental rights protection to the level of protection and the particular (national) balancing conducted in concrete cases, and to the fundamental societal choices underlying them. Fundamental rights protection no longer seems to be the main cause for concern, given the development of EU fundamental rights protection, and national identity has taken over as the main bone of contention. Yet, fundamental rights issues may be considered as part of national identity.

Roughly at the time of the Maastricht Treaty, the focus shifted to the issue of what is often referred to as 'creeping competence', *Kompetenz-Kompetenz* and *ultra vires* acts – i.e. ensuring that acts of the Union do not exceed the competences conferred on it.[23] There is a close connection with the national constitutional basis of European integration and the statehood of Member States. This *ultra vires* protection (i.e. protection against Union action that exceeds the scope of its competences) has only in one instance led to a constitutional court actually declaring an act of Union law, more particularly a judgment of the Court of Justice, *ultra vires*, namely the Czech court in *Landtová*.[24]

More recently, approximately since 2005 and the drafting of the Treaty establishing a Constitution for Europe, the main constitutional limit to further integration which has come into focus is the notion of 'constitutional identity'. That notion is not only relevant at the national level, but also at the EU level, because the EU is obliged to respect the 'national

[21] This with the quite limited exception of proceedings relating to an application for interim measures, under the *Foto Frost* case law.
[22] This includes, presumably, also Art. 4(2) TEU, which imposes on the Union the obligation to respect national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. This is often referred to as 'national constitutional identity'.
[23] For these terms, see the glossary.
[24] For more details, see the chapter on the Czech Republic in Annex 1.

identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' of the Member States (Article 4(2) TEU).

It should be noted that the obstacles we have mentioned do not exist in all Member States, or at least, they have not always been made explicit. There is, accordingly, a great variety between the Member States.

- Several Member States have no - or at least no specific or clearly articulated - substantive obstacles for further integration under secondary EU law. To this category of Member States belong for instance Estonia, The Netherlands, the United Kingdom, Croatia and Slovenia. In Ireland and Cyprus, the Constitution explicitly grants constitutional immunity to EU law and national laws, acts and measures necessitated by membership.
- In other Member States only one of the obstacles is developed explicitly, such as in France (constitutional identity) and Denmark (*ultra vires* review).
- The Czech constitutional court has defined the obstacles of *ultra vires* and fundamental rights review, and has hinted at constitutional identity review as an obstacle, but has explicitly refused to further define it and has left it open for further development on a case by case basis.
- In Germany and Sweden, all three obstacles have been defined.
  In Bulgaria, Malta and Poland, the entire Constitution has to be respected.

To this must be added that the dividing lines between *ultra vires* review, fundamental rights review and constitutional identity review can be blurred and the three categories may overlap. In Germany for instance an EU act which infringes German constitutional identity is by definition also an *ultra vires* act, while the reverse is not the case.[25] Moreover, a sufficient level of fundamental rights protection is part of German constitutional identity, and also some particular rights are considered as a part of constitutional identity, such as the right to privacy.

This is different in Austria, where *ultra vires* review by courts is considered to be a matter distinct from review against constitutional principles. In Sweden, *ultra vires* review and review against fundamental principles and fundamental rights used to be distinguished not only conceptually, but also institutionally. The Swedish constitutional organs have accepted the possibility of *ultra vires* review by courts, but until the constitutional revision leading up to the partly amended 2012 constitution, they held that the particular question whether EU law has respected the fundamental principles by which Sweden is governed and whether it gives fundamental rights protection equivalent to that under the Swedish constitution and the ECHR was outside the jurisdiction of courts.

In Denmark, the Supreme Court has only elaborated upon the possibility of an *ultra vires* review by Danish courts, but at the same time has stated the EU does not have the competence to issue secondary law which is contrary to the Danish Constitution, including the 'rights of freedom' contained therein. Therefore, the situation seems to be that if the EU acts against the rights of freedom in the Danish constitution, the EU also acts *ultra vires*.

There seem to be different concepts of constitutional identity in the case law of the national constitutional courts. In the German version, constitutional identity implies *continuity* of the essence or the core of the German constitution (diachronic identity). German constitutional identity refers to those unamendable fundamental principles which form the backbone of the German constitution: the principles of human dignity and fundamental rights protection, democracy, rule of law, the social state and the federal state, as well as essential state functions. When the *Bundesverfassungsgericht* protects German

[25] It should be stressed that an EU act which violates German constitutional identity not necessarily also violates Art. 4(2) TEU. The interpretation of German constitutional identity in the sense of the German Basic Law is ultimately a matter of the German Constitutional Court, while the interpretation of Art. 4(2) TEU is ultimately a matter for the Court of Justice of the EU.

constitutional identity, it safeguards the continuing existence of these essential features of the German constitution and the German State.

In contrast, French constitutional identity seems to refer not to all French fundamental constitutional principles, but only to those principles (and constitutional provisions) which are specifically French (distinctive identity by contrast). When the *Conseil constitutionnel* protects French constitutional identity, it safeguards the constitutional '*exception française*' in relation to the European Union. Moreover, French constitutional identity is not unamendable.

Practically, this difference between the two notions of constitutional identity entails that Germany's constitutional identity may be violated when a core principle of the German Constitution is not sufficiently protected in the EU legal order, irrespective of whether or not the principle exists at the EU level (e.g. *nullum crimen sine culpa*,[26] data protection). French constitutional identity is at stake only when a French fundamental principle which has no equivalent in the EU legal order is infringed. Furthermore, the notion of constitutional identity comes into play at different occasions. In France, constitutional identity is not, at least not so far, a separate criterion used in the review of the constitutionality of EU (amendment) treaties; rather, it is specifically envisaged as a limit to the effect of secondary EU law in the French legal order. In contrast, in Germany the constitutional identity must not only be respected by the EU legislature and other EU institutions, i.e. under the current treaties, but is also a parameter for judicially reviewing a new EU treaty.

This German version of constitutional identity seems to be dominant in the EU in as much as in other Member States EU acts also have to respect fundamental national constitutional principles. Although the term constitutional identity is not always used there, this is for instance the case in Poland, Estonia, Italy, Portugal, Spain and Sweden.

2.1.2. Overcoming the substantive obstacles under the current treaties

Essentially, there are three main forms of overcoming an obstacle to further integration under the present Treaties, depending on whether such obstacle is situated at the EU or at the national level.

In case of EU-level obstacles, the first option in order to overcome them is that of amending the Treaties. This is indicated particularly when the present Treaty framework does not provide for an adequate legal basis for further EU integration.

Besides amendment of the EU Treaties themselves, further European integration also has proven possible by means of the conclusion of treaties outside the formal framework of the European Union in cases in which there was either no legal basis in the existent Treaties, or further integration was politically not feasible for lack of consensus between the Member States. Thus the Schengen conventions, the Prüm Treaty as well as the ESM Treaty and the Fiscal Compact created the legal bases which under the circumstances were deemed to be insufficiently present. The adoption of (amendment) treaties as a means to further EU integration is further discussed below.

Thirdly, national constitutional amendment might provide a way of overcoming an obstacle, whenever the latter is situated at the national level. For example, the implementation of the EAW framework decision required a constitutional amendment in France and Poland. However, a constitutional amendment is not always politically feasible and sometimes legally impossible on relevant points. Also this is discussed below.

[26] See BVerfG, Lissabon Urteil, at para. 364.

2.1.3. Procedural limits

The procedural obstacles regard participation requirements for the adoption of autonomous EU acts and for EU acts which require some form of approval by the Member States before they can enter into force. The existence of such requirements is provided for in EU law itself or in Member States' constitutional law, or both.

These requirements can be categorised as follows.

1. First, there are participation requirements, which find their origin in national constitutional law and practice and which are confirmed by EU law. In the Member States, the national Parliament is generally at least associated to EU decision-making by some form of parliamentary scrutiny system, which is either based on a parliamentary scrutiny reserve system or a mandating system, or on a combination of these. In general, the national constitutional basis for these scrutiny systems is the accountability of the government collectively or of the ministers individually to their national Parliament.

Article 10(2) TEU confirms that the members of the European Council and Council, presumably *qua* members of these councils, are democratically accountable to their national parliaments or citizens, while Article 12 TEU attributes a role for national parliaments within the process of EU decision-making.

2. The second category of participation requirements finds its origin in EU law; however, national laws have added further conditions to the ones set out in EU law. The Treaties require that several kinds of (draft) EU acts have to be approved nationally before they can be taken or enter into force.

The required approval can be tacit, as is the case regarding simplified Treaty revisions under Article 48(7) TEU (also known as the 'general passerelle clause'): the European Council can decide that the voting procedure in the Council changes to qualified majority voting where Title V of the TEU[27] and the TFEU prescribe unanimity, or that the ordinary legislative procedure becomes applicable where the TFEU prescribes a special legislative procedure; a condition is that none of the national parliaments objects to the change within a period of six months.

In several Member States, tacit parliamentary approval for these simplified Treaty revisions is not considered to provide adequate national democratic legitimation and instead approval by act of parliament (Germany[28]) or even by both act of parliament and referendum (the United Kingdom) is required.

Another example of decisions which require tacit national parliamentary approval is Article 81(3) TFEU (extension of the ordinary legislative procedure to EU family law measures). However, some national laws set additional requirements for such a decision to be taken. For instance, in Germany and the United Kingdom, decisions under that provision have to be approved by act of parliament, in the Netherlands by resolutions in both houses of parliament. As in Germany and the United Kingdom, the rationale for the accentuation of the approval requirement in the Netherlands is a democratic one, but it is of a different kind: in the Netherlands, it is the absence of decisive co-legislative power for the European Parliament which justifies the requirement.

This second category also includes those decisions which require approval of the Member States according to "their respective national constitutional requirements". Examples are the European Council decision under Article 42(2) TEU (common EU defense) and the

[27] Decisions with military implications or those in the area of defence are exempted.
[28] Would the concrete EU act constitute an act that supplements or amends the *Grundgesetz*, this would require a two thirds majority in both houses of parliament (and the 'eternity clause' applies).

simplified Treaty revisions under Article 48(6) TEU.[29] Generally these decisions have to be approved nationally in the same way as treaties; in fact, these decisions amount to treaties whose conclusion alone (not the national approval) is simplified.

3. The participation requirements in the third category again have a national origin, but this time they are not confirmed by EU law. These requirements concern EU acts which can be validly made and enter into force after adoption by the EU institutions themselves in accordance with the Treaties; however, in some States national law demands that the relevant acts are subject to prior approval nationally.

In this respect again there is a great variety between individual Member States. In several Member States such as Bulgaria, Estonia, Italy, Malta, Portugal and Sweden there are no national approval requirements regarding these autonomous EU decisions at all.

In many other Member States, a minister may only vote in favour of certain draft acts in the European Council or Council if the draft has been approved nationally, but the scope of acts requiring such approval differs greatly. Also, the approval requirements themselves vary: from approval (whether or not with a qualified majority) by resolution of the national parliament to approval by act of parliament or under the procedure for national constitutional amendment, and sometimes approval by act of parliament and referendum.

By way of example we refer to the Netherlands, where acts under Articles 77(3) (creating the power to adopt provisions concerning passports, identity cards, residence permits or any other such document in the framework of the free movement and residence of EU citizens under Article 20 TFEU), 87(3) (operational police cooperation), and 89 TFEU (operation of law enforcement authorities in another Member State) require prior approval in both houses of parliament. Again, the criterion for prior national parliamentary approval is the absence of decisive co-legislative power for the European Parliament.

In Germany, the list of EU acts that require parliamentary approval, either by resolution or by act of parliament, is mainly based on the criterion that the relevant EU acts affect the democratic principle under national constitutional law unless the national parliament can previously exert control powers of review and approval over the relevant EU act. This notably concerns acts adopted under the flexibility clause of Article 352 TFEU.

In the United Kingdom, the European Union Act 2011 subjects a shopping list of EU decisions to approval by identical resolutions of both Houses of Parliament, by Act of Parliament or by Act of Parliament *and* referendum. The spectrum of the decisions concerned ranges from decisions (or simplified Treaty revisions) enabling qualified majority voting in the Council or making the ordinary legislative procedure applicable, via acts under Article 352 TFEU and decisions permitting the alteration of the number of members of the European Commission, to decisions amending the Statutes of the European System of Central Banks, the European Central Bank, the Court of Justice of the European Union and the European Investment Bank.

2.1.4. Overcoming procedural obstacles

Generally, the procedural obstacles are overcome by abiding to them: if a certain EU act requires a constitutional amendment, then the relevant procedure for constitutional amendment is to be followed.

[29] The European Council decision of 25 March 2011, amending Article 136 TFEU with regard to a stability mechanism for member states whose currency is the euro is the first simplified Treaty revision under Art. 48(6) TEU.

2.2. Further treaty reform

Further steps in European integration may require going beyond the existing Treaty framework, either by amending the EU Treaties in accordance with the procedure provided therefore in the Treaties (ordinary or simplified), or by stepping outside the existing Treaties and concluding new Treaties, such as in the case of the recent Fiscal Compact and the ESM Treaty. Of course, whether such Treaty amendment is feasible will depend first and foremost on the political will of the Member States. Nevertheless, there are also national constitutional conditions and obstacles that may restrict the possibility of the adoption of such Treaties, which require ratification by all Member States in accordance with their constitutional requirements. These can be broken up in substantive and procedural requirements.

2.2.1. Substantive reservations

There is a broad variety among Member States as to the *substantive* obstacles which constitutions impose on further integration by treaties. One set of obstacles depends on the sheer volume of powers transferred, which is then considered to threaten fundamental principles of the constitution, such as statehood, national democracy or sovereignty. The Danish Supreme Court has stated that under Article 20 *Grundlov* transfers of competences may not be so extensive that Denmark cannot any longer be considered to be an independent state.[30] According to the Spanish Constitutional Tribunal, transfers of the exercise of competences under Article 93 of the Spanish Constitution have 'material limits' and may not affect the sovereignty of the Spanish State, the Spanish basic constitutional structures and the Spanish system of fundamental principles and values set forth in the Constitution.[31]

But the best known example is Germany, where the *Bundesverfassungsgericht* has suggested on several occasions that there may be a tilting point at which the sheer volume of powers transferred is so high that it harms German democracy and hence also the German citizens' fundamental right to vote, so that the Treaty amendment would be unconstitutional, or that German statehood itself, considered to be a constitutional prerequisite, would be threatened (Maastricht decision). In the *Lisbon* decision, the *Bundesverfassungsgericht* has attempted to list the essential state functions or sovereign powers, which need to remain in the hands of the State in order for Germany to retain its sovereign statehood. In essence, five areas of state activity must remain for the democratic will-formation and decision making within Germany:

- substantive and formal criminal law,
- the police monopoly on the use of force towards the interior and the military monopoly on the use of force towards the exterior,
- fundamental fiscal decisions on public revenue and public expenditure, with the latter exclusion being particularly motivated, inter alia, by social-policy considerations,
- decisions on the shaping of circumstances of life in a social state, and
- decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities.[32]

The Polish Constitutional Tribunal has stated that neither Article 90 nor Article 91 of the Constitution could be used as a legal basis for the delegation of competences to the EU to such an extent that this would signify the inability of Poland to continue functioning as a sovereign State and where an international organisation would in fact become the sovereign.[33]

[30] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.8.
[31] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[32] Lissabon Urteil, para 252, further elaborated in para 253-260.
[33] Trybunał Konstytucyjny**,** decision K 18/04, para 8.

The approach of the Czech Constitutional Court in its *Lisbon I* decision was more subtle. The Court stated that it would not provide a detailed list or a catalogue of principles forming the material core of the Constitution. This would have been appropriate if the standard for review was only the material core, but it was not, it was the entire constitutional order.[34] Accordingly, the Court did not provide an exhaustive list but it rather discussed various aspects of the core which would certainly be included if the Court were to make such a list. When asked to draw up a list of non-transferrable competences and to authoritatively define 'substantive limits to transfers of competences' in the *Lisbon II* case, the Constitutional Court repeated that the legislature is the appropriate organ to specify these limits, since this is in fact a political question which provides the legislature wide discretion. Responsibility for these political decisions remains with the legislature and the Court can make these decisions subject to its review only after they have actually been made on the political level.[35] The Court has also warned that creating a final list or a catalogue of the elements of the material core of the Czech Constitution could be problematic as it could 'limit future self-serving definition of these elements based on cases being adjudicated at the time.'[36] In other words, the Court preferred to leave the question open and to further define and specify the content of the concept of the constitutional identity of the State on a case-by-case basis.

Sometimes, a similar concern is reflected in the Europe clause, in a much more subtle manner, where the Constitution prescribes that 'only specified competences' or 'specified powers' may be transferred. The underlying concern does not relate to the volume of competences conferred, but to the fact that a transfer should not give *carte blanche* to the EU to extend its own powers, or consist in an uncontrolled or irreversible loss of competences. Luxembourg, Spain, Belgium and Romania offer an interesting variation on this theme: according to the Constitutions of these Member States only the *exercise* of competences' may be transferred, thus not the competences themselves. Sovereignty itself remains with the State.

The underlying concern in all these cases is similar: the constitutions (are interpreted to) protect the statehood or sovereignty of the State and its existence as an independent and sovereign State. Accordingly, the State cannot by way of these treaties lose its statehood, sovereignty and independence entirely. In other words, the consequence seems to be that the procedure for the transfer of competences cannot be used to absorb the State in a federal Union which would mark the end of sovereign statehood.

There is however also a number of countries where the constitution does not seem to limit the extent of competences that can be transferred, and at least in theory, does not seem to preclude the loss of statehood or to prohibit the State from entering into this kind of treaties. This seems to be the case for instance in the Netherlands. In the United Kingdom substantive limits are not developed either. However, in that Member State there also seems to be very little need to develop them as long as the British Parliament remains legislatively omnipotent and can revoke any transfer of power with a simple majority. At the same time, the fact that the constitution does not impose legal limits to the extent of competences that can be transferred does not imply that this would politically be easily acceptable; it merely means that the concerns over sovereignty and statehood have not been expressed in legal form in the constitution or constitutional doctrine. Moreover, procedural obstacles can compensate for the lack of substantive obstacles. This is what has happened in the United Kingdom, where the European Union Act 2011 subjects not only most (ordinary or simplified) Treaty revisions, but also a variety of EU acts to a referendum requirement. In a comparative perspective the areas covered by the referendum requirement partially cover the same ground as the 'essential conditions for the exercise of national sovereignty' in the case-law of the French Constitutional Council (justice and home affairs, the currency, taxation, foreign affairs and security policy). In addition, the areas

[34] Lisbon I, para 93.
[35] Lisbon II, para. 111.
[36] Lisbon II, para. 112.

overlap to a certain extent with the areas which, according to the German Constitutional Court, are very sensitive for the ability of a constitutional state to democratically shape itself and which, consequently, are easily prone to infringements of German constitutional identity (substantive and formal criminal law; disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior; fundamental fiscal decisions on public revenue and public expenditure; living conditions in a social state; and decisions of particular cultural importance, such as regarding family law and the education system).

More often, however, the substantive limits concern less the extent of the competences conferred or the precise powers to be transferred, but rather the way in which they are to be exercised, and the values and principles they must respect. Specific characteristics of the State or specific value choices expressed in the constitution must remain unaffected and free from interference.

Again, there is a broad variety in the constitutional sensitivities that are expressed in the constitutional texts and constitutional doctrine and case law. In some cases, particular sensitivities are singled out. These range from issues of neutrality and defence (Ireland and Austria), to specific national conceptions of particular fundamental rights and how they should be protected (abortion in Ireland, *laïcité* in France, abortion and family values in Poland), or to specificities of the form of government of the country (such as republicanism in France and Italy).

Often, the constitutional sensitivities find expression in the form of conditions which membership of the EU (or of international organisations) must comply with. They are then not restricted to a particular fundamental right or constitutional value, or to one specific element of the form of government, but they relate rather to the core values of constitutionalism themselves. It is not always clear, but often implied, that it is the particular national expression of these (universal or at least shared European) constitutional values that is protected.

Thus, several constitutions (are interpreted to) express the idea that the State can only ratify treaties and participate in the EU or international organisations in so far as these comply with the core values of the constitution. They thus project their basic constitutional principles on the Union, and require the Union to comply with essentially the same principles.

This is the case for instance in Italy, where the Constitution does not mention such conditions, but where the *Corte costituzionale* has developed the doctrine that there are counterlimits to European integration and the EU must comply with the ‘principi inviolabili della costituzione’ (inviolable constitutional principles) as well as the inalienable human rights. Article 23 of the German Basic Law states that ‘with a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law’. These principles coincide to a large extent with the Basic Law’s inviolable core, which is unamendable, and which is considered to reflect Germany’s ‘constitutional identity’. The *Bundesverfassungsgericht* reviews whether draft treaties comply with these core principles, as well as with Germany’s ‘constitutional identity’.

The French *Conseil constitutionnel* reviews whether draft treaties comply with specific provisions in the Constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions for the exercise of national sovereignty.

Under Article 6 of Chapter 10 of the Swedish Instrument of Government, a transfer may not 'affect the basic principles by which Sweden is governed', and the protection of fundamental rights must correspond to that afforded under the Swedish Constitution and the ECHR.

The Czech Constitutional Court has made it clear that if the EU wants to 'keep' the transferred competences it has to ensure sufficient level of protection of fundamental rights.

In sum, the substantive constitutional limitations and obstacles have been brought to the fore more explicitly over the past decades. Where they seem to have been implicit or presumed, they have gradually been developed by judicial bodies and made explicit in the constitutional texts.

So, how can these obstacles be overcome? What procedures must be followed to do so? This question is tackled in the following section.

2.2.2. Procedural hurdles for further integration

In short, it could be said that the more a treaty impinges on a national constitution and the more it (is seen to) approach(es) its core values, the more difficult it becomes to ratify such treaty, and the higher the procedural hurdles that need to be overcome. Procedural constitutional hurdles to further European integration by way of EU Treaty amendment, or by the conclusion of treaties outside the EU Treaty framework, relate both to the approval of the relevant treaty, and, should this be necessary, amendment of the constitution. These are considered in turn.

Approval of the treaty

In some Member States, approval of EU and EU related treaties requires only a simple majority in Parliament. This is the case in Belgium, the Netherlands, Spain and Italy. Until recently, it was similar in the United Kingdom; however, under the European Union Act 2011, most treaties, among them treaties transferring new competences, not only have to be approved by Parliament, but also in a binding referendum.

In other Member States, all EU Treaties require approval with special majority in Parliament. This is the case in Hungary where Article E(4) of the Fundamental Law requires a two-thirds majority of the votes of the Members of Parliament for the approval of power-transferring treaties. Under Article 85(2) of the Bulgarian Constitution, a majority of two-thirds of all members of the National Assembly is required to pass a law approving treaties that 'confer on the European Union powers ensuing from the Constitution'. The Swedish Instrument of Government requires a majority of at least three quarters of the votes with at least half of the members of the *Riksdag* (the Swedish Parliament) being in favour (Article 5, Chapter 10, Instrument of Government) or alternatively, a constitutional amendment which requires two votes of the *Riksdag* with elections being held in between the votes.

In yet other countries, the procedure depends on how invasive the relevant treaty is to the national constitution. Thus, the Finnish Constitution requires since 2012 a two-thirds majority only for those treaties which 'concern the Constitution', or if a transfer of authority to the European Union 'is of significance with regard to Finland's sovereignty'. In Denmark, treaties which transfer to the EU legislative, administrative and judicial competences which may result in decisions having direct effect in Denmark have to be approved by the Danish Parliament with a majority of five-sixths of its members. Under Article 23 of the German Basic Law, a treaty amendment that supplements or changes the Basic Law is subject to a two-thirds majority requirement and the 'eternity clause' applies. Although it is not absolutely clear when this is the case, in practice the government and *Bundestag* have found that this does not apply to accession treaties, although the *Bundesrat* holds the view

that it also applies more broadly to accession treaties, simplified treaty amendment and the ESM and Fiscal Compact treaties.

In Austria, the accession to the European Union was considered to amount to a 'total revision of the constitution', as the accession was understood as a change of the very foundations of the Austrian constitutional order, and was therefore adopted as a 'constitutional law', *Verfassungsgesetz,* with a two-thirds majority requirement in both houses of parliament and a compulsory referendum. The treaty approvals have since then been done in the form of a partial constitutional revision (*Verfassungsgesetz* with two thirds majority with optional referendum) or, since 2008, with the same formal voting requirement (though no longer as formally a *Verfassungsgesetz*).

In Ireland, accession and all EU Treaty amendments so far have been accompanied by a referendum, since the approval of EU Treaties is considered to require constitutional amendment, which can only be done by referendum.

In France, treaties regarding the accession of new States to the EU have to be submitted to referendum. However, the duty lapses if parliament, by the adoption of an identical motion in each house with a three-fifths majority of the votes cast, decides that the bill may be approved by the *Congrès* (the joint meeting of both houses) with the same majority (Article 88-5 Constitution).

Referendums are not required for the approval of Treaty amendments in other Member States as a rule, but have been held on occasion, often in the form of a consultative referendum. This is different for accession. In many Member States, and even in most which joined since 1995, referendums have been held, either because a referendum was constitutionally required or because it was considered necessary politically in order to secure the legitimacy of the accession.

Constitutional amendment preceding approval

If a Treaty submitted for approval is found to actually infringe the constitution, the procedural requirements become more stringent, and ratification will usually have to be preceded by a constitutional amendment. Indeed, States usually can only become party to a treaty if it does not conflict with the constitution. There are a few exceptions to this rule, though. The Netherlands and Portuguese Constitutions allow for the approval of treaties which deviate from the Constitution without constitutional amendment, as long as a two-thirds majority is achieved.

Constitutional amendments that are conducted to prepare for ratification are not exceptional. In fact, many Member States have considered it necessary to amend their constitution on the occasion of the ratification of EU amendment Treaties. This is illustrated by the constitutional amendments which have proved necessary in several Member States to allow for the ratification of the Maastricht Treaty, which intended to grant electoral rights to EU citizens who are non-nationals (e.g. Spain, Belgium); or the changes to the French Constitution to provide the Parliament with the necessary powers to partake in the EU subsidiarity review mechanism.

More important perhaps are constitutional amendments taking place on the occasion of Treaty amendment, which are considered necessary because the Constitution is considered to require a broader overhaul in order to legitimate approval and ratification of the Treaty.[37] The Constitution is then adapted to better reflect the constitutional reality, or to change the domestic constitutional settlement and adjust it to the new environment (think of changes in parliament-government relations) or to emphasise and confirm certain

[37] This is not necessarily so. It can also take place in between Treaty amendments, as the Finnish and Swedish examples show.

constitutional values and principles which are not changed by EU membership (as for instance the introduction of Article 23 in the German Basic Law). Constitutional amendment requires a stronger consensus than is needed to decide 'normal politics'. If the country is then able to secure the consensus required for constitutional amendment, this at least in theory increases the support and hence also the legitimacy for the relevant treaty. On the other hand, it does make approval and ratification much more cumbersome, and may even threaten it, either because it simply takes too much time to achieve an amendment (see below), or because it is impossible to secure the necessary special majority. This is probably the reason why some countries have on occasion chosen to go ahead with approval and ratification absent a constitutional amendment, despite the fact that the constitutionality of a treaty was seriously in doubt (Belgium at the time of the Treaties of Rome and Maastricht; Portugal at the time of accession). It may also be the reason why the constitutional implications of amendment treaties are downplayed in other countries, so that the path of constitutional amendment does not have to be taken.

The procedural requirements for constitutional amendment vary to a large extent (see Annex III, column 'Procedural clauses for overcoming constitutional obstacles'). The easiest are flexible constitutions like that of the UK where simple majorities suffice. At the other end of the spectrum, in the context of Treaty ratification, are those which require elections between the two phases of the amendment process, as two consecutive legislatures have to accept the constitutional amendment, often with a special majority (Belgium, the Netherlands, Finland). For those exceptionally rigid constitutions, constitutional amendment at the occasion of treaty approval is hardly an option. The Finnish and the Netherlands Constitutions contain a safety valve in the form of a special procedure allowing for the approval, by special majority, of unconstitutional treaties (Article 91(3) of the Netherlands Constitution and so-called exceptive enactments in Finland). Yet, while these have been used in the Finnish case, none of the European Treaties has so far been approved under the enhanced procedure in the Netherlands.

The limits of constitutional amendment

Nevertheless, not all constitutional impediments and obstacles can be overcome by following special procedures or amending the constitution. Some constitutional provisions are simply considered so crucial and the constitutional hurdles are accordingly so high, that they cannot be removed by the normal procedures. If a proposed treaty reaches those constitutional limitations (the constitutional core), approval can only be secured through other means and avenues. These are explored in the following section.

2.2.3. Overcoming the hurdles

Certain constitutional limitations cannot be removed by the 'normal' procedural means of treaty approval or constitutional amendment. These constitutional sensitivities can be accommodated, be it only at a certain cost.

One avenue for further EU integration respecting individual national (constitutional) sensitivities is to create exceptions for those Member State that are not able or willing – for constitutional or other reasons - to take a new step in European integration. This actually is standing EU practice. Thus, the Schengen Convention and the Fiscal Compact have been concluded between only a limited number of Member States as traditional international conventions, not as EU (amendment) Treaties (the Schengen Convention was later incorporated in the EU framework). Such exceptions can also be included in the Treaties themselves, in opt-outs or in protocols.

Another avenue for taking new steps in EU integration while respecting individual national constitutional sensitivities concerns the way the competences are exercised at the EU level. For instance, in France the transfer of competences which are 'essential for the exercise of national sovereignty' does not require a constitutional amendment if the competences are exercised at the EU level by the Council acting with unanimity. The same goes for German

constitutional identity, which is not infringed as long as the *Bundestag* retains 'a formative influence on the political development in Germany'. A transfer is possible, as long as the *Bundestag* 'is in a position to exert a decisive influence on European decision-making procedures'.[38]

Finland takes a similar approach, which aims at securing continued involvement of the national parliament in decisions which are considered to be at the heart of national sovereignty. Under Section 94(3) of the Constitution 'An international obligation shall not endanger the democratic foundations of the Constitution'. In the case of some of the measures and stability mechanisms adopted in the context of the economic crisis, unanimous decision-making is seen as precondition for compatibility with Finnish sovereignty and the Finnish Constitution, and as protecting the budgetary and legislative powers of the Finnish parliament.

As indicated before, things may become even more complicated when the wish to further EU integration might collide with obstacles deriving from provisions that are unamendable. These are provisions which are considered to be so essential that they are protected even against the highest authority in the land, the Constitution-amending power or the *pouvoir constitué*. The best-known example of such an unamendable core is laid down in Article 79(3) of the German Basic law. Also the Constitution of the Czech Republic (Article 9(2)), the French Constitution (Article 89(5)), the Greek Constitution (Article 110), the Italian Constitution (Article 139) and the Romanian Constitution (Article 152) contain such a 'Ewigkeitsklausel' or 'eternity clause'.[39] In other Member States, these are not made explicit in the text of the Constitution, or in constitutional case law, but they are often implied or presumed: no State will lightly give up the principles of democracy, rule of law, the protection of fundamental rights, or statehood itself.

Yet, at least in some Member States the provisions that claim to be unamendable under the present national constitutional arrangement can themselves be amended, as is the case in France. And even were this is not the case, as in Germany, the obstacle is not constitutionally insurmountable. At least certain infringements of German constitutional identity can be overcome if the German people as the 'original' constituent power adopts a new constitution. In this requirement of the intervention of 'the people', i.e. the entity which within the state is considered to be the bearer of national sovereignty, lies a common denominator between Germany and several other Member States which do not have unamendable provisions, but require approval by the people of (certain) constitutional amendments. For instance in Spain, an infringement of the sovereignty of the Spanish State and the Spanish basic constitutional structures can be accepted only on the basis of a constitutional amendment procedure of which a binding national referendum is the final stage.

While thus even the highest procedural constitutional hurdles are not insurmountable, they also should not be discounted too lightly. They demonstrate that the step under review touches upon the basic fundaments of the constitutional settlement or even the basic social contract prevailing in a country. Changing those requires a very broad consensus. Whether it is possible to reach such consensus will be a political question, rather than a legal one.

[38] Lisbon decision, par. 246.
[39] In France and Italy it is limited to the republican form of government, though the Italian constitutional court reads inviolable principles in the Constitution.

3. CONSTITUTIONAL AVENUES FOR FURTHER EUROPEAN INTEGRATION: SOME FINAL CONCLUSIONS

The central research question of this report is **whether, and to what extent, national constitutions provide guidance for further European integration, and reversely how the latter can take place in full respect for national constitutional identities**.

On the basis of our findings in the in-depth studies of a representative selection of Member States (Annex I) and a bird's eye views for all Member States (Annex II), we in the previous chapter have identified and analysed obstacles of a substantive and procedural nature in national Constitutions, and have outlined possibilities and impossibilities of overcoming them. In this chapter we sum up in more general terms what constitutional avenues exist for further integration in the Union as a result. When formulating these avenues against the background of existing obstacles, we distinguish between avoiding substantive constitutional obstacles on the one hand, and overcoming the obstacles on the other. Generally, the substantive constitutional obstacles can be overcome, but often only if the procedural constitutional hurdles can be managed.

Before we embark on the discussion, it is important to remember the nature, role and functions of national constitutions. Roughly, it could be said that constitutions perform four main functions:

- constituting the polity, which may be understood as expressing the basic social contract;
- organising and structuring the exercise of public authority and dividing powers between the various branches;
- limiting the exercise of public authority, which also includes fundamental rights protection of individuals; and
- expressing common values of society.

The exercise of public authority takes place under the constitution, in the form and within the limits it determines, and abiding by the basic values it expresses. However, membership of the European Union challenges the national constitutions in various ways.

Powers, which under the constitution have been attributed to national bodies, are transferred to the EU, and hence they are exercised differently from the way it was intended under the national constitution. The EU itself is as such not bound by those national constitutions, but does indeed require the Member States to apply EU law and enforce it with precedence, even if it should infringe the national constitution and even if the relevant rules could not be applicable if they were purely national law. Accordingly, the supremacy of the Constitution itself is challenged.

To a certain extent and to various degrees, constitutions are carriers of common ideals, values and aspirations, and of elements of national identity. Some of these values, ideas and aspirations are shared also by the other Member States, and are common European principles and values which also bind the EU, such as those listed in Article 2 TEU. Nevertheless, in some cases, even these shared European values find a particular national expression, such as the idea that the main focus of democracy should be on national institutions (Germany), or particular choices in the context of human rights, which reflect fundamental choices a society makes (e.g. on abortion, same-sex marriage). Accordingly, while some of these constitutional obstacles derive from shared constitutional values and principles (generally speaking the rule of law, democracy, fundamental rights), and their protection can also be guaranteed (at least in part) at the European level, in other cases, the EU, as it stands now, cannot 'replace' or 'compensate for' these national constitutions and the values and principles they express and protect.

Moreover, constitutions not only are often considered to be expressions of the will of the people to form a polity (political autonomy) and to be governed under the constitution, but many also legally and judicially protect this foundational will. This may take different forms, for instance by protecting the sovereignty of the state, statehood itself or the national nature of democracy, or a combination of these.

Seen in this light, it should come as no surprise that many Member States, while they have adapted their constitutions to allow for membership and facilitate it, keep their reservations, and impose conditions on EU law.

Against this background, what are the constitutional avenues for further (I) avoiding the existent substantive constitutional obstacles on the one hand, and (II) overcoming the obstacles, and making them disappear, on the other?

3.1. Avoiding substantive constitutional obstacles

EU integration, both under the current treaty framework and beyond it, can be taken further while avoiding substantive constitutional obstacles. However, this has important implications for both Member State actors and EU institutions.

3.1.1. Further integration under the current treaty framework

Under the current treaty framework, the most important manner to avoid constitutional blockages for the Member States actors is their abidance by the constitutional rules and principles. This requires the Member States' actors, especially government representatives in the EU institutions and national parliaments in their various roles vis-à-vis EU institutions and in the implementation of EU law, not to contribute to the making of EU law that would infringe their own Constitution. In some cases, where they cannot prevent the coming into existence of such legislation, they can negotiate exceptions. An example is the highly differentiated definition of 'municipality' in Directive 94/80/EC on the right of EU citizens to participate in municipal elections, due to constitutional differences in the consequences of granting non-nationals the right to participate in municipal elections; the Directive also caters for some special problems for the Belgian form of federalization via a number of derogations.

Similarly, the risk of running into national constitutional obstacles can be reduced through EU practices which show awareness of respective national constitutional limits to integration. This is reflected in the Treaty system and the way in which it operates in several ways.

With respect to the constitutional principles and values which the Member States share, truly European constitutional mechanisms have developed, which may to a large extent compensate for the leaking away of powers under national constitutional systems of the individual Member States. In the context of fundamental rights protection, which historically has been the first issue of contention between the Member States' constitutions and European law, a mature and truly European system and culture of protection of fundamental rights is developing on the basis of the EU Charter and other mechanisms. While this cannot fully replace national constitutional protections, and conflicts may continue to arise, especially due to differences in the balances struck between fundamental rights and other interests, and the different scope of certain rights, constitutional clashes can often be avoided.

The issue of the EU remaining *intra vires* requires taking seriously the legal basis of EU action by the legislative, executive and judicial organs of the Union. Should this not be taken seriously by the *Union legislature*, and would the *Court* return to overly deferential forms of reviewing the legal basis of EU measures, Member State courts could step in, even

the ones that have taken the line that they will not consider *ultra vires* complaints admissible unless the EU scrutiny falls short.

Also, strict abidance by the principle of subsidiarity can reduce the possibilities of running into constitutional obstacles for further integration. In cases in which such obstacles are signalled, both under the subsidiarity procedure but also in the context of the political dialogue of the Commission with the national parliaments (the so-called Barroso initiative), the Commission could withdraw its proposal even if relevant thresholds under the Protocol (Nr. 2) on the application of the principles of subsidiarity and proportionality have not been reached.

In some cases, the constitutional sensitivities are not shared among Member States, and are particular to one or several Member States. Sometimes, these sensitivities are addressed in the Treaties or in EU legislation themselves, and provisions are made to accommodate them and provide for exceptions. This is not merely a matter of political sensitivity: there is also a broader obligation of the EU and its institutions under Article 4(2) TEU to respect the 'national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' of the Member States, as well as 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. This can be considered a recognition of the fact that the EU must pay due regard to the constitutional concerns of the Member States. At least as regards national obstacles that can be subsumed under Article 4(2) TEU, prudent decision-making is called for.

Generally, the EU institutions have several techniques at their disposal to avoid national constitutional obstacles and to accommodate constitutional diversity while engaging in further European integration within the present treaty framework. We mention the following:

- The choice of legal instrument (the choice for a directive might leave more leeway for implementation in accordance with national constitutional requirements);
- The use of techniques like the 'open method of coordination' and other benchmarking techniques rather than harmonization;
- The use of minimum rather than total harmonization;
- The use of exemptions or differentiated regulation.

The *Court of Justice* has regularly shown to be sensitive to fundamental national constitutional objections, in particular in the field of the justification of restrictions on the free movement rights.[40] There are, however, also cases that go in the opposite direction.[41] This sometimes happens as regards harmonization measures which do not allow for differentiation, for instance because of a different appreciation of the importance of general principles of law or of fundamental rights, particularly in light of a principled approach to the primacy of EU law over national constitutional law (a claim, as we already remarked, that is not generally accepted in most Member States) or in light of the more utilitarian considerations of the unity and effectiveness of EU law. Here, constitutional conflict can ensue.

The practices here intended are premised on awareness and sensitivity in the EU institutions of national constitutional obstacles that further integration might run into. This

[40] E.g. Case 379/87, 28 November 1989, *Anita Groener v Minister For Education and City Of Dublin Vocational Educational Committee*; ECJ, Case C-36/02, 14 October 2004, *Omega*; ECJ (Second Chamber), Case C-391/09, 12 May 2011, *Malgožata Runevič-Vardyn*; ECJ (Second Chamber), Case C-208/09, 22 December 2010, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*; ECJ (Third Chamber), Case C-314/08, 19 November 2009, *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu.*

[41] E.g. ECJ (Grand Chamber), 18 December 2008, Case C-213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias*; ECJ (Grand Chamber); Case C-409/06, 8 September 2010, *Winner Wetten*; ECJ Case C-399/11, 26 February 2013, *Melloni*.

in turn highlights the importance of an honest constitutional dialogue not only between courts, but also between European and national political institutions.

3.1.2. Further integration beyond the current treaty framework

The recent Fiscal Compact and especially the ESM Treaty show that further EU integration is still possible by the adoption of new treaties without running into substantive constitutional obstacles. In none of the contracting Member States the ratification of these treaties required a constitutional amendment, even though their constitutionality has (unsuccessfully) been challenged in several Member States. However, the margins seem to be narrow. By now the state of EU integration has advanced so far, and the competences already transferred are so extensive, that almost every new transfer of competences is likely to be constitutionally sensitive in at least one of the Member States.

The spectrum of competences whose transfer is constitutionally sensitive varies from Member State to Member State. But in its entirety the spectrum ranges from those competences which historically have formed the nucleus of national sovereignty and statehood (e.g. foreign affairs and defense, criminal law), via economic competences to competences related to national culture and the welfare state (social security etc.).

This may be illustrated by some practical examples. In Ireland, issues of defence policy and neutrality remain politically sensitive and in Austria these have a definite constitutional edge; although the introduction of a common EU defence is clothed with specific procedural guarantees, there are other sensitive issues concerning EU military operations and other forms of cooperation short of a common defence that might affect constitutionally relevant neutrality policies. In Germany, the sheer size of committing its public finance to rescue operations could become an obstacle to further integration. Further integration in the field of economic, monetary and fiscal governance, as well as in the field of the own means of the Union, might transgress national constitutional limits.

Nevertheless, to a certain extent national substantive constitutional sensitivities regarding new transfers of competences can be accommodated, be it only at a certain cost.

One avenue for further EU integration respecting individual national constitutional sensitivities is to create treaty exemptions for those Member States who not are willing to integrate (further) in a certain area or field. This actually is reflected in EU practice. Various Protocols to the Treaties from Maastricht to Lisbon testify to this.

Another avenue for transferring new competences to the EU while respecting individual national constitutional sensitivities regards the way the competences are exercised at the EU level. For instance, in France the transfer of competences which are ‘essential for the exercise of national sovereignty’ does not require a constitutional amendment if the competences are exercised at the EU level by the EU Council acting with unanimity. Likewise with respect to German constitutional identity: German constitutional identity requires that the Bundestag retains ‘a formative influence on the political development in Germany’. However, that does not exclude that the relevant competences are transferred to the EU. This is possible as long as the Bundestag ‘is in a position to exert a decisive influence on European decision-making procedures.’[42]

3.1.3. Overcoming substantive constitutional obstacles

Substantive constitutional obstacles, whether arising under or beyond the current treaty framework, can be overcome in different ways. Sometimes they can be conquered via an informal adaptation of the constitution. Here, one can think of a re-interpretation of existing constitutional provisions (e.g. to allow for the primacy of EU law, as happened in Italy on the basis of a novel interpretation of Article 11 of the Constitution). However, more

[42] Lisbon judgment at para. 246.

generally they require the adoption of a treaty (amendment), the adoption of a constitutional amendment, a combination of both or even the adoption a new constitution.

The prescribed route depends on the kind of constitutional obstacle encountered, but in all situations at least certain procedural constitutional hurdles have to be taken. Even a (simplified) treaty amendment which does not encounter any substantive constitutional obstacle in the Member States needs to be approved by the national parliaments or in a referendum, or in both, depending on the requirements of national constitutional law. If substantive constitutional obstacles are encountered, the procedural hurdles become higher. In nearly all such cases, qualified majorities in parliament are required, or a referendum, or again a combination of both. And in some Member States the wish to further EU integration might even collide with obstacles which are derived from provisions which claim to be unamendable. These are provisions which are considered to be so essential that they are protected even against the highest authority in the land, the constitution amending power or the *pouvoir constitué*.

These procedural constitutional obstacles should be put in perspective. The history of European integration shows that further integration has often led Member States to amend their Constitution. This has happened typically at times of Treaty amendments which entailed new steps in EU integration (think of, for instance, the Treaty of Maastricht), but also in cases of major steps in EU integration under the Treaties in force (such as in the case of the European arrest warrant). Member States have regularly taken the occasion of accession and of Treaty amendment for a general restatement of the conditions of membership or to adapt the domestic constitutional architecture to the requirements of EU integration (e.g. Article 23 of the German Basic Law and Article 88-1 ff. of the French Constitution at the time of Maastricht). Sometimes, this may also take place on the occasion of a wider project of constitutional amendment (Sweden, Finland, and this year, Romania). It should be noted that, in general, these constitutional amendments have been adopted with large majorities, and express the commitment of the relevant Member State to European integration. In this respect, European integration has been built to a considerable extent by national constitutional adaptation over time. European integration can be said to be also a product of the constitutional flexibility of the Member States. This has contributed to the constitutional legitimacy of European integration.

Moreover, at least in some Member States the provisions which claim to be unamendable under the present national constitutional arrangement can themselves be amended. And even were this is not the case, as in Germany, the obstacle is not constitutionally insurmountable. At least certain infringements of German constitutional identity can be overcome if the German people as the ‘original’ constituent power adopt a new Constitution. In this requirement of the intervention of ‘the people’, i.e. the entity which within the state is considered to be the bearer of national sovereignty, lies a common denominator between Germany and several other Member States which do not necessarily have unamendable provisions, but require approval by the people of (certain) constitutional amendments. For instance in Spain, an infringement of the sovereignty of the Spanish State and the Spanish basic constitutional structures can be accepted only on the basis of a constitutional amendment procedure of which a binding national referendum is the final stage.

While the procedural constitutional hurdles which need to be managed for overcoming substantive constitutional obstacles are certainly not insurmountable, they also should not be discounted too lightly. One reason for this is the phenomenon of minority governments, traditional for instance in Denmark, but now more frequent even elsewhere. This may make it difficult to obtain even a simple majority on controversial decisions, whereas under circumstances of broad government coalitions it may be relatively easy to obtain a qualified majority of two thirds of the vote. In addition, there is the current Eurosceptic political climate in many Member States. So the political context must not be ignored in assessing constitutional possibilities for even relatively small steps on the road to further integration.

This is *a fortiori* the case in the context of moving into a new constitutional order, for instance by giving the *Kompetenz-Kompetenz* to the EU or by giving up independent statehood under international law. In some Member States, statehood in the context of EU membership is already considered to be more or less similar to some kind of statehood in a federal type of European constellation. Moreover, the perspective of development towards a situation in which the constitutional orders of the Member States are formally no longer expression of political autonomy, and derive their powers no longer from national political society but top-down from the Union, poses challenges which may be in a technical sense and from a strictly legal perspective manageable, and can technically be framed in terms of constitutional law, but at present such a perspective must be deemed to be politically unfeasible. Many Member States' constitutional orders tend not to engage in thinking beyond their own parameters, notably those of statehood as it is presently known. Here we are leaving the area of constitutional law and enter the realm of political speculation and assessment.

When engaging in further integration beyond the present Treaty framework, not only a constitutional sensitivity is called for. Overall political and social realities are more decisive than constitutional rules.

ANNEX I: IN-DEPTH STUDY OF SELECTED MEMBER STATES

1. CROATIA*

1.1. GENERAL CONSTITUTIONAL FEATURES

The Republic of Croatia is a very young independent and sovereign state. It declared its independence from Yugoslavia in 1991, with Franjo Tudjman, the leader of the Croatian Democratic Union party, becoming the country's first president. The Croatian Constitution was adopted on 22 December 1990 (after the first democratic multi-party parliamentary elections) and is the supreme law of the land. It has been amended in November 1997, November 2000, March 2001, and finally in June 2010 incorporating all the necessary changes in order to facilitate Croatian accession to the European Union. Croatia was the 28th country to join the European Union on 1 July 2013.

Croatia is a parliamentary democracy. Legislative authority is vested in the unicameral Parliament (*Sabor*)[43] comprising no less than 100 and no more than 160 deputies elected on the basis of direct, universal and equal suffrage by secret ballot for a term of four years. Currently, the Croatian Parliament has 151 members elected in December 2011. The Parliament's internal structure and operating methods are regulated by the Standing Orders, which are passed by a majority vote of all deputies. The Croatian Parliament decides on the enactment and amendment of the Constitution, enacts laws and governs the National Budget, calls referendums, and engages in a number of other activities as stipulated in Article 81 of the Constitution.

The President of the Republic is the head of State, elected by direct popular vote for a term of five years. He or she is elected by an absolute majority vote. If none of the candidates receive such a majority, the elections are repeated after fourteen days. This time, only the two candidates who obtained the highest number of votes in the first election can be elected. If one of the candidates withdraws, the right to be elected is passed on the candidate who has the next highest number of votes. No one shall be re-elected the President of the Republic more than once. Ivo Josipovic won the presidential election in January 2010 and is the current President of the Republic of Croatia.

Croatia has a three-tiered judicial system, consisting of the Supreme Court, county courts, and municipal courts. Croatia's Supreme Court is the highest court of law which assures uniform application of laws and equality of all before the law. Members of the high court are appointed by the National Judicial Council, an autonomous and independent body of eleven members, and justices on the Supreme Court are appointed for life.

The Constitutional Court is a body of thirteen judges elected by a two-thirds majority of the deputies in the Croatian Parliament for the term of eight years. The Constitutional Court ensures, *inter alia*, the compliance of all laws with the Constitution and monitors whether elections and referendums are conducted in compliance with the Constitution. However, the Constitution does not explicitly mention the competence of the Constitutional Court to review the conformity of national laws with international treaties, or the conformity of international agreements with the Croatian Constitution.

Croatia has a monist tradition when it comes to the effect of treaties in the domestic legal order: ratified international treaties are a component of the Croatian domestic legal order and have primacy over domestic law.

* Many thanks to Tamara Ćapeta for valuable comments.

[43] The Upper House (Chamber of Counties) was eliminated by constitutional amendment in March 2001.

1.2. THE SITUATION UNDER THE CURRENT SYSTEM

1.2.1. Enabling Clauses – allowing for membership

The international recognition of the Republic of Croatia in January 1992 marked the beginning of a development of relations between Croatia and the European Union. The intensification of these relations from the beginning of 2000 led to the signing of the Stabilisation and Association Agreement (SAA) on 29 October 2001. Croatia was the second country to sign a Stabilisation and Association Agreement (SAA) with the EU and that agreement represented the first formal step towards institutionalising the relationship of Croatia with the EU. The agreement entered into force on 1 February 2005.

Following Croatia's application for membership in the European Union on 21 February 2003 in Athens, the Council of the EU asked the European Commission to prepare an opinion on Croatia's application bid. Based on a positive opinion by the Commission, the Council granted Croatia the status of candidate country for membership.

The negotiations officially started in October 2005. The Treaty of Croatia´s Accession to the European Union was signed in Brussels at a separate ceremony preceding the 9 December 2011 session of the European Council. A referendum on the Accession Treaty was held in January 2012, and the Croatian citizens opted for Croatia's accession to the European Union (66, 27 % of the electorate voted in favour of accession). With 136 affirmative votes, the Parliament ratified the Accession Treaty in March 2012. Croatia became the 28th EU Member State on 1 July 2013.

The Croatian Constitution contains general provisions on the position of international law[44] in the Croatian legal order as well as a separate title with specific provisions dedicated to and regulating the relations with the EU. These provisions were added to the Constitution in 2010, when Croatia adopted major constitutional amendments in order to ensure full constitutional conformity with EU accession and integration.[45]

The Croatian Constitution contains two separate constitutional bases according to which Croatia could accede to the EU. Firstly, there is a general provision on transfer of powers to international organisations in Article 140 (former Article 139), which states that 'international treaties which grant an international organization or alliance powers derived from the Constitution of the Republic of Croatia shall be ratified by the Croatian Parliament by a two-thirds majority of all deputies.' This Article does not require a referendum but one could still be requested on the basis of Article 87 Constitution.[46]

Secondly, Article 142 (former 141) deals specifically with associations of Croatia into alliances with other States. This Article requires a two-thirds majority vote of all deputies but it also requires a referendum. Paragraphs 3 and 4 are relevant here:

> 'Any association of the Republic of Croatia shall first be decided upon by the Croatian Parliament by a two-thirds majority of all deputies.
>
> Any decision concerning the association of the Republic of Croatia shall be made in a referendum by a majority vote of all voters voting in the referendum.'

There are arguments in favour and against the use of either the former or the latter

[44] Articles 139-141 of the Constitution.
[45] The constitutional amendments of 16 June 2010 (Narodne Novine 76/2010) introduced a Chapter VIII with specific provisions on membership in the European Union in the Croatian Constitution (Articles 143 – 146).
[46] Article 87 of the Constitution provides for a possibility for the Croatian Parliament and/or the President of the Republic (on the proposal of the Government and with the countersignature of the Prime Minister) to call a referendum on a proposal to amend the Constitution or any other issue deemed to be of importance to the independence, integrity and existence of Croatia. In a referendum, decisions are made by a majority of voters who have cast their vote.

provision as a constitutional basis for accession of Croatia to the EU[47] but the political actors in Croatia opted for Article 142 of the Constitution, which required a confirmatory referendum.

Article 143 of the Constitution, which entered into force on the day that Croatia acceded to the Union, is a specific provision on transfer of powers to the EU and it is central to any further Treaty reform.[48] The first part of the provision proclaims Croatian participation in the creation of European unity, as a Member State of the EU, in order to ensure 'lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union'.

The second part states that Croatia shall, pursuant to Articles 140 and 141[49] of the Constitution, 'confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'. The ratification of treaties, which transfer powers upon the institutions of the EU, requires the approval of the two-thirds majority of all deputies in the Croatian Parliament (Art. 140 (2)). Subsequently, the President of the Republic has to sign the documents of ratification of international treaties previously ratified by the Croatian Parliament. Article 141 of the Constitution provides that a ratified international agreement (already published in the official journal) will constitute part of the domestic legal order and will have primacy over domestic law.

1.2.2. Adaptation of the constitutional framework to facilitate membership

On 16 June 2010 the Croatian Parliament adopted the changes to the Croatian Constitution, which, among other things, regulate the status of EU law in the national legal order.

Pursuant to Article 152 of the Constitution, the changes contained in the new Title VIII of the Constitution, which bears the title 'European Union', entered into force on the day of the Croatian accession to the Union. Title VIII was designed and adopted in order to ensure that the constitutional requirements for Croatian membership in the EU are met. However, this does not mean that the Croatian membership in the EU would not have been possible without the constitutional amendment. Much of the content arranged by Title VIII follows from the provisions of the EU Treaties, secondary EU law and practice of the Court of Justice of the EU as well as from the Treaty on Croatian accession to the EU. Nevertheless, the provisions have an internal legal importance in facilitating the fulfilment of the Croatian obligations towards the European Union.

Changes proposed in Chapter VIII regulate the legal basis of EU membership and the transfer of constitutional powers to its institutions (Art. 143), the participation of Croatian citizens and institutions in the EU institutions (Art. 144), the application of EU law in the Croatian legal order (Art. 145), and the rights of EU citizens (Art. 146).

Article 143 of the Constitution declares European unification to be an objective of the Republic of Croatia together with other European states and explicitly permits the transfer of sovereignty rights to the European Union, which are necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

Article 144 deals with the participation of the citizens of the Republic of Croatia, the Croatian Parliament and the Government of the Republic of Croatia in the EU institutions.

[47] See e.g. Ćapeta (2008), Rodin (2008).
[48] Since this Article has been included in the Constitution it is no longer necessary to use Art. 142 for future Treaty amendments.
[49] 'International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.'

Article 145 prepares the Croatian constitutional and legal order for the application of EU law by the national courts and public administration bodies. In particular, paragraph 1 refers to the principle of equivalence of the exercise of rights ensuing from EU law and the exercise of rights under Croatian law, paragraph 2 to the application of EU legal acts and decisions in Croatia, paragraph 3 to the protection of subjective rights based on the EU *acquis communautaire*, and paragraph 4 to the principle of direct application of EU law by the administrative bodies. This Article, which was meant as a national expression of European principles initially formulated in the practice of the Court of Justice of the EU, is somewhat problematic. First of all, the Article does not mention supremacy of EU law even though some of the paragraphs might be interpreted in this way[50] and secondly, it adds the 'accepted by' condition in the second paragraph providing that 'all the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the EU *acquis communautaire*.'[51]

Article 146 states that Croatian citizens shall be EU citizens and shall enjoy the rights guaranteed by the EU *acquis communautaire*, which will be exercised in compliance with the conditions and limitations laid down in the founding treaties of the EU and measures undertaken pursuant to such treaties. The last paragraph refers to all citizens of the EU who shall enjoy all rights guaranteed by the EU *acquis communautaire* in the Republic of Croatia. First of all, it is interesting to note that Croatia is the first (and so far only) Member State to adopt such a detailed provision on EU citizenship in its Constitution. The provision is in fact a domestic version of the general provision on EU citizenship which can be found in Article 20 of the Treaty on the Functioning of the European Union (TFEU). The framers of the Croatian Constitution adopted an interesting holistic approach: Article 146 lists the rights deriving from EU citizenship and declares them applicable to Croatian citizens, and it subsequently provides that the rights guaranteed by the EU *acquis communautaire* will be enjoyed by all citizens of the EU.[52] This seems to indicate that what was primarily on the drafters' minds was to inform Croatian nationals about their future EU citizenship status and the rights attached to it.

Professor Rodin, who was a member of the expert Subcommittee on EU integration of the Government's *ad hoc* Committee on Constitutional Reform, argued that the motivation for introducing such a provision was largely political. In the first instance, it was important to educate Croatian citizens about one of the benefits of joining the EU, namely the rights they will gain in the territory of EU Member States upon Croatia's entry into the EU. Another reason was to illustrate reciprocity: it was important to also declare that Croatian citizens will acquire certain rights in the territory of EU Member States and not only acknowledge these rights for EU nationals in the territory of Croatia.[53]

In addition to the European section that was included in the Constitution, other essential changes have been made in the 2010 amendment, most notably in the provision on referendum[54], which now requires a majority of voters who have cast their vote instead of a majority of registered voters. The justification for changing this provision is the fact that a large number of electoral abstainers (mainly living outside of Croatia) would automatically represent a vote 'against'.[55] This amendment automatically meant eased

[50] The explanation attached to the proposed constitutional amendment of Article 145 does indicate that the framers had the principle of supremacy in mind; however, this is not a guarantee that the provision will be interpreted in this way.
[51] This point is further discussed in section II D (1).
[52] For a more detailed analysis see T. Orsolić (2011).
[53] Orsolić (2011).
[54] Article 142 (4) of the Constitution: 'Any decision concerning the association of the Republic of Croatia shall be made in a referendum by a majority vote of all voters voting in the referendum'. In addition, 'any association of the Republic of Croatia shall first be decided upon by the Croatian Parliament by a two-thirds majority of all deputies' (Art. 142 (3)).
[55] Proposal to amend the Constitution of the Republic of Croatia, from September 2009, made by the Croatian Government, available in Croatian at http://www.cpi.hr/download/links/hr/12816.pdf.

conditions for a referendum on joining the EU and was arguably, along with few other amendments, crucial for the successful outcome.

Another important amendment adopted in 2010 was the one on the extradition of Croatian citizens. In order to facilitate the implementation of the European Arrest Warrant (EAW) framework decision, the Croatian Parliament amended Article 9 (2) which now includes an exception to the general rule that Croatian citizens may not be extradited to another state, namely the possibility of extradition in case of execution of a decision on extradition made in compliance with the *acquis communautaire* of the European Union.

However, even though the Constitution was amended in order to facilitate the implementation of the EAW decision, the ordinary law implementing the decision (the so-called "lex Perković" passed three days before Croatia's EU accession on 1 July 2013)[56] respected the framework decision but only for crimes committed after 7 August 2002.[57] The EU had threatened Croatia with sanctions soon afterwards, explaining that Croatia cannot insert derogations in the implementing legislation and reminding that Article 39 in the Accession Treaty to the European Union gives the Commission the right to take 'appropriate measures in the event of serious shortcomings'. In an attempt to avoid a rift with the EU just months after joining, Parliament adopted further amendments in October 2013, changing the restrictions on the use of the EAW and making it applicable to all criminal offences, regardless of when they were perpetrated. The new law entered into force on 1 January 2014.[58]

1.2.3. Status, effect and rank of EU law in the domestic legal order

Article 141 of the Croatian Constitution sets out the position of international law in the Croatian legal order. It reads as follows:

> 'International treaties which have been concluded and ratified in accordance with the Constitution, published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.'

Accordingly, ratified international treaties have binding force in Croatia; they are a component of the domestic legal order and have primacy over domestic law. This provision shows the monist approach adopted in Croatia concerning the position of international treaties in the national legal order. What is not explicitly clarified in this provision is the relationship between international treaties and the Croatian Constitution.

Article 145 of the Constitution determines the status of EU law specifically in the Croatian legal order. The first paragraph declares that the exercise of the rights ensuing from the EU *acquis communautaire* is made equal to the exercise of rights under Croatian law.

The second paragraph appears to be problematic. It reads as follows:

[56] The law's nickname comes from suspicions that it was amended to shield Josip Perković, a former Yugoslav state security and Croatian secret services operative who is wanted by Germany for questioning over the murder of a Croatian businessman there in 1983.
[57] Article 132a (3) of the Act on judicial cooperation in criminal matters with the Member States of the European Union, available at the website of the Croatian Parliament http://www.sabor.hr/English.
[58] This however might not be the end of the story, since Croatian opposition politicians claim that Perković cannot be extradited to Germany regardless of the EAW, because of the statute of limitations in the Croatian Criminal Code. Nevertheless, the Croatian Government has insisted that this obstacle to Perković's extradition is not a problem for the EU. It remains to be seen how the new legislation will be applied, in particular in the case of Perković, but the Commission will surely monitor the process and lift the sanctions threat only after it deems the outcome satisfactory.

> 'All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*.'

The wording of this provision is not only peculiar with the 'accepted by' part but also self-contradicting. It states that EU legal acts and decisions accepted by the Republic of Croatia shall be applied in accordance with the EU *acquis communautaire*. The EU *acquis communautaire* denotes, *inter alia*, absolute and unconditional supremacy of EU law so it is unclear how the application of EU acts is in accordance with the EU *acquis communautaire* if it is conditional upon acceptance by the Republic of Croatia.

This constitutional reform seems to indicate that the framers of the Croatian Constitution were not entirely aware or acceptant of the principle of primacy of EU law.[59] According to the jurisprudence of the CJEU, EU law has primacy over national law, including national constitutional law, and is thus not something that Member States may or may not accept.[60]

The wording of this Article was possibly inspired by the wording and interpretation of Article 141, a general longstanding Croatian constitutional provision which provides that international treaties which have been concluded and ratified in accordance with the Constitution shall be a component of the Croatian legal order and shall have primacy over domestic law, but not over the Constitution.[61]

1.2.4. Conditioning participation in EU integration

Substantive Limits

One of the conditions for participation in EU integration is fairly explicit in Article 145 (2) of the Constitution, stating that all legal acts and decisions of the EU institutions **accepted by** Croatia shall be applied in Croatia in accordance with the EU *acquis communautaire*. This provision has been discussed earlier in the report[62] and it can be seen as a (potential) condition for further EU integration. However, this will primarily depend on its interpretation by the Croatian Constitutional Court.

Professor Rodin interprets this provision in an EU-friendly manner. According to him, it is crucial to realise that this provision implies not only the obligation to apply EU law in the Croatian legal order but also the obligation to apply national law in accordance with EU law. This follows from the general principles of EU law such as direct effect and primacy, but also from the principle of international law *pacta sunt servanda*. Furthermore, EU law should be seen as having primacy over Croatian law. This primacy is one of the most important characteristics of EU law and hence Article 145 (2) should be understood as a norm which implicitly prescribes direct effect and primacy of EU law.[63]

Moreover, Professor Rodin claims that the part of the provision stating 'all the legal acts and decisions accepted by the Republic of Croatia in European Union institutions' concerns all legal acts and decisions accepted in the EU institutions, thus also acts and decision which are adopted by using majority voting, even if Croatia voted against the adoption of such an act or such a decision in the Council of Ministers.[64] This seems quite odd, as it appears that the part 'accepted by the Republic of Croatia' is negated in his interpretation, or rather interpreted as meaning 'accepted by the EU Institutions'.

[59] Orsolić (2011), p. 339.
[60] *Costa v Enel* [1964] ECR 585 (6/64).
[61] Orsolić (2011), p. 339.
[62] See section I b and I c.
[63] Rodin (2010), p. 5.
[64] *Ibid*.

Despite his positive attitude towards the interpretation of the aforementioned provision it has been recorded that Professor Rodin never agreed to insert it into the Constitution.[65] The Subcommittee of which he was a member was no longer assembled when Article 145 was re-drafted and accepted in the Government's proposal for the constitutional amendment.

Whether such a lack of transparency was purposefully created in order to 'cover up' the adoption of constitutional amendments which are evidently in contradiction to some of the fundamental principles of EU law, by withholding them from the expert community and the public in general, or whether it was unintended, is unclear.[66]

In any case, our main concern is the motivation of the constitution-framers for inserting such a provision and more importantly, the effects it will generate in the future. For this we will have to await a judgment by the Croatian Constitutional Court. It is very uncertain whether the interpretation will indeed be pro-European and in the way Professor Rodin has argued or perhaps very different and hence problematic for further EU integration.

Some authors have taken a different position. Professor Smerdel, for instance, argues that it would not be wise give complete supremacy to EU law and to give up on the Croatian Constitution. The claim for 'reserved constitutional domain' should not only be made by larger EU Member States such as Germany and France, but also by smaller ones which are smaller but still equal. On the basis of the doctrine of constitutional identity, constitutional courts may decide to give supremacy to national constitutions over EU law.[67] In order to support this argument, Professor Smerdel makes explicit reference to the case law of the German Constitutional Court as well as to other constitutional courts which have developed the theory of constitutional identity. This theory was the fundamental basis for decisions of those courts in which primacy is given to national constitutional law. As for Croatia, there are no provisions in the Croatian Constitution precluding the Constitutional Court from adopting the same approach, according to Smerdel. It is in fact fairly easy to construe a constitutional basis for the supremacy of national constitutional law over EU law in relevant matters, even though it is not explicitly stated in the Constitution (Croatian negotiators in the accession process have warned that including such a provision in the Constitution would mean the end of negotiations).[68] Relevant provisions in this respect are Articles 2, 3 and particularly Article 5 of the Constitution. Article 2 is a sovereignty clause stating that the sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable. It further states that Croatia may conclude alliances with other states but it retains its sovereign right to decide upon the powers to be delegated and the right to freely withdraw therefrom. Article 3 outlines the highest values of the constitutional order of the Republic of Croatia[69] and Article 5 proclaims that laws shall comply with the Constitution and other regulations with the Constitution and law. This certainly puts the Croatian Constitution in the central position and indeed leaves space for the interpretation of the Constitution's supremacy over all laws, including EU law. The key question is thus how the Constitutional Court will approach all these issues? At present, it is difficult to predict the direction of the Constitutional Court's future jurisprudence in this respect.

Procedural Limits

The Croatian Parliament participates in European affairs on the basis of the Constitution of the Republic of Croatia, the Law on Cooperation of the Croatian Parliament and the

[65] The information is obtained in a conversion between Siniša Rodin and Tina Orsolić. See Orsolić (2011), p. 339.
[66] Orsolić (2011), p. 340.
[67] Smerdel (2012) p. 6.
[68] Smerdel (2012), p. 7 (footnote 31).
[69] 'Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia'.

Government of the Republic of Croatia in European Affairs (hereinafter the Law on Cooperation) and the Standing Orders of the Croatian Parliament.

The Croatian Parliament participates in EU affairs both indirectly, by supervising the activities of the Government in the EU institutions, and directly, executing the powers granted to national parliaments by the Lisbon Treaty. The latter primarily concerns parliamentary scrutiny and subsidiarity checks of the proposed legislative acts of the EU as well as the involvement in the political dialogue with the European institutions. The stated powers are listed in Article 3 of the Law on Cooperation and executed by the European Affairs Committee on behalf of Parliament (in accordance with Article 4 of the Law on Cooperation), except for issues related to the common foreign and security policy of the European Union, which fall within the competence of the Foreign Affairs Committee.

The European Affairs Committee prepares an annual parliamentary Work Programme containing draft European acts which need to be scrutinised. Specialised parliamentary committees are involved in the scrutiny from the beginning of the process, as they may propose draft acts from their scope of work to be included in the Work Programme. Once the draft act in question, along with the corresponding Position of the Republic of Croatia, is delivered to the Croatian Parliament, specialised committees may debate them and send their opinions to the European Affairs Committee. The latter, taking into consideration opinion(s) of specialised committees, then draws a Conclusion on the Position of the Republic of Croatia, which forms the basis of the Government's action in the European institutions.

Article 12 of the Law on Cooperation regulates the implementation of the *passerelle* clause stating that the Parliament may adopt a conclusion that opposes the proposed decision of the European Council set forth in Article 48 (7) TEU or the proposed decision of the European Commission set forth in Article 81 (3) TFEU within six months of the delivery of the notification of the initiative taken by the Council/Commission.

The subsidiarity check procedure is outlined in Articles 13 and 14 of the Law on Cooperation. If, within seven weeks from the submission of a draft legislative act of the European Union by the EU institutions, the European Affairs Committee establishes that this draft legislative act does not comply with the principle of subsidiarity, it shall send a reasoned opinion to the Speaker of Parliament, who shall deliver it to the Government, the presidents of the European Parliament and the European Commission and to the Presidency of the Council of the European Union. The Committee may also deliver a reasoned conclusion, on the basis of which the Government will bring an action before the Court of Justice of the European Union.

1.3. FURTHER TREATY REFORM

1.3.1. Substantive reservations

The Croatian Constitution does not contain unamendable provisions. However, certain core values of the Croatian society have been discussed lately and it seems that some sort of constitutional identity theory is in fact emerging at the moment. Here it is important to mention the most recent developments in Croatia. On 1 December 2013, a constitutional referendum was held in Croatia in which voters decided to include a definition of marriage as a union between a man and a woman in the Constitution. In other words, this constitutional amendment created a constitutional prohibition of same-sex marriage. After processing the results, the State Electoral Commission announced that 65.87% voted yes, 33.51% no and 0.57% of ballots were disregarded as invalid. 37.9% of eligible voters voted in the referendum.[70]

[70] For a detailed overview of the results see the State Electoral Commission's website available only in Croatian at www.izbori.hr.

The referendum was initiated by the conservative organization 'U ime obitelji' ('In the Name of the Family') which gathered 683.948 signatures[71] demanding a referendum. The initiative was later supported in the Parliament by more than two-thirds majority (104 votes) becoming the first referendum in the Croatian history initiated on the request of the citizens. A former Prime Minister and an independent member of the Croatian Parliament, Jadranka Kosor, proposed the submission of a request for the review of constitutionality of the referendum to the Constitutional Court, in accordance with Article 129 (9) of the Constitution which, *inter alia*, gives the competence to the Court to ensure that referendums are conducted in compliance with the Constitution and other laws. This proposal was however rejected in the Parliament.

Nevertheless, the Croatian Constitutional Court has unanimously adopted a resolution concerning the national constituent referendum on the definition of marriage, in which it concluded that the referendum revealed a number of problems in the Croatian referendum law and opened a series of legal questions.[72] The Court however acknowledged the fact that the Croatian Parliament supported the initiative for the referendum with a higher majority than the majority required to change the Constitution. Therefore, the decision must be respected and the subsequent monitoring of the constitutionality of the referendum and the existence of constitutional requirements for its continuation is not necessary.[73]

The problem with this specific referendum, with proposals for future referendums[74] and generally with the Croatian referendum law is the abolishment of the threshold of 50 percent plus one voter turnout in Article 87 of the Constitution. The Constitutional Court has requested the legislature to ensure a stable regulatory framework for referendum procedure that meets the standards of a democratic society.[75] The Court has also noted, referring to the Venice Commission's opinion on the Fourth Amendment to the Fundamental Law of Hungary[76] as well as to the case law of the European Court of Human Rights, that the incorporation of legal institutes in the Constitution (such as marriage) must not become a systemic phenomenon, and exceptional individual cases must always be justified by being associated or representing the deep-rooted social and cultural values of the Croatian society.[77] Notwithstanding the criticism, the Court did not put in question the validity of neither the referendum on the definition of marriage nor the one on the accession of Croatia to the EU, both being adopted according to the new alleviated rules.

What seems to be more of a genuine problem for further EU integration is the fact that in this way a theory of constitutional identity/material core seems to be emerging in Croatia, and there is nothing stopping it at the moment. However, there are discussions already concerning an amendment of the constitutional provision on referendum as well as placing restrictions on what can be changed by means of a referendum (mainly concerning fundamental rights and international obligations). If this would happen, it would certainly have consequences for the substantive limits for further Treaty reform in the EU.

1.3.2. Procedural hurdles for further integrations

Article 143 provides an explicit permission for the transfer of competences to the European Union. It states that pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the EU the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

[71] This is more than 10 percent of the total electorate of the Republic of Croatia, as required by Art. 87 third sentence.
[72] Resolution of the Croatian Constitutional Court SuS-1/2013, available in Croatian on the website of the Constitutional Court.
[73] *Ibid*., para 11.
[74] Such as the one on Bilingual Ethnic Minority Rights.
[75] Resolution of the Croatian Constitutional Court Sus-1/2013, para. 10.1.
[76] Opinion 720/2013, CDL-AD (2013)012, Strasbourg 17 June 2013.
[77] I*bid*., para. 9.1.

Article 140 of the Constitution prescribes the procedure for granting powers derived from the Constitution: ratification by the Croatian Parliament by a two-thirds majority of deputies. Article 141 gives primacy to international treaties over domestic law. This seems to indicate that the further transfer of powers to the EU would take place without the requirement of referendum. This is however not certain. It might also be that the ratification will take place on the basis of Article 142, as it did with the Accession Treaty, where a two-thirds majority is needed in the Parliament as well as a confirmatory referendum (paragraphs 3 and 4). Nevertheless, this Article explicitly concerns associations (and dissociations) of Croatia into alliances with other States, which means that this provision should be used in a limited number of situations e.g. when a new State is acceding to the Union (it could be seen as an association with a new state) but in other situations Article 143 should be used as a legal basis for further transfer of powers to the EU.

The Croatian Constitution does not specify an explicit competence for the Constitutional Court to review the conformity of national laws with international treaties, or the conformity of international agreements with the Croatian Constitution. Nevertheless, this competence may implicitly be derived from the Constitutional Court's role as the guardian of the hierarchy of the Croatian legal order. It is however important to distinguish between two situations.

The first one relates to the assessment of conformity of laws with international treaties which, on the basis of Art. 134 of the Constitution, became part of the legal system of Croatia. Such international agreements can serve as a criterion for reviewing the constitutionality of laws, and the Constitutional Court, since the beginning of its practice in 1998, has evaluated the compliance of laws with international treaties. Finding a violation would not only mean a violation of the international commitments taken by Croatia, but also a breach of Articles 3 and 5 of the Constitution.

The other one concerns assessment of conformity of international agreements with the Constitution. Article 131 of the Constitution[78] does not provide for an explicit competence to review the validity of international agreements; it can however be constructed in view of the competence of the Constitutional Court to rule on the constitutionality of laws and other regulations. The act of Parliament ratifying an international agreement has the same legal status and hence a constitutional review of the act of ratification is possible in order to stop the entry into force of a treaty. It is not an unknown practice in the Union; quite a few Constitutional Courts in the EU have conducted constitutional review of acts of ratification. It is also not an unknown practice in Croatia; the Constitutional Court has already declared itself competent to rule *a posteriori* on the compatibility of an international treaty with the Croatian Constitution. This could eventually lead to problems in application of the *Simmenthal* mandate.[79]

As for the national legislation implementing EU law, constitutional judges can review it and there are, in principle, no legal obstacles. However, now that Croatia is a Member State of the EU, Croatian courts will have to interpret national law in light of EU law, which should in turn narrow down the possibility for control and make the review of national legislation implementing EU law unlikely.[80]

[78] 'The Constitutional Court of the Republic of Croatia shall repeal a law if it finds it to be unconstitutional.
The Constitutional Court of the Republic of Croatia shall repeal or annul any other regulation if it finds it to be unconstitutional or illegal.
In the cases specified in Article 129, paragraph (1), sub-paragraph 3 of the Constitution, if the Constitutional Court of the Republic of Croatia finds that a law is non-compliant with the Constitution and law or that another regulation is non-compliant with the Constitution and law, it shall hand down a decision pronouncing non-compliance with the Constitution or law'.
[79] See Ćapeta (2009b) and Rodin (2011).
[80] Rodin (2011) p. 324.

1.3.3. Overcoming the hurdles

The Croatian Constitution does not include provisions which are unamendable and any future Treaty reform considered unconstitutional can be rectified by means of a constitutional amendment. Nevertheless, some very recent developments in Croatia, which were discussed earlier in this report, might change the situation. It is however difficult to predict at this moment what these changes might mean for further EU integration.[81] Therefore, the evaluation of the obstacles and ways to overcome these is conducted on the basis of the present-day situation in Croatia.

Thus, if future Treaty reform required a constitutional amendment, it could take place in two alternative ways.

The first procedure, which has always been applied so far, is provided for in section IX of the Constitution. Amendments may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the President of the Republic or the Government of the Republic of Croatia. The Croatian Parliament determines whether or not the procedure for amending the Constitution will be initiated by a majority of all deputies as well as what the draft amendments will be. The decision to amend the Constitution is made by a two-thirds majority of all deputies.[82]

A different procedure is provided for in Article 87 of the Constitution, which lays down the possibility that the Croatian Parliament or the President of the Republic (at the proposal of the Government and with the countersignature of the Prime Minister) may call a referendum on a proposal to amend the Constitution. The Croatian Parliament will also call a referendum on a proposal to amend the Constitution if so requested by ten percent of the total electorate of Croatia. At such referendums, decisions are made by a majority of voters taking part therein.

Accordingly, any amendment of the Croatian Constitution can be done either through the procedure prescribed in section IX or by means of a referendum.

1.4. REFERENCES

Tamara Ćapeta, 'Ustavne promjene i članstvo u EU', Informator: poslovno-pravni magazin, 56464 (2008)

Tamara Ćapeta, 'Ustavni acquis communautaire i ustavni poredak Republike Hrvatske', in Hrvoje Kačer, Hrvoje Momčinović, Mladen Žuvela (2009) Liber amicorum in honorem Jadranko Crnić : (1928.-2008.), Zagreb 221-249.

Tamara Ćapeta, 'Nacionalni Ustav i nadređenost prava EU u eri pravnog pluralizma' (National Constitution and supremacy of EU law in the era of legal pluralism), *Zbornik Pravnog fakulteta* 59 (2009), 63-96.

Tina Orsolić, 'A national constitutional provision on EU citizenship – the case of Croatia', *Dutch Constitutional Law Review* 2 (2011) 334-341.

Siniša Rodin, 'Constitutional Challenges Ahead of Croatia's Future EU Accession', report presented at the UNIDEM Campus Trieste Seminar "European Integration – Constitutional and Legal Reforms", Trieste, Italy, September 2007.

Siniša Rodin, 'Ustavna osnova za članstvo Hrvatske u Europskoj uniji', Informator: poslovno-pravni magazin 5692 (2008)

[81] The most recent developments concern the referendum on the definition of marriage. For the discussion see section 1.3.1.
[82] Articles 147-149 of the Croatian Constitution.

Siniša Rodin, 'Ustavni sud i članstvo Republike Hrvatske u Europskoj uniji' , in Hrvoje Kačer, Hrvoje Momčinović, Mladen Žuvela (2009) Liber amicorum in honorem Jadranko Crnić : (1928.-2008.), Zagreb 317-345.

Siniša Rodin, Pravo Europske unije i pravni poredak Republike Hrvatske nakon 20 godina hrvatskog ustava, Working paper WP H 2/2010 Opatija Inter-University Centre of Excellence.

Siniša Rodin, 'Requirements of EU membership and legal reforms in Croatia' *Politička misao: Croatian Political Science Review* 38, 2011.

Branko Smerdel, 'Hrvatska ustvanost u Europskoj uniji: drzavna zajednica ili zajednica novog tipa?' *Hrvatska pravna revija* 2012.

2. THE CZECH REPUBLIC*

2.1. GENERAL CONSTITUTIONAL FEATURES

The Czech Republic was a part of Czechoslovakia since October 1918, when Czechoslovakia gained its independence from the Austro-Hungarian Empire. In January 1993, Czechoslovakia split into two independent states: the Czech Republic and Slovakia. The communist party of Czechoslovakia had transferred rule to Václav Havel and his supporters without a major opposition already in 1989, in what was later called the 'Velvet Revolution'. As the last president of Czechoslovakia and the first of the Czech Republic, Václav Havel helped facilitate the democracy-building process with free parliamentary elections in June 1990, the first since 1946.

The current Czech Constitution (*Ústava České republiky*) was adopted on 16 December 1992 and entered into force on 1 January 1993, replacing the 1960 Constitution of Czechoslovakia and giving way to a peaceful dissolution of the Slovak Republic and the Czech Republic. The Constitution has undergone a number of amendments since, including the 2001 package serving as a preparation for the accession to the European Union.

The Czech Republic is a parliamentary democracy. The current bicameral Parliament is divided into the Chamber of Deputies (*Poslanecká sněmovna*) and the Senate (*Senát*). The Chamber of Deputies has 200 members, who are elected for four-year terms. The Senate consists of 81 members who are elected every six years, one third of them every two years. Parliamentary elections are conducted by secret ballot, and voting is universal, equal, and direct. Members are elected to the Chamber of Deputies under the proportional system and to the Senate under the majority system. Every citizen who has reached the age of 18 is entitled to vote for the candidates to the Parliament and every citizen who is entitled to vote and has reached the age of 21 may stand for election to the Chamber of Deputies, while it is necessary to be at least 40 to be eligible for the position of a senator. No one may be a member of both chambers simultaneously. The office of the president or a judgeship is incompatible with the position of deputy or senator.

The Government is the supreme body of the executive power. It is accountable to the House of Parliament for its actions. A President of the Republic is elected once every five years and recently the President has been elected directly, which has shifted the system from parliamentary to semi-presidential system.

The judicial system in the Czech Republic comprises the Constitutional Court of the Czech Republic and the 'ordinary' court system. The ordinary court system consists of the Supreme Court (*nejvyšší soud*), the Supreme Administrative Court (*nejvyšší správní soud*), high courts (*vrchní soudy*), regional courts (*krajské soudy*) and district courts (*okresní soudy*). The Constitutional Court is a body of fifteen judges appointed by President of the Republic for the period of 10 years, with the consent of the Senate. The jurisdiction of the Court is regulated in Article 87 of the Constitution which contains an exhaustive list of the Court's competences. These competences of the Court include, *inter alia*, the review of compliance of laws with the Constitution, the protection of constitutionally guaranteed rights and freedoms against infringements by public authorities, and the review of conformity of international treaties with the Czech constitutional order, prior to ratification under Article 10a or Article 49 of the Constitution. A treaty may not be ratified before the Constitutional Court has given its judgment.

The Czech Republic has a monist tradition when it comes to the effect of international treaties in the domestic legal order. It moved from a dualist tradition firstly in 1991 concerning human rights treaties and in 2001 with regard to all other international treaties.

* Many thanks to Jan Komárek for his valuable comments.

2.2. THE SITUATION UNDER THE CURRENT SYSTEM

2.2.1. Enabling Clauses – allowing for membership

Diplomatic relations between the EU and the former Czech and Slovak Federal Republic (CSFR) were first established in September 1988. The first document regulating mutual economic relations was the Trade and Cooperation Agreement, concluded in 1990. In 1993 the Czech Republic signed the Europe agreement (also known as Association agreement) with the (then) European Community. This agreement proved to be a useful instrument serving as basis for further negotiations on the subject of association of the Czech Republic to the EU.[83]

The accession of the Czech Republic to the EU has been supported by most parliamentary parties and by a majority of the Czech population since the early nineties. However, issues of European integration and EU accession have been significantly politicized since the mid-1990s. This was arguably due to the Eurosceptic positions taken by the Civic Democratic Party (ODS) lead by the former Czech Prime Minister Václav Klaus, which was the dominant partner in the coalition government.[84]

Nevertheless, the accession negotiations were opened in March 1998 and concluded in December 2002. The Treaty of Accession, specifying the conditions of the Czech Republic's membership in the EU, was signed in Athens in April 2003. Two months later the accession to the EU was confirmed in a referendum on the Accession Treaty (77,3 % of the electorate voted in favour of the accession). On 1 May 2004, the Czech Republic became a full member of the European Union.

The Czech Constitution adopted in 1992 had been amended only twice[85] before the 2001 package of amendments preparatory for the EU membership.

The constitutional basis for the conferral of competences to the EU institutions can be found in Article 10a, which reads as follows:

> (1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.
> (2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.

Such a transfer of powers requires the approval of both Chambers of the Czech Parliament: a three-fifth majority of all deputies and a three-fifth majority of all senators present,[86] unless a referendum is required by a constitutional act, which was the case only with the Accession Treaty.[87] In this case, the Czech Parliament decided that the Accession Treaty required approval obtained in a referendum. As there is no framework law regulating nationwide referendum in the Czech legal system, a special constitutional act needs to be adopted each time. The adoption of such constitutional acts requires the concurrence of the votes of three-fifths of all deputies and three-fifths of all senators present.[88]

[83] European Commission MEMO/96/34 on EU-Czech Republic relations, available on the official website of the European Union, at http://europa.eu/rapid/press-release_MEMO-96-34_en.htm.
[84] Hanley (2003) p. 1-2.
[85] In 1997 concerning the reorganisation of self-governing territories and in 2000 relating to peace-keeping missions.
[86] Article 39 (4) of the Czech Constitution.
[87] Constitutional Act of Law No. 515/2002 Coll. of November 14th, 2002, on the referendum on accession of the Czech Republic to the European Union.
[88] Article 39 (4) of the Czech Constitution.

2.2.2. Adaptation of the constitutional framework to facilitate membership

The Czech Constitution represents an example of the 'international organisation' approach[89] towards EU integration. This approach means that the constitution includes a number of general clauses on international organizations, but makes no specific reference to the EU.

The 2001 amendments concerning the Czech Republic's membership in the EU are spread throughout the Constitution. First of all, a direct constitutional basis is created for the transfer of sovereign powers to an international organisation in Article 10a, which provides that 'certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.' As already stated above, such a transfer requires the approval of a three-fifth majority of all deputies, and a three-fifth majority of all senators (Art. 39(4)), unless a referendum is required by a constitutional act (Art. 10a(2)).[90] However, membership in an international organisation that does not involve the transfer of sovereign powers is approved by an ordinary parliamentary ratification.[91] The status of international treaties (the ones which involve a transfer of powers and the ones which do not) has been strengthened with the 2001 amendment: promulgated, ratified and binding international agreements are part of legislation, and have precedence in case of a conflict with domestic statutes.[92]

A number of other provisions specify the role of the judiciary in the context of the EU: Article 95 of the Constitution authorises all Czech judges to assess the conformity of domestic statutes with international treaties. In addition, Article 87 (2) of the Constitution introduced the preliminary constitutional review of international treaties, providing that prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall have the jurisdiction to decide the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving its judgment. In accordance with § 71a of the Czech Constitutional Court Act, such a decision may be requested by:

> a) one of the chambers of Parliament, as of the moment when the treaty is submitted to it for its consent to ratification, until the moment when the treaty receives that consent,
> b) a group of at least 41 Deputies or a group of at least 17 Senators, from the moment when the Parliament has given its consent to the ratification of the treaty, until the moment when the President of the Republic ratifies the treaty,
> c) a group of at least 41 Deputies or a group of at least 17 Senators, from the declaration of the results of a referendum in which consent to the ratification of a treaty is given, until the moment when the President of the Republic ratifies the treaty,
> d) the President of the Republic, from the moment when the treaty was submitted to him for ratification.

The additional amendments also established the Parliament's responsibilities in EU matters as well as the extent of control over the Government in EU matters. Article 10b (1) indicates that the government will inform the Parliament in advance on issues connected to obligations resulting from the Czech Republic's membership in an international organization. The second paragraph states that both chambers of Parliament will give their views on draft decisions of such international organizations in the manner laid down in their standing orders. The last paragraph further specifies that a statute governing the relations

[89] This term has been used by Anneli Albi in her writings, see e.g. Albi (2005) A and Albi (2005) B.
[90] This is a high threshold to reach and lengthy constitutional amendments procedures are not uncommon in the Czech Republic.
[91] Article 49 Constitution.
[92] Article 10 Constitution. Former Article 10 (prior to the 2001 amendments) granted such a status only to human rights treaties and all other treaties had the same rank as that of domestic statutes.

between both chambers may delegate the exercise of the chambers' competence to a common body of both chambers.

2.2.3. Status, effect and rank of EU law in the domestic legal order

The 2001 amendments in the Constitution moved the Czech Republic from a traditional dualist to a monist system concerning the position of international treaties in the national legal order.[93]

Article 10 of the Czech Constitution reads as follows:

> Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

In addition, the commitment towards respecting international law and international obligations is reinforced in Article 1 (2) of the Constitution, which states that the Czech Republic shall observe its obligations resulting from international law. Application of this article also includes the Czech Republic's obligations stemming from accession to the European Union.

However, the relationship between international law (and in our case EU law in particular) and the national Constitution is not regulated in the Constitution and the situation is, as in most other EU Member States, more complex. This leaves the respective Constitutional Courts with the heavy burden to find solutions to the (sometimes) inevitable conflicts between EU law and national constitutions.

In this context, the Czech Constitutional Court subscribed itself to a Euro-conforming interpretation of Czech national law including constitutional law, but noted that in the event of a clear conflict between the Czech Constitution, especially its material core (Art. 9 (2) and (3) of the Constitution)94, and European law which is impossible to settle by means of interpretation, the Constitution of the Czech Republic, and especially its material core, must take precedence.[95]

2.2.4. Conditioning participation in EU integration

The Constitution does not contain provisions that explicitly state the conditions under which participation in European integration may continue or limits to it. Article 10a mentions the transfer of 'certain' powers, which implies that there are limits to the transfer, but those limits are not explicitly stated anywhere. Nevertheless, the case law of the Constitutional Court shows that this court, like few counterparts, has provided an interpretation of the provisions relating to the most important issues regarding the interrelation between the Constitution and the EU legal system: on the Sugar Quote Regulation and the European Arrest Warrant Framework decision in 2006, on the Treaty of Lisbon twice in 2008 and 2009, and on *ultra vires* acts of the EU institutions in 2012.

[93] This was done for the first time in 1991 but only for human rights treaties.
[94] Article 9 provides that: (2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.
(3) Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.
[95] Pl. ÚS 19/08, para. 85.

Substantive Limits

Fundamental rights
Protection of fundamental rights and freedoms is part of the material core of the Czech Constitution according to the Czech Constitutional Court, and hence a condition under which EU integration may continue. The EU must provide a sufficient level of protection of fundamental rights in order to 'keep' the current transferred powers. The Constitutional Court has stated in the first Lisbon judgment that respecting the material core of the Constitution under Article 9 (2) principally means the protection of fundamental human rights and freedoms, as they are enshrined in the Czech Charter of Basic Rights and Fundamental Freedoms, in the European Convention for the Protection of Human Rights and Fundamental Freedoms, in other international treaties in this field, and in the settled case law of the Constitutional Court of the Czech Republic and the European Court of Human Rights. Protection of fundamental rights and freedoms is part of the material core of the Constitution, and if the standard of protection by the EU would become deficient, the bodies of the Czech Republic would have to take back the transferred powers in order to ensure protection of the standard. However, the Court noted that it has not observed anything like that at the present time.[96]

Thus, it seems that the Constitutional Court has granted a presumption of equivalent protection to the EU institutions but in case of serious deficiency the Court will intervene. However, conflicts between national courts and the EU court in the area of fundamental rights seem less likely today, as the 'equivalence' in substance seems to be widely acknowledged.

Ultra vires doctrine
The Constitutional Court of the Czech Republic stated in the first Lisbon decision that it is able, in exceptional circumstances, to function as an *ultima ratio* and review whether any act of Union bodies exceeds the powers which the Czech Republic transferred to the European Union under Article 10a of the Constitution. However, the Constitutional Court presumes that such a situation can occur only in very exceptional cases.[97]

And yet, only a couple of years later the Court was confronted with one of those exceptional cases. The Court did what it said it would do in the case of transgression of the scope of transferred competences by one of the EU institutions: it declared the ruling of the Court of Justice of the EU in *Landtová*[98] an *ultra vires* act.[99]

In the *Landtová* case the Czech Supreme Administrative Court had challenged the case law of the Constitutional Court concerning special pension increments (which the Court ordered to be paid to the Czech citizens affected by the dissolution of Czechoslovakia) claiming, *inter alia*, incompatibility with EU law. The Court of Justice concluded that the special pension increments violated EU law but only to the extent that the payment of the contested increment was reserved solely to Czech citizens residing on the territory of the Czech Republic. This nationality and residence requirement amounted to direct and indirect discrimination in the view of the Court of Justice and there was no evidence capable of justifying it.

Subsequently, the Supreme Administrative Court concluded that in light of the *Landtová* judgment the relevant case law of the Constitutional Court was no longer binding on it. This clash between the two Czech Courts led the Constitutional Court to engage in the *ultra vires* test of the Court of Justice's judgment in *Landtová*. This was however completely

[96] Pl. ÚS 19/08, para 196.
[97] Pl. ÚS 19/08 para 120.
[98] Case C-399/09, judgment of 22 June 2011.
[99] Pl. ÚS 5/12 (Slovak Pensions). An English translation of the judgment is available online, at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2.

unnecessary since the Court of Justice ruled that the special increment can in fact be paid, under the condition that it is made available to all EU citizens. This means that the Czech Constitutional Court could have avoided direct conflict and used 'the helping hand of the Court of Justice to reaffirm its authority over the Supreme Administrative Court'.[100] It however decided otherwise.

The paragraph of the judgment in which the Constitutional Court considered the Court of Justice's ruling *ultra vires* is the following:

> Due to the foregoing, European law, i.e. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and members of their families moving with the Community, cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; and, based on the principles explicitly stated by the Constitutional Court in judgment file no. Pl. ÚS 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires.[101]

In the Constitutional Court's view, this case lacked the foreign element to come within the scope of Union law altogether. Union law is not applicable to the contested increment, since there is no foreign element involved in the social security entitlements arising from periods of insurance completed when Slovakia and the Czech Republic were still constituent parts of the same State. Moreover, this agreement was listed in the third annex of the Regulation on the application of social security schemes to employed persons moving within the Union. That effectively allowed it to remain applicable, in spite of the provision that the Regulation would replace any social security conventions concluded between Member States.

It is highly unlikely that this decision of the Czech Constitutional Court was a result of some calculated strategy; it rather stems from the frustration of the Court over the apparent loss of control over the ordinary courts, which can now take advantage of their cooperation with the Court of Justice of the EU in order to escape certain domestic procedures and to disobey constitutional judgments.[102]

It is not certain what kind of effects this judgment might generate in the future. It could potentially set a precedent which in consequence might have a massive impact on the entire structure of EU law. However, most scholars agree that it will more likely remain an isolated episode with no major consequences rather than a trigger for a constitutional crisis in the European Union.[103]

Constitutional identity

The idea of the material core of the constitution, something that can also be called the constitutional identity of the Czech Republic, was discussed in somewhat broad terms by the Czech Constitutional Court in both Lisbon judgments.

Lisbon I

The Senate of the Czech Republic, on the basis of Article 87 (2) of the Constitution, asked the Constitutional Court to assess, after the government had asked for parliamentary ratification of the Treaty of Lisbon, whether the Treaty is in accordance with the constitutional order of the Czech Republic. In particular, the Senate asked for a

[100] Komárek (2012), p. 328.
[101] Pl. ÚS 5/12, para VII(2).
[102] Komárek (2012) p. 332.
[103] See e.g. Dyevre (2013), Komárek (2012), Zbíral (2012).

constitutional assessment of whether the Lisbon Treaty would be in accordance with the constitutional characteristics of the Czech Republic as a sovereign, unitary and democratic state that respects the rule of law, as required by Article 1 (1) of the Constitution of the Czech Republic. In its judgment of 26 November 2008, the Constitutional Court ruled that there was no constitutional obstacle to the ratification of the Treaty of Lisbon.

When testing the Lisbon Treaty, the Constitutional Court conducted what it calls a 'comprehensive review'. Its basic standard was the entire constitutional order, even though the material core of the Constitution (i.e. the essential requirements of a democratic state based on the rule of law, which may not be amended) played a key role.

The Court stated that it would not provide a detailed list or a catalogue of principles forming the material core of the Constitution. This would have been appropriate if the standard for review was only the material core but it is not, it is the entire constitutional order.[104] Thus, the Court did not provide an exhaustive list but it rather discussed various aspects of the core which would certainly be included if the Court were to make such a list.

The Court ruled that the transfer of powers of the Czech Republic to an international organization under Article 10a of the Constitution cannot be such as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Article 9 (2) in connection with Article 1 (1) of the Constitution)[105]. The concept of sovereignty, interpreted in the context of the stated provisions, clearly shows that there are certain limits to the transfer of sovereign powers. However, these limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion; interference by the Constitutional Court should be considered only where the scope of discretion was clearly exceeded and where a transfer of powers went beyond the scope of Article 10a of the Constitution.[106]

Furthermore, the Court stated that the material core of the Constitution under Article 9 (2) also includes the protection of fundamental human rights and freedoms. If the standard of protection by the EU became inadequate, the bodies of the Czech Republic would have to take back the transferred powers in order to ensure protection of the standard. However, the Court noted that it has not observed anything like that at the present time.[107]

Lisbon II

In 2009, a group of Czech senators lodged a second constitutional complaint requesting the Constitutional Court to assess the Lisbon Treaty as a whole.[108] In particular, the petitioners asked the Constitutional Court to define 'the substantive limits to transfers of competences', while trying to define these limits themselves[109], motivated most notably by the Lisbon judgment of the German Constitutional Court which provides such a catalogue.

However, the Constitutional Court clearly stated that it does not have any intention to create a list of non-transferrable competences and to authoritatively define 'substantive limits to transfers of competences', as the petitioner requested. It recalled that in its first Lisbon decision, it had stated that the legislature is the appropriate organ to specify these limits, since this is in fact a political question which provides the legislature wide discretion. Responsibility for these political decisions remains with the legislature and the Court can

[104] Pl. ÚS 19/08, para 93.
[105] Article 1 (1): The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Article 9 (2): Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.
[106] Pl. ÚS 19/08, para 109.
[107] Pl. ÚS 19/08, para 196.
[108] The first Lisbon case only concerned the compatibility of certain provisions of the Lisbon Treaty with the Czech Constitution, not the whole Treaty.
[109] Pl. ÚS 29/09, paras. 51 and 56.

make these decisions subject to its review only after they have actually been made on the political level.[110]

The Court has also warned that creating a final list or a catalogue of the elements of the material core of the Czech Constitution could be problematic as it could 'limit future self-serving definition of these elements based on cases being adjudicated at the time.'[111] In other words, the Court prefers to leave the question open and further define and specify the content of this concept (i.e. the constitutional identity) on a case-by-case basis.

Procedural Limits

The first paragraph of Article 10b Constitution provides that the government will inform the Parliament, regularly and in advance, of issues connected to obligations resulting from the Czech Republic's membership in an international organization. The second paragraph states that both chambers of Parliament will give their views on draft decisions of such international organizations in the manner laid down in their standing orders. The last paragraph further specifies that a statute governing the relations between both chambers may delegate the exercise of the chambers' competence pursuant to paragraph 2 to a body common to both chambers.

Since the chambers have not established a common body to represent the Parliament in EU matters, there is also no special act setting up the cooperation between the two chambers. As a consequence, the chambers of the Parliament exercise the scrutiny separately and independently of each other. However, the powers of both chambers as well as the procedure for the scrutiny are very similar.

Chamber of Deputies: Committee for European Affairs
In the Chamber of Deputies, the Committee for European Affairs is the main body dealing with EU issues. It was established in May 2004 as an obligatory standing committee of the Chamber after the Czech Republic's accession to the EU. The Committee has 15 members proportionally representing all political parties elected to the Chamber of Deputies and hence its decisions are considered as an official position of the entire Chamber. The Committee deliberates draft acts and other documents of the European Union based upon the Government's preliminary opinion. The Committee may pass such drafts on to other competent committees and it may at the same time specify the time period in which a draft is to be deliberated. After the debate, the Committee adopts a resolution. Considering the extensive number of documents, only legislative proposals of key importance are included on the agenda for the plenary session. After the plenary session of the Chamber of Deputies, the resolution is communicated to the Government. The opinion of the Committee is not binding on the Government but the Government shall take it into account. However, some decisions do require a prior approval of the Chamber of Deputies. Those are, *inter alia*, decisions enabling the extension of the EU powers (flexibility clause) and changing unanimity procedure in the Council to qualified majority voting (passerelle clauses).[112]

In addition, the Chamber of Deputies may initiate an action for annulment of a legislative act of the EU before the Court of Justice on the grounds of infringement of the principle of subsidiarity.

[110] Pl. ÚS 29/09, para. 111.
[111] Pl. ÚS 29/09, para. 112.
[112] These decisions relate to the powers that were given to the national parliament with the Lisbon Treaty. For an overview of all decisions requiring prior approval and the established procedure, see § 109i-k of the Rules of Procedure of the Chamber of Deputies.

The procedure to initiate such an action is as follows:

> § 109d
> (1) The Committee for European Affairs, or a group of at least 41 deputies may propose to the Chamber in writing to adopt a resolution to file an action on the grounds of infringement of the principle of subsidiarity by an act of the European Union (hereinafter referred to as "draft action"). A draft action must contain the exact wording of the action upon which the Chamber is to resolve.
> (2) A draft action shall be submitted to the President of the Chamber the fifteenth day at the latest prior to the expiration of the term for filing the action, which is laid down in the European Union law. The President of the Chamber shall include the timely submitted Draft Action on the agenda for the next session of the Chamber or, alternatively shall call a session of the Chamber for its deliberation so that he enables a timely deliberation of a draft action.
> (3) The draft action shall be delivered to all the deputies at least 72 hours prior to its deliberation in the Chamber.
>
> § 109e
> (1) If the Chamber approves a draft action, it shall authorize a deputy or, alternatively, other suitable person, to represent it in proceedings before the European Court of Justice (hereinafter referred to as "Authorized representative"). The authorization is not tied to the term of office of the deputy.
> (2) The Authorized representative is bound by the wording of the action, and he is not entitled to withdraw the action.
> (3) Should it find grounds the Chamber may change its valid resolution on the authorization.
>
> § 109f
> (1) The President of the Chamber shall immediately pass on the resolution of the Chamber that contains the wording of the action to the Government, and for information also to the President of the Senate.
> (2) The Government shall submit the action to the European Court of Justice without undue delay.
>
> § 109g
> (1) The Government, members of the Government, Government Commissioners and the heads of central and other public administration authorities shall provide the Authorized Representative with all the necessary co-operation for his course of action in the proceedings.
> (2) The Authorized representative shall inform the Committee for European Affairs of the course of the proceedings in terms and in a manner laid down by the Committee.
>
> § 109h
> The status of the Chamber as a party to the proceedings before the European Court of Justice and the status of the Authorized representative will remain unaffected by the elapse of the electoral term of the Chamber or by its dissolution.[113]

Senate: Committee on EU Affairs and Committee on Foreign Affairs, Defence and Security
The Senate has entrusted the management of scrutiny of EU legislation to two committees: the Committee on EU Affairs and the Committee on Foreign Affairs, Defence and Security (the so-called 'designated committees'). The former committee deals with all EU policies regulated by the Treaty on the Functioning of the EU, i.e. policies falling within the former first and third pillars, while the latter deals with acts falling within the area of common

[113] Section 109 d-h of the Rules of Procedure of the Chamber of Deputies Act of Law No. 90/1995 Coll.

foreign and security policy. Both committees decide about the selection of documents for scrutiny, about involvement of other committees and about submission of scrutinized documents to the plenary for debate.

The government provides the designated committee with an Explanatory Memorandum containing its position on the EU matter in question. The representative of the Ministry subsequently presents the governmental position during the Committee's deliberation of the document. After the debate, the designated committee may decide to take the document into account or it can adopt a resolution and forward the document to the plenary. The opinion of the designated committee is not binding on the Government but the Government will take it into account. However, as with the Chamber of Deputies, the Government cannot give its consent to certain decisions in the European Council without a prior approval of the Senate. Those are, among others, decisions enabling the extension of the EU powers (flexibility clause) or changing unanimity procedure in the Council to qualified majority voting (passerelle clauses).

In addition, the Senate may also initiate an action for annulment of a legislative act of the EU before the Court of Justice of the EU on the grounds of infringement of the principle of subsidiarity.

The procedure to initiate such an action is as follows:

> Section 119p
> (1) The Designated Committee or a group of at least 17 Senators may submit a proposal to the Senate that the Senate file an action on the grounds of infringement of the principle of subsidiarity by a legislative act under the law of the European Union (hereinafter the "Draft Action"). The Draft Action shall contain the wording of the action upon which the Senate is to resolve.
> (2) The Draft Action shall be submitted to the President of the Senate who shall send the same to all the Senators and Senators' Groups without delay and place it on the agenda of the next Senate meeting so that it may be considered no later than 10 days prior to the elapse of the period stipulated by the law of the European Union.
> (3) An invitation to the debate on the Draft Action shall always be delivered to the relevant member of the Government.
>
> Section 119q
> (1) If the Senate passes the Draft Action, it shall authorise a Senator and, as the case may be, another suitable person, to represent the Senate in proceedings before the European Court of Justice.
> (2) The Senate may amend its resolution on authorisation of its representative, should it find grounds for such an amendment.
>
> Section 119r
> (1) The President of the Senate shall deliver the Senate's resolution passing the Draft Action, along with the wording of the action, to the Government without delay; however, not later than 3 working days prior to the elapse of the period set forth in the law of the European Union; the Government shall forward it to the European Court of Justice so as to meet the set time-limit.
> (2) The President of the Senate shall further send the resolution and the wording of the action pursuant to subsection 1 to the President of the Chamber of Deputies and to the Government agent representing the Czech Republic before the European Court of Justice.
>
> Section 119s

The government agent representing the Czech Republic before the European Court of Justice shall provide the persons authorised to represent the Senate under Section 119q with any and all necessary cooperation in respect of the appropriate course of action within the proceedings; nevertheless, their relation to the Government and to its opinion on the subject matter of the proceedings will remain unaffected thereby.[114]

2.3. FURTHER TREATY REFORM

2.3.1. Substantive reservations

The first time that the Constitutional Court has addressed the meaning and scope of Article 10a of the Czech Constitution was in the *Sugar Quote Regulation*[115] case. The Constitutional Court was, thus, for the first time faced with the question of the degree to which it is even authorized to judge the constitutional conformity of legal norms tied up with Community law.

The Court first stated that, according to the case law of the Court of Justice of the EU, a matter regulated solely by EU law takes precedence over national law, and cannot be contested on the basis of national law, not even constitutional law.[116] The Court also recognised that it would be impossible to ignore the enormous impact that Community law has had on the formation, application, and interpretation of national law, especially in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. Accordingly, the Constitutional Court must take into account the principles arising from Community law when interpreting national constitutional law in this field.[117]

Nevertheless, the Court also indicated that it cannot disregard the fact that several high courts of older Member States, including founding members, such as Italy and Germany, and later acceding Member States such as Ireland and Denmark, have never entirely accepted the doctrine of the absolute precedence of Community law over the entirety of constitutional law; they always reserved the right to interpret principles such as the democratic state based on the rule of law and the protection of fundamental rights.[118]

In the Constitutional Court's view, the transfer of powers of national organs to EU organs, which took place on the basis of Article 10a of the Constitution, is naturally a conditional transfer, as the original holder of sovereignty, as well as of the powers derived therefrom, still remains the Czech Republic. In the Court's opinion, the conditional nature of the delegation of these powers is manifested on two levels: the formal and the substantive level. The first of these levels concerns the power attributes of state sovereignty itself, while the second concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive rule of law state. In such determination, the Constitutional Court is called upon to protect constitutionalism (Art. 83 of the Constitution of the Czech Republic). According to Article 9 (2) of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law remain beyond the reach of the Constituent Assembly itself.[119]

The outcome of this case was that the Czech court considered itself competent to review European law against the Czech Constitution, but that the actual framework for review is

[114] Section 119 p-s of the Standing Rules of the Senate Act No. 107/1999 Coll.
[115] PL ÚS 50/04, judgment of 8 March 2006.
[116] Pl. ÚS 50/04, Section VI-5.
[117] *Ibid*., Section VI A-11.
[118] *Ibid*., Section VI A-6.
[119] Pl. ÚS 50/04, Headnotes.

limited. An exhaustive test would not be feasible because, according to the Constitutional Court, the legitimacy of European law arises from the national transfer of competences to the European Union pursuant to the Treaty of Accession that was concluded on the basis of Article 10a of the Czech Constitution. Therefore, the Constitutional Court limited itself to testing the core of the constitution, more particularly the 'very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law'. The core of the Czech constitution has to be upheld because the Czech state institutions cannot freely dispose of this core, not even through membership in the European Union.[120]

In November 2008, the Czech Constitutional Court conducted a preliminary constitutional review of the conformity of the Lisbon Treaty with the constitutional order of the Czech Republic. In the first place, the Court decided that the competence of Article 10a of the Constitution does not include the conclusion of treaties which affect the material core of the constitution itself (Article 9 (2) and (3) of the Constitution). As part of that core, the Court considers primarily the concept of national sovereignty. In the Court's view, the transfer of competences to the EU should not by definition be seen as an impairment of national sovereignty; rather, the joint exercise of sovereign competences might strengthen it. Naturally, there are limits to the possibilities of transfer of sovereign competences, but the Court allows the legislature a wide margin of discretion in deciding those limits. The Court found the challenged provisions of the Lisbon Treaty not to go beyond the powers that are transferred. The Court however stated that if an international organisation would go beyond the powers that are transferred to it, the Court would not hesitate to intervene. The challenged provisions of the Treaty of Lisbon, however, do not have such consequences and are therefore in conformity with the constitutional order of the Czech Republic.

The Court also clarified the *locus* of the Constitution in the Czech constitutional order. It reaffirmed its standpoint from previous judgments[121] and subscribed to the principle of a Euro-conforming interpretation of Czech constitutional law, but noted that in the event of a clear conflict between the domestic constitution, especially its material core, and EU law that cannot be restored by a reasonable interpretation, the constitutional order of the Czech Republic, especially its material core, must take precedence.[122]

A year later, in the second judgment on the Treaty of Lisbon, the Constitutional Court fully confirmed its previous ruling of 28 November 2008. It firstly stated that the objections that had already been dealt with in the first Lisbon decision were inadmissible. This reveals that the Constitutional Court had no intention to unnecessarily delay the ratification process. This is an important point to have in mind for future Treaty amendments.[123] On the points which were not dealt with in the first decision, the Court held that ratification of the Lisbon Treaty meant no loss of sovereignty for the Czech Republic, at least not more than allowed through the prior transfer of sovereign powers to the EU institutions. It stated that 'in a modern democratic state governed by the rule of law, state sovereignty is not an aim in and of itself, i.e. in isolation, but is a means to fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands [...] The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole.' [124]

[120] Van den Brink (2010), p. 2.
[121] In the EAW judgment the Court provided the interpretation of Article 1 (2) and Article (10) of the Constitution: 'From Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation enshrined in Art. 10 of the EC Treaty, follows a constitutional principle according to which national legal enactments, including the Constitution, should whenever possible be interpreted in conformity with the process of European integration and the cooperation between European and Member State organs'.
[122] Pl. ÚS 19/08, para. 85.
[123] Van den Brink (2010) p. 3.
[124] Pl. ÚS 29/09, para. 147.

After examining the case law of the Constitutional Court, it became evident that the Court has posed some substantive limits for further EU integration through interpretation of the constitutional provisions. However, while the Court constantly repeated that the limits to the transfer of competences exist in the so-called material core of the Constitution, it refused to follow the example of the German Constitutional Court and specify the elements of this material core. This might prove to be a good thing as it leaves space for different interpretations on what the material core of the Czech Constitution actually is but it might be problematic as well, depending on how the constitutional judges conduct this case-by-case analysis of the material core.

2.3.2. Procedural hurdles for further integrations

The new Article 10a provides that "certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution". The ratification of such a treaty requires the consent of the Parliament, unless a constitutional act provides that such ratification requires a referendum. The consent of the Parliament necessitates the approval of a three-fifth majority of all deputies, and a three-fifth majority of all senators (Art. 39(4)).

Only the Accession Treaty required a confirmatory referendum; other treaty amendments were approved by the Parliament according to the rules provided in Article 39 (4). It is to be expected that the future Treaty reforms will follow the same procedure.

A confirmatory referendum may be proposed by either the government or jointly by at least two-fifths of the Chamber of Deputies or two-fifths of the Senate. If a majority of voters who have cast their vote voted in favour, the outcome of a referendum will be considered positive.

Prior to the ratification of a treaty under Article 10a or Article 49, and pursuant to Article 87(2) of the Constitution, the Constitutional Court shall have jurisdiction to decide the conformity of the treaty with the Czech constitutional order.[125] A treaty may not be ratified prior to the Constitutional Court giving a judgment.

2.3.3. Overcoming the hurdles

The Constitution of the Czech Republic does not specifically state which constitutional provisions cannot be amended. Therefore, any inconsistency with international treaties can in principle be removed by amending the Constitution. The Constitution can be amended only by constitutional acts, which require approval of the three-fifth majority of the Members present in the Chamber of Deputies and in the Senate. Alternatively, the Czech Constitutional Court might solve potential conflicts by means of consistent interpretation. A good example of such an action by the Constitutional Court is the *European Arrest Warrant*[126] case. In this case, the conflict of the wording of Article 14 (4) of the Charter of Fundamental Rights and Liberties, which states that 'no Czech citizen shall be removed from his/her homeland,' and the European Arrest Warrant Framework Decision, was obvious; yet, the Constitutional Court opted for a consistent interpretation and found no conflict between the two. First of all, the Court stated that all domestic law sources, including the Constitution, must be interpreted as far as possible in light of EC law. This principle is derived from Article 1 (2) of the Constitution, in conjunction with the principle of sincere cooperation laid down in Article 10 of the EC Treaty.[127] Secondly, the Court claimed that citizens' rights cannot be significantly affected due to the fact that a criminal matter will be decided in another Member State of the Union, as each EU Member State is bound by a standard of human rights protection, which is equivalent to the standard required in the Czech Republic. The Court further argued that, in order to determine the meaning of

[125] For the conditions under which this jurisdiction is triggered see section 2.2.2.
[126] PL ÚS 66/04, judgment of 3 May 2006.
[127] PL ÚS 66/04, para. 61.

Article 14 (4) of the Charter, it is important to consider the historical impetus for its adoption. The Court concluded, after careful historical interpretation of the provision, that it was never concerned with extradition.[128]

The Constitutional Court thus considerably altered the meaning of the Czech provision in order to avoid a direct conflict with EU law. While this is one way of solving conflicts, it would be impossible to apply it when the material core is at stake. Moreover, Article 9 (2) of the Constitution states that any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. The Constitutional Court has dealt with this provision in the Lisbon judgments, and more importantly in the *Melčák* judgment[129]. The latter case was purely a national case in which the Court examined the constitutionality of the constitutional Act no. 195/2009 on shortening the Fifth Term of Office of the Chamber of Deputies. The first question addressed by the constitutional judges was whether the Court has the jurisdiction to decide on the constitutionality of constitutional acts. This competence was not specifically given to the Constitution Court in Article 87 of the Constitution; the Court has only the jurisdiction to review and annul *statutes* and individual provisions thereof if in conflict with the constitutional order of the Czech Republic. However, in light of Article 9(2) of the Constitution and 'in line with the constitutional development of European democracies in the protection of the constitutive principles of a democratic society'[130] the Court found itself to be competent to review the constitutionality of constitutional acts and declared the act at hand unconstitutional.[131] This decision has been heavily criticised by politicians and constitutionalists as activist and unacceptable interference with the competences of the Parliament.[132]

EU-related instances in which the Constitutional Court dealt with Article 9(2) (as part of the material core) of the Constitution are the two Lisbon judgments. It ruled that amending the Constitution is 'out of question' as regards its material core, which is exempted from any changes.[133] The Court explained that transfer of powers to the EU is conditional on two levels: the formal and the material level. The formal level limits the transfer of powers by preserving the foundations of state sovereignty of the Czech Republic which can be found in Article 1 (1) of the Constitution. The material level concerns the manner of exercising the transferred competences, which may not jeopardize the essence of a law-based state. This limitation arises from Article 9 (2) of the Constitution, under which amending the essential requirements of a democratic state governed by the rule of law is impermissible. As the Constitutional Court emphasised, the material limits for transfer of powers are even beyond the reach of the constitutional legislature itself.[134]

A provision that supports the proposition that there are limits to further transfers of powers to the EU is the same provision that gives the competence for the transfer, namely Article 10a of the Constitution. It states that **certain** powers of the Czech Republic authorities may be transferred by treaty to an international organization. The fact that only certain powers may be transferred implies that not all powers can be transferred and hence, there are limits to the transfer. The Constitutional Court has stated that the meaning of the word 'certain' must logically be interpreted in view of other provisions of the constitutional order, especially Article 1 (1) of the Constitution, under which the Czech Republic is a sovereign and unitary state governed by the rule of law, established on respect for the rights and freedoms of the human being and citizens.[135]

[128] PL ÚS 66/04, para. 66.
[129] Pl. ÚS 27/09, judgment of 10 September 2009. This is possibly the most important decision of the Czech Constitutional Court in the whole time of its existence.
[130] *Ibid*. part IV.
[131] The Court however emphasised that this constitutional act is only constitutional in its form but not in its substance as it was an act for individual instance (*ad hoc*) and retroactive.
[132] Tomoszek (2010).
[133] Pl. ÚS 19/08, para 91.
[134] *Ibid*., para. 130.
[135] Pl. ÚS 19/08, para. 130.

In conclusion, Articles 1 (1) and 9 (2) of the Constitution are part of its material core, according to the Czech Constitutional Court, and they have to be respected at all times. If a constitutional amendment would jeopardise these and other provisions which amount to the core of the constitutional order of the Czech Republic, the Court will intervene.

The Constitutional Court did not go much further than this in dealing with the limits to further transfer of competences to the EU. Instead, it argued that specifying a list of non-transferrable competences (i.e. the material core) would limit future definitions and interpretations which should take place on a case-by-case basis.

This might prove to be a favourable stance for further Treaty reform as it leaves space for different interpretations of the unamendable material core of the Czech Constitution, but it might at the same time be problematic, depending on how the constitutional judges conduct this case-by-case analysis of the material core.

2.4. REFERENCES

Anneli Albi, '"Europe" Articles in the Constitutions of Central and Eastern European Countries', *Common Market Law Review* (2005) (A)

Anneli Albi, '*EU Enlargement and the Constitutions of Central and Eastern Europe*' (Cambridge University Press 2005) (B)

Michal Bobek & David Kosař 'The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia – An Overview', Eric Stein Working Paper No 2/2010.

Arthur Dyevre 'Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach, LSE Law, Society and Economy', Working Papers 2/2013.

Seán Hanley 'Referendum Briefing No 6 on the Czech EU Accession Referendum 13-14 June 2003', Opposing Europe Research Network (OERN).

Jan Komárek (2012) 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' *European Constitutional Law Review* 8 (2012), 323-337.

Maxim Tomoszek 'Proportionality in Judicial Review of Constitutional Amendments', paper presented at the VIIIth World Congress of The International Association of Constitutional Law, available at http://www.juridicas.unam.mx/wccl/ponencias/9/175.pdf.

Ton Van den Brink 'The Czech Constitutional Court and the Treaty of Lisbon', available at http://ssrn.com/abstract=1729751. The original text in Dutch is published in *Tijdschrift voor Constitutioneel Recht* 3 (2010) p. 315-321.

Robert Zbíral 'A Legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*', *Common Market Law Review* 49 (2012) 1475–1492.

3. ESTONIA*

3.1. GENERAL CONSTITUTIONAL FEATURES

Estonia became an independent state in 1918, but was occupied since the beginning of the Second World War, first by the Soviet Union, then by Germany and subsequently again by the Soviet Union. Estonia regained independence in 1991, adopted a new Constitution by referendum in 1992 and is an EU Member State since 1 May 2004. It is a republic with a parliamentary system of government and a unicameral parliament, the *Riigikogu,* consisting of 101 members. The President of the Republic, elected by the *Riigikogu,* is not a political protagonist and has more or less the competences a head of state in a parliamentary system of government usually has.[136] Noteworthy in the context of this report is that he has the power to initiate constitutional amendments.[137] Executive power is vested in the government.[138] The ministers are both collectively and individually accountable to the *Riigikogu*, which may adopt motions of no-confidence against the government as a whole or against the prime minister and other ministers individually.[139]

The Estonian court system comprises courts of first instance (county and administrative courts), circuit courts and the Supreme Court. The Supreme Court is divided in four chambers. Three of these, the civil, criminal and administrative chambers, review lower court judgments by way of cassation proceedings. The fourth chamber, the Constitutional Review Chamber, acts as the constitutional court of Estonia; this task is performed by the Supreme Court *en banc*, i.e. the full Court of 19 justices, if a (constitutional) case is referred to it by the Constitutional Review Chamber or by one of the other three chambers of the Supreme Court.[140] Henceforth, the term Supreme Court will be used for the Supreme Court in its constitutional court capacity, unless indicated otherwise.

Lower Courts may of their own motion or on the initiative of (one of) the parties decide not to apply legislation or an international agreement (treaty) which they think is unconstitutional. However, they may not declare legislation or a treaty unconstitutional; this is the exclusive competence of the Supreme Court. If a lower court disapplies (a provision of) an act or treaty, it has the obligation to refer its decision to the Supreme Court,[141] which then decides on the constitutionality of the act or treaty. The Supreme Court can also be called in by the Estonian president, the Chancellor of Justice or by the council of local government (the latter for local affairs only). The Estonian president, who has a suspensive veto power in the legislative process, may refer acts of parliament to the Supreme Court after first having asked for a new discussion and a new decision on the act by the *Riigikogu*.[142] The Chancellor of Justice, an institution constitutionally entrusted with, among others, the task to examine whether the legislation is in conformity with the Constitution, may refer acts of Parliament to the Supreme Court.[143] He may also submit treaties for review, both prior to and after ratification.[144] Supreme Court decisions have *erga omnes* effect.

---

* Many thanks to Anneli Albi for her valuable comments.
[136] Art. 78 *Põhiseadus*.
[137] Art. 161 *Põhiseadus*.
[138] Art. 86 *Põhiseadus*.
[139] Art. 97 *Põhiseadus*.
[140] Art. 3(3) Constitutional Review Court Procedure Act.
[141] Art. 9(1) Constitutional Review Court Procedure Act.
[142] Art.107(2) *Põhiseadus*.
[143] Ar. 142 *Põhiseadus*.
[144] On the basis of Art. 6(1)(4) of the Constitutional Review Procedure Act; see Constitutional judgment 3-4-1-6-12 of the Supreme Court *en banc* of 1 July 2012, par.111: '§ 6(1)4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Supreme Court *en banc* is of the opinion that § 6(1)(4) of the CRCPA grants the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after the

Regarding the effect of treaty law in the national legal order, Estonia is monistic. Treaties have infra-constitutional and supra-legislative status in the Estonian legal order.[145]

3.2. THE SITUATION UNDER THE CURRENT SYSTEM

3.2.1. Enabling Clauses – allowing for membership

Originally, the Estonian Constitution (*Põhiseadus*) did not contain a provision explicitly allowing for EU membership. To be sure, the Constitution enabled Estonia to become a member of international organisations, because its Article 121(3) stipulates that the *Riigikogu* has to ratify and denounce treaties 'by which the Republic of Estonia joins international organisations or unions'. However, this provision was not thought to be a sufficient basis for EU membership. The first Article of the *Põhiseadus* declares that Estonia is an independent and sovereign democratic republic wherein the supreme power of the state is vested in the people, and that Estonian independence and sovereignty are 'timeless and inalienable'. In a very prominent, although certainly not generally accepted[146] interpretation by a Constitutional Expert Commission, EU membership was considered to be contrary to this provision. In its report, published in 1998, the Commission concluded that although accession would not affect Estonian independence (Estonia would not become part of another (federal) state but of a confederation), it would affect Estonian sovereignty, because accession would give the EU considerable law-making authority in Estonia. This infringement of Estonian sovereignty was not considered to lead to an alienation of Estonian sovereignty altogether, as Estonia would still have the right to secede from the Union (on the basis of the right of national self-determination; at the time, the right to withdraw from EU was not yet enshrined in the Treaties). Nevertheless, as the first sentence of Article 123 of the *Põhiseadus* forbids Estonia to conclude international treaties which are in conflict with the Constitution, EU accession would in the view of the Expert Commission require a constitutional amendment.[147] Other constitutional provisions were also considered to be contrary to EU law, such as Article 111 (which gives the exclusive right to issue currency to the Bank of Estonia) and Article 48 (which restricts membership of political parties to Estonian citizens only).[148]

Against the background of rising Euroscepticism in the years preceding accession, it was ultimately decided not to amend individual Articles of the Constitution, but to submit the proposal for a Constitution of the Republic of Estonia Amendment Act (CREAA) to a referendum, together with a proposal for the Accession to the European Union Act.[149] On 14 September 2003, the Estonian voters in one referendum approved both acts with a majority of 67 %.

The Constitution of the Republic of Estonia Amendment Act reads as follows, as far as is relevant here:

> Article 1. Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia.

---

ratification, i.e. by way of subsequent review. The Supreme Court *en banc* holds that the competence of the Chancellor of Justice arising from § 6(1)4) of the CRCPA is not in conflict with the Constitution.'

[145] Art. 123(2) *Põhiseadus*: 'If laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply'. All translations of provisions of the *Põhiseadus* are derived from website of the Estonian president, http://www.president.ee/en/republic-of-estonia/the-constitution/.

[146] Albi (2002), p. 46-7; Laffranque (2004), p. 3-8.

[147] This interpretation is in line with the *travaux préparatoires* of the *Põhiseadus*, according to which Estonia's entry into political, economic, and military associations would require a referendum; Albi (2005b), p. 32. See also Albi (2001), p. 436-437; Albi (2005a), p 410.

[148] Albi (2005a), p. 410; Albi (2005b), p. 89-90; another argument for the Committee to argue for a constitutional amendment is that it considered Article 123 *Põhiseadus* to give only primacy to primary treaty law, not secondary; Schneider, p. 9-11.

[149] Albi (2005b), p. 89/90; Laffranque (2007a), p. 55.

Article 2. As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty.

Article 3. This Act may be amended only by a referendum.

This Act entered into force on 14 December 2003 and, despite its name, has not amended the text of the Constitution as to the form; it is also labelled the third Constitutional Act, the first being the Constitution itself and the second the Constitution Implementation Act. It is the Constitution of the Republic of Estonia Amendment Act which includes the constitutional provisions allowing for EU membership.

3.2.2. Adaptation of the constitutional framework to facilitate membership

After the adoption of the Constitution of the Republic of Estonia Amendment Act, no other constitutional adaptations have been necessary to facilitate participation of Estonia in the EU. This is due to a very extensive interpretation of the aforementioned Act, which according to the Supreme Court has the effect of suspending the applicability of all constitutional provisions which are not compatible with EU law;[150] see next section.

3.2.3. Status, effect and rank of EU law in the domestic legal order

The status and effect of EU law in the Estonian legal order is determined by the Constitution of the Republic of Estonia Amendment Act (CREAA) of 14 December 2003. Article 2 CREAA states that 'as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty'. This provision has been subject to a very important interpretation by the Supreme Court on 11 May 2006.[151]

The Supreme Court stated that although the CREAA had been enacted as a 'separate constitutional act' and had not formally amended the *Põhiseadus*, it had nevertheless substantively amended the entire Constitution. The effects of the CREAA are far reaching: EU law has not only become one of the grounds for the interpretation of the *Põhiseadus*, but also for its application. Thus, only those parts of the Constitution which are in conformity with EU law or which fall outside the scope of EU law are still applicable; the applicability of all the other constitutional provisions is suspended.[152] In short, on the basis of the CREAA EU law is assimilated with Estonian constitutional law and (temporarily) sets aside any constitutional provision which is incompatible with it; it can also be argued that the CREAA gives EU law primacy (of application) on the *Põhiseadus*.[153]

This assimilation of Estonian and EU law however does not imply that the Supreme Court itself is empowered to test Estonian acts of parliament (or subordinated legislation) against EU law. This is a task for the ordinary lower courts and for the civil, criminal and administrative chambers of the Supreme Court.[154] Referring to the principle of loyal cooperation in currently Article 4(3) TEU, the Supreme Court has instructed these courts to

[150] Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, par. 14-16.
[151] Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006; the case concerned the compatibility of Article 111, which gives the exclusive right to issue currency to the Bank of Estonia, with Estonia's membership of the Eurozone.
[152] Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, par. 14-16; with this decision the Constitutional Review Chamber confirmed the reasoning of the Administrative Chamber of the Supreme Court in decision 3-3-1-74-05 of 25 April 2006; see Ginter (2006), p. 920 (note 17a). See also constitutional judgment 3-4-1-33-09 of the Supreme Court *en banc* of 1 July 2010, par. 40: 'Taking account of § 3(1) of the Constitution according to which the power of state is exercised also according to the law of the European Union (i.e. on the basis of the Foundation Treaties approved by Estonia and the secondary legislation in conformity with the Foundation Treaties)...'.
[153] Laffranque (2007a), p. 57/58.
[154] Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 31 and 32.

deal with EU law in complete EU orthodoxy, if need be after having posed preliminary questions to the Court of Justice. The courts have to solve conflicts between Estonian acts and EU law first by way of an interpretation of national law conforming to EU law. If this is not possible, they have to disapply the conflicting Estonian act (exclusionary effect of EU law), and, if the EU law concerned is directly effective, they have to apply EU law (substitutionary effect of EU law). Moreover, if a national act is allegedly contrary to both the *Põhiseadus* and EU law, the courts have to prioritise the review of the act against EU law.[155] In addition, 'as a rule' the courts are not allowed to test the constitutionality of EU law.[156]

The lack of competence of the Supreme Court to review acts allegedly contrary to EU law extends to national acts which, in the words of the Court itself, are 'related to EU law', for instance by implementing directives. Reviewing the constitutionality of such a national act can (indirectly) lead to reviewing the constitutionality of the EU law implemented, which would be contrary to EU law.[157] At the same time, the Court has set up a 'non-exhaustive list' of three situations in which it would nevertheless test the constitutionality of Estonian acts 'relating to EU law'. This is the case when:

> 1) the 'formal' constitutionality of an act is contested, i.e., the act is allegedly contrary to Estonian constitutional provisions due to issues of competence, procedure or form;
> 2) the contested act implements EU law but also regulates situations which are not governed by EU law; in this case the Supreme Court is competent to rule on the constitutionality of the provision in so far as it falls outside the scope of EU law;
> 3) EU law, including the case law of the Court of Justice, leaves national authorities discretion in the implementation of EU law; in this case, the implementing act must conform both to EU law and to the *Põhiseadus*.[158]

This division of power between the Supreme Court and the other courts is related to the kind of primacy which is attached to EU law and to the kind of review by the Supreme Court. On the one hand, in line with the IN.CO.GE.'90 case-law of the Court of Justice of the EU,[159] the kind of primacy accorded to EU law in the Estonian legal order is primacy of application, not primacy of validity: if a national act is in conflict with EU law, the former doesn't have to be declared invalid, but should 'simply' be disapplied. On the other hand, the Supreme Court exercises 'abstract' constitutional review: in contrast to the ordinary courts, it does not resolve 'a case or controversy', i.e. a legal dispute in the strict sense, but only determines whether the contested act as such is unconstitutional.[160] In other words, the Supreme Court can only declare national acts valid or invalid, not disapply them.[161] This characteristic makes the Supreme Court unfit for a review of national legislation against EU law.

---

[155] Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 31 and 32, with references to ECJ case law.
[156] Par. 29 of constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008.
[157] Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 29.
[158] Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 33-37.
[159] Joint cases C-10/97 until C-22/97, Ministero delle Finanze vs. IN.CO.GE.'90 [1998] ECR I-6307.
[160] Art. 14(2) of the Constitutional Review Court Procedure Act; cp. constitutional judgment 3-4-1-1-05 of the Supreme Court *en banc* of 19 April 2005, in which the Court denies the Chancellor of Justice the competence to request the Court to declare an Act unconstitutional on the ground that it is contrary to EU law (par. 49); the Court *inter alia* remarks that it is up to the legislature 'whether it wants to regulate the procedure for declaring invalid Estonian legislation which is in conflict with European Union law' (par. 50); see also constitutional judgment 3-4-1-33-09 of 1 July 2010 of the Supreme Court *en banc*, par. 41.
[161] Article 152 of the Constitution: 'In a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution. The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.'

3.2.4. Conditioning participation in EU integration

Substantive Limits

In a discussion of the conditions for participation in the current state of European integration, Article 1 CREAA[162] occupies the centre stage. The provision states that 'Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia'. It possibly forms the basis for an *ultra vires* review and for what may be called a constitutional identity review of (secondary and primary) EU law.

Ultra vires review?
A Working Group installed by the *Riigikogu* to present an opinion on the compatibility of the European Constitutional Treaty with the *Põhiseadus* concluded among other things that even under that Treaty Estonia 'retains the possibility to control whether the EU acts in accordance with the competences conferred on it by the Member States and does not usurp the competences belonging to Estonia' on the basis of Article 1 CREEA.[163] However, in the case law of the Supreme Court the theme of *ultra vires* control of secondary EU acts is not developed in any way.

Review of compatibility with the Estonian fundamental constitutional principles?
The same holds more or less true for review of EU law against the fundamental Estonian constitutional principles to which Article 1 CREAA refers. In this respect, the provision might be read in several ways. Firstly, the provision might be interpreted to condition Estonia's EU membership: Estonia may belong to the EU as long as the fundamental principles of the Estonian Republic are respected; if they are not respected, Estonia should withdraw from the EU. A second interpretation is that, in case of a conflict between EU law and Estonian fundamental principles, the latter should prevail.[164] The history of the provision makes clear that the second interpretation is the most convincing one. The draft of the CREAA simply stated that Estonia could accede to the EU. However, the Chancellor of Justice proposed to add a so called 'crisis reservation' (or 'defence clause'), which ultimately resulted in the referral to the fundamental constitutional principles.[165] The aim of the Chancellor was to ensure that, in case of conflict between the fundamental constitutional principles and EU law, the principles would prevail.[166]

Now two questions arise in this context. The first is what are these fundamental principles, the second is whether the courts are competent to test national acts implementing or executing EU law against them.

A non-exhaustive list of Estonian fundamental constitutional principles
The fundamental principles are not defined in law, including case law,[167] but perhaps may be discerned with relative certainty on the basis of concurring definitions in constitutional literature. The proposal of the Chancellor of Justice which lies at the basis of the 'defence clause' reads that Estonia can accede to an EU which 'functions according to the principles of human dignity and the social and democratic rule of law, which is founded on liberty, justice, and law, and which shall guarantee the preservation of the Estonian nation, language, and culture through the ages'.[168] The gist of the Chancellor's proposal was accepted, but in order to prevent the repetition of constitutional text, the drafters of the CREAA referred simply to the 'fundamental principles'.[169] A Working Group of experts which was established by the Constitutional Committee of the *Riigikogu* with the task of

[162] Available at <http://licodu.cois.it/?p=3058&lang=en>.
[163] Laffranque (2007b), p. 83-84.
[164] Ginter (2008), p. 32
[165] Narits, p. 58.
[166] Ginter (2008), p. 34.
[167] Ginter (2013), p. 340.
[168] Laffranque (2007a), p. 57; Narits, p. 58.
[169] Narits, p. 58.

performing a constitutional analysis of the European Constitutional Treaty established a more or less similar catalogue of fundamental principles: national sovereignty; a state that is based on liberty, justice, and law; the defence of internal and external peace; preservation of the Estonian nationality and culture through the ages; human dignity; the social state; democracy; the rule of law; honouring of fundamental liberties and freedom; and proportionality of actions taken under state authority.[170] This list of conditions draws partially on the general provisions of Chapter I of the *Põhiseadus*,[171] partially on Article 10 of that Constitution[172] and partially on the Constitution's preamble.[173] It should be noted that according to the Working Group the list was enumerative, not exhaustive.[174]

The fundamental principles, which have been characterised as those values without which Estonia and its Constitution would lose their 'essence',[175] may be compared to the principles which in Germany derive from the eternity clause in the German Constitution and which together make up German constitutional identity.

Are courts competent to review EU law against Estonian constitutional identity?
Are the Estonian courts allowed to test EU law against principles belonging to Estonian constitutional identity? That is the second question raised by the reference to the fundamental principles in Article 1 CREAA. An affirmative answer seems, at first sight, obvious in view of the history of the reference. If the courts indeed have this competence, the scope of their review is possibly extremely broad as it might concern both secondary *and* primary EU law.

The possibility of review of secondary EU law is accepted by at least a part of Estonian legal scholarship.[176] Thus, some authors defend the position that the fundamental principles form an exception to the primacy of European Union law, although at the same time the 'non-offensive nature' of the exception is emphasised.[177] The duty of the EU to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional' (Article 4 (2)TEU) would give substance to this position.[178] Also some lower court judges consider it possible 'that an act of (…) secondary community law can be set aside in a national court procedure' on the basis of Article 152 *Põhiseadus*.[179] This constitutional provision prescribes that the 'courts shall not apply and the Supreme Court

[170] Narits, p. 62; cp. Kerikmae and Nyman-Metcalf, p. 384-385; see also Schneider, p. 11.
[171] Especially Art. 1 *Põhiseadus*: 'Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable.'
[172] Art. 10 *Põhiseadus*: 'The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law.'
[173] Since the constitutional amendment of April 2007, which inserted the phrase 'the state's objective of guaranteeing the preservation of the Estonian language through the ages', the preamble reads, as far is relevant here: 'With unwavering faith and a steadfast will to strengthen and develop the state (…) which is founded on liberty, justice and law, which shall protect internal and external peace, and is a pledge to present and future generations for their social progress and welfare, which shall guarantee the preservation of the Estonian nation, language and culture through the ages'.
[174] Narits, p. 62.
[175] Idem.
[176] For a plea for such review, see Kalmo, p. 591-592.
[177] Laffranque (2007a), p. 66; Ginter (2008), p. 35. The Estonian Constitutional Expert Commission in its report on EU accession in 1998 already remarked that the Supreme Court should retain ultimate control over EU secondary legislation to guarantee its conformity with the fundamental principles of the Constitution; Albi (2005a), p. 421. In contrast, Narits, p. 59/60, is vehemently against ex post review of EU law with fundamental principles. According to him, a potential conflict of EU law with the fundamental principles should be resolved by achieving a change in EU law.
[178] Laffranque (2012), p. 121-123.
[179] Pilving and Lapimaa, p. 2.

shall declare invalid' any legislation which conflicts with 'the provisions and spirit of the Constitution'. [180]

If indeed the courts are competent to review EU law against the fundamental principles, such review might not be limited to secondary EU law alone. A remarkable feature of the Estonian constitutional system is that the Constitutional Review Procedure Act explicitly makes room for a declaration of unconstitutionality by the Supreme Court of a treaty which has been ratified and entered into force; this, on request of the Chancellor of Justice or upon referral of an ordinary court.[181] Now neither the Accession Treaty nor the Treaty of Lisbon have been reviewed by the Supreme Court. At least in principle, therefore, it cannot be excluded that the Supreme Court is competent to declare primary EU law unconstitutional.[182]

The position of the Supreme Court on both issues is not clear. On the one hand, the Court has ruled that 'only that part of the Constitution is applicable, which is in conformity with European Union law or which regulates the relationships that are not regulated by European Union law', without even hinting to any exception with regard to the fundamental principles.[183] Similarly, the Supreme Court refuses to review an act of Parliament implementing EU law on referral by a lower court if the lower court has not first established that the act is not mandated by EU law. The reason is that the Supreme Court would otherwise risk to subject secondary EU law to a constitutionality test, which would be contrary to both the case law of the Court of Justice and Article 2 of the CREAA;[184] again, no exception was worded. On the other hand, the Supreme Court has stated that 'as a rule, the courts are not competent to review the constitutionality of the EU law', thus perhaps leaving open the possibility of such review in case the fundamental principles are at stake. However, while review of the constitutionality of secondary EU law has been regarded as possible but simultaneously a '*rather* theoretical and emotional' possibility,[185] review of primary EU law may be regarded as a *sheer* theoretical possibility.

What would happen if the Supreme Court would declare (secondary) EU law contrary to the fundamental principles? Two possible consequences are indicated in the Constitutional Review Procedure Act and the Foreign Affairs Act: withdrawal from the EU or starting negotiations to achieve an amendment to bring EU law in conformity with the

[180] Art. 152 *Põhiseadus*: 'In a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution. The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.'
[181] Resp. Art. 6 (4)(4) and Art. 9(1) Constitutional Review Court Procedure Act. The Supreme Court *en banc* explicitly has accepted the former provision in constitutional judgment 3-4-1-6-12 of 12 July 2012, par.111: '§ 6(1)(4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Supreme Court *en banc* is of the opinion that § 6(1)(4) of the CRCPA grants the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after the ratification, i.e. by way of subsequent review. The Supreme Court *en banc* holds that the competence of the Chancellor of Justice arising from § 6(1)4) of the CRCPA is not in conflict with the Constitution.'
[182] Narits, p. 59-60.
[183] Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, par. 16; cp. the dissenting opinions of justices Villuy Kõve and Eerik Kergandberg; the latter in point 2 of his opinion: 'It is regrettable that the opinion of the Supreme Court contains no explanation as to why it has not considered necessary to include the provisions of § 1 of CAA into the analysis of constitutionality. I find that such an analysis, one related also to the fundamental principles of the Constitution of the Republic of Estonia, would have been imperative for the reason that the second part of the opinion has, in fact, tried to explain the actual implications of the adoption of the Constitution of the Republic of Estonia Amendment Act at a referendum for the entire Estonian constitutional order. Yet, this explanation is and will remain incomplete without taking a stand as to the present status of § 1 of CAA.'
[184] Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 29-31.
[185] Pilving and Lapimaa, p. 2; emphasis added.

Põhiseadus.[186] Another possibility is of course amending the Constitution to adapt it to EU law. On the Estonian constitutional amendment procedure, see below section 3.3.3.

Procedural Limits

Estonia has adopted a mandating system when it comes to decision-making in the Council and European Council. If the EU Affairs Committee of the *Riigikogu*, or the Foreign Affairs Committee in cases concerning the common foreign and security policy, adopts an opinion on an EU draft decision, it takes its position 'on behalf of the *Riigikogu*'. In that case, the government in principle has to adhere to the opinion. If the government deviates from it, it has to justify its behaviour to the EU Affairs Committee (or the Foreign Affairs Committee) at the earliest possible moment.[187] The ultimate sanction for overriding the mandate of the EU Affairs Committee or the Foreign Affairs Committee is the adoption of a motion of no confidence by the *Riigikogu* in the government, the prime minister or a minister.

There are no other procedural requirements regarding EU decision-making.

3.3. FURTHER TREATY REFORM

3.3.1. Substantive reservations

In literature, it has been suggested that the Constitution of the Republic of Estonia Amendment Act (CREAA) leaves the Supreme Court with no competence at all to review the constitutionality of future EU amendment treaties: the authorisation for EU membership contained in the CREAA would shield such treaties from constitutional review.[188] The Supreme Court's reasoning regarding the admissibility of the request of the Chancellor of Justice to review the ESM Treaty gives some substance to this position.[189] In that judgment, the Supreme Court ruled that because the ESM Treaty is an international agreement 'governed by international law', and neither primary or secondary EU law 'nor an amendment of the founding treaties of the European Union for the purposes of Article 48 of the TEU' (emphasis added), the CREAA was not applicable and the Chancellor's request was admissible.[190] *A contrario*, this seems to imply that a request to review an EU amendment treaty would not have been admissible. A possible explanation for that position

[186] Art. 15(3) Constitutional Review Procedure Act: 'If an international agreement or a provision thereof is declared to be in conflict with the Constitution the body which entered into the agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a manner which would ensure its conformity with the Constitution. An international agreement which is in conflict with the Constitution shall not be applied nationally.'
Art. 24 of the Foreign Relations Act is even more explicit:
'(1) If the Supreme Court has declared a treaty or a part thereof to be in conflict with the Constitution, the proposal to withdraw from the treaty, denounce it or initiate the procedure for amendment thereof shall be made by:
1) the Government of the Republic to the Riigikogu if the Riigikogu has ratified the treaty;
2) the Ministry of Foreign Affairs to the Government of the Republic if the Government of the Republic has concluded the treaty.
(2) If a national legal act is contrary to the treaty binding on the Republic of Estonia, the Government of the Republic, the corresponding ministry or the State Chancellery shall initiate the bringing of such legal act into conformity with the treaty.'

[187] Par. 1523 and 1524 Riigikogu Rules of Procedure and Internal Rules Act.

[188] Küpper, p. 285-286; this however seems to be a very isolated position; cp. also Ginter & Narits, p. 60.

[189] Ginter (2013), p. 335.

[190] Judgment of the Supreme Court *en banc* of 12 July 2012, case 3-4-1-6-12, point 110: 'Primary and secondary law of the EU are distinguished for the purposes of the TFEU and TEU. The basis of the European Union law is comprised of Treaties establishing the European Union and Accession Treaties (including the TFEU and TEU), i.e. the primary law which serves as the basis for the legislation adopted in EU institutions, which is the secondary law (regulations, directives, decisions and recommendations within the meaning of Article 288 of the TFEU). Based on competency and procedural rules and requirements of formalities, the Treaty is clearly not the primary law of the EU *nor an amendment of the founding treaties of the European Union for the purposes of Article 48 of the TEU*. On the same considerations the Treaty is not a legislative act within the secondary law of the EU. *The Treaty will not be adopted by an EU institution*. The Supreme Court *en banc* is of the opinion that a similar position is shared by experts, e.g. the Faculty of Law of the University of Tartu. For the above-mentioned reasons the Constitution of the Republic of Estonia Amendment Act does not apply in the adjudication of this case'.

would be that the duty to participate in further EU integration is one of the obligations deriving from EU membership which Estonia has to fulfil according to Article 2 CREAA.[191]

However, complete constitutional immunity of EU amendment treaties seems to be out of line with Article 1 CREAA.[192] It is also hardly compatible with Article 2 CREAA, which states that 'As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty'. Both the history[193] and the text of the latter provision indicate that the applicability of the Constitution is only subjected to the rights and obligations arising from the Accession Treaty, i.e. the rights and obligations existing at the time of accession, 1 May 2004. Complete immunity would also not be compatible with the interpretation of the Supreme Court of Article 2 CREAA. According to the Court, the effect of Article 2 is that 'only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law'; all the other provisions are suspended.[194] Logically, this implies that at least the provisions which are not 'suspended' by Article 2 are applicable to the review of new, not yet ratified EU amendment treaties, which after all are not yet EU law. Moreover, complete immunity is not compatible with an *obiter dictum* of the Supreme Court in the ESM judgment itself, in which the Court states that although Article 1 CREAA 'is to be considered as (...) an authorisation which allows Estonia to be a part of the changing European Union', it 'does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent'.[195] All in all, the conclusion must therefore be that the Supreme Court does not mean to give total immunity to EU amendment treaties. An alternative interpretation of the Supreme Court's consideration on the admissibility of the Chancellor's request is that the Chancellor is not competent to refer EU amendment treaties to the Supreme Court, but others are. However, it is not clear what could be the rationale for this.

Another possibility is that instead of complete immunity, EU amendment treaties have *partial* immunity under Estonian constitutional law: while 'ordinary' treaties can be tested against the whole Constitution, EU amendment treaties can only be tested against the Constitution's fundamental principles. This stance would be compatible with Article 1 CREAA and seems to a certain extent to be corroborated by the interpretation of Article 2 CREAA in the aforementioned *obiter dictum* in the ESM Treaty judgment. If this is indeed the Supreme Court's position, Article 1 CREAA would turn out to be the very open EU integration clause which the constitutions of the Central and Eastern European EU Member States miss.[196]

However, it must be admitted that the *obiter dictum* is multi-interpretable; if one reads the whole text of the consideration, it even allows for the interpretation that any EU amendment treaty which transfers competences to the EU can be tested against the whole Estonian Constitution (or at least against all those provisions of the Constitution which have not become inapplicable for being contrary to EU law on the basis of Article 2 CREAA).[197]

[191] Küpper, p. 286.
[192] 'Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia.'
[193] Laffranque (2011), p. 19; Ginter & Narits, p. 59-60.
[194] Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, par. 16.
[195] Judgment 3-3-1-85-07 of the Administrative Law Chamber of the Supreme Court of 7 May 2008, in which the possibility of reviewing amendment treaties was left open. See also Laffranque (2012), p. 131.
[196] According to Miroslav Wyrzykovski, cited in Albi (2005b), p. 31.
[197] Judgment of the Supreme Court *en banc* of 12 July 2012, case 3-4-1-6-12, par. 223: 'The Supreme Court *en banc* holds that § 1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union, provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the Riigikogu which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment

Nevertheless, the conclusion may be that in Estonia at least the areas to which the fundamental principles relate are substantially reserved areas for further integration.

When it comes to the form and intensity of the review, the ESM Treaty judgment suggests that EU amendment treaties jeopardising fundamental principles will be subjected to a proportionality review. That is the test to which the Supreme Court subjected the emergency voting procedure of Article 4(4) of the ESM Treaty. This provision allows the ESM to give financial aid to Eurozone states in financial distress without the consent of Estonia. According to the Court, the provision interfered 'with the principle of a democratic state subject to the rule of law and of the state's financial sovereignty, since indirectly the people's right of discretion is restricted.'[198] These principles belong to the catalogue of fundamental principles in the sense of Article 1 CREAA (*supra* under II.D). However, although the Chancellor of Justice had argued that the potential financial consequences for the Estonian state budget were far reaching, the Supreme Court found the interference not unconstitutional. The point of departure for its reasoning was a remarkable modern interpretation of the sovereignty clause in the *Põhiseadus*, which has been characterized as one of the most 'souverainist' constitutions in Europe.[199] Although Article 1 of the Constitution qualifies Estonian sovereignty as 'timeless and inalienable', and '(t)he core essence of sovereignty is the right of discretion in all matters, irrespective of external influences sovereignty', the Court submitted that the clause must be interpreted in the present-day context and endorsed the opinion of Anneli Albi that membership of the EU and international organisations has become a natural part of sovereignty in this day and age.[200] More specifically, the Court considered that the aim of the emergency voting procedure (safeguarding the stability of the Eurozone) is legitimate and coincides with the constitutional duty of the Estonian state to guarantee rights and freedoms of Estonians: 'A threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia' and thereby a threat to 'the people's income, quality of life and social security.'[201] The emergency voting procedure also rather easily passed the other hurdles of proportionality test.[202]

The reasoning employed shows that not just any interference with the fundamental principles is unconstitutional and requires approval by the people, but only very profound interferences.[203] Certainly, the transfer of the *Kompetenz-Kompetenz*, i.e. the competence to delineate the competences of the EU, to the EU would require a referendum.[204]

All in all the ESM Treaty judgment shows a very large extent of constitutional benevolence towards the EU.[205] This matches with the prevailing political climate in Estonia, where several leading politicians and lawyers have expressed their support for the establishment

---

to the founding treaty the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU'.

[198] Judgment of the Supreme Court *en banc* of 12 July 2012, case 3-4-1-6-12, par. 223, par. 153.

[199] Albi (2002), p. 42.

[200] Judgment of the Supreme Court *en banc* of 12 July 2012, par. 130.

[201] Idem, par. 165.

[202] Idem, par. 186-203.

[203] It seems probable that the Supreme Court will adopt the same approach when reviewing EU amendment treaties. This fits with observation of Lagerspetz & Maier, p. 99, that the Estonians define their Nation more in terms of linguistic and cultural than of political unity.

[204] Albi (2005a), p. 417.

[205] Judgment of the Supreme Court *en banc* of 12 July 2012, case 3-4-1-6-12, par. 223: 'Article 2 CREAA authorises Estonia to be part of 'the changing European Union' but 'does not authorise the integration process of the European Union to be legitimised to an unlimited extent' ; in case of a 'more extensive interference with the principles of the Constitution… it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again'.

of a European federal state.[206] It should however also be noted that the ESM Treaty judgment was given by the smallest possible majority of the justices – no less than nine of the nineteen justices dissented.

3.3.2. Procedural hurdles for further integrations

The *Riigikogu* has to approve the ratification of treaties 'by which the Republic of Estonia joins international organisations or unions'.[207] Legislative proposals approving treaties go through the ordinary legislative procedure, even if in principle they only have two readings (instead of three) before the final vote.

Estonia is not allowed to conclude treaties which are in conflict with the Constitution.[208] Although treaties can also be declared unconstitutional after ratification (see above under 3.2.4 A) it is, in the words of the Supreme Court, more appropriate to verify the constitutionality of the international agreement before its ratification. Such an interpretation also allows the State to take steps to amend the text of an already signed unconstitutional international agreement and to bring it into accordance with the Constitution before it is ratified and brought into force.[209]

The Chancellor of Justice can refer treaties to the Supreme Court prior to ratification either directly[210] or indirectly.[211] The President of the republic can only indirectly challenge a treaty, via the act of Parliament approving the treaty concerned. He has the right to demand a new parliamentary debate and a new decision on an act adopted by the *Riigikogu* and referred to him for promulgation; if Parliament readopts the act, the president has the choice between promulgating the act or referring it to the Supreme Court for review; if the Court declares the act not unconstitutional, the president has to promulgate it.[212]

A constitutional amendment procedure may not be initiated or completed during a state of emergency or a state of war.[213] Moreover, if a constitutional bill is rejected by the *Riigikogu* or in a referendum, a year has to lapse before a similar bill may be introduced. These provisions can be amended by a constitutional amendment approved by the people in a referendum (*infra*).

3.3.3. Overcoming the hurdles

If a treaty is declared unconstitutional prior to its ratification, the Constitution has to be amended before the treaty can be ratified. The Estonian constitutional amendment procedure knows two stages.[214] The first stage consists of parliamentary approval, the

---

[206] Information of Anneli Albi to the author.
[207] Article 121, sub 3 *Põhiseadus.*
[208] Article 123, first sentence, *Põhiseadus*.
[209] Constitutional judgment 3-4-1-6-12 of the Supreme Court *en banc* of 1 July 2012, par. 115 and 116.
[210] Art. 6(1)(4) Constitutional Review Procedure Act.
[211] Constitutional judgment 3-4-1-6-12 of the Supreme Court *en banc* of 1 July 2012, par.112: '§ 139(1) of the Constitution grants the Chancellor of Justice the right to inspect the legislative instruments of the legislative and executive branch of government and of local authorities in terms of their accordance with the Constitution. The Supreme Court *en banc* holds that § 139(1) of the Constitution grants the Chancellor of Justice the right to challenge an act in accordance with which the Riigikogu ratifies an international agreement.'
[212] Art. 107(2) *Põhiseadus*.
[213] Art. 161 *Põhiseadus*. The right to initiate amendment of the Constitution rests with not less than one-fifth of the membership of the Riigikogu and with the President of the Republic.
Amendment of the Constitution shall not be initiated, nor shall the Constitution be amended, during a state of emergency or a state of war.
[214] See Article 161 (cited above) and the following articles:
Article 162. Chapter I 'General Provisions' and Chapter XV 'Amendment of the Constitution' of the Constitution may be amended only by a referendum.
Article 163. The Constitution shall be amended by an Act which has been passed by:
1) a referendum;
2) two successive memberships of the Riigikogu;
3) the Riigikogu, as a matter of urgency.

second stage may consist of a national referendum; a referendum is required when the amendment concerns, *inter alia,* the general provisions in Chapter I, which contains the Articles 1-7 *Põhiseadus*.

As we have seen, it is not clear whether or to what extent EU (amendment) treaties can be tested against Estonian constitutional law. A possibility is that they can be tested only against the fundamental principles referred to in Article 1 CREAA. That begs the question of how these fundamental principles relate to the general provisions in Articles 1-7 CREAA: is any interference with the fundamental principles at the same time an interference with the general provisions which would require a referendum? If one compares the list of fundamental principles with the text of the Constitution (*supra,* under II.D.1), this does not seem to be the case. However, the Supreme Court's position in the ESM Treaty judgment seems to be that any unconstitutional infringement of the fundamental principles requires a referendum. Perhaps this position is based on Article 3 CREAA ('This Act may be amended only by a referendum'). Nevertheless, it cannot be excluded totally that the ratification of a treaty which interferes to an unconstitutional degree with a fundamental principle always requires a referendum. Secondly, it cannot be excluded that EU amendment treaties are reviewed against the whole Constitution (as far as still applicable; *supra* under III.A). Therefore, the entire constitutional amendment procedure will be depicted here.

A constitutional amendment can be initiated by at least one-fifth of the members of the *Riigikogu* or by the president of the republic. As said, the procedure consists of two stages. In the first stage, the bill has to be debated by the *Riigikogu* in three readings, with a time-lapse of at least three months between the first reading (discussion of the bill's general principles) and the second reading (discussion of the bill's provisions) and of at least one month between the second and the third reading (final votes); at the end of the third reading, in principle the *Riigikogu* also decides on the second stage of the constitutional amendment procedure. There are three possibilities.

First, the *Riigikogu* may, with a three-fifths majority, decide to submit the bill to a referendum. The date of the referendum is freely decided by Parliament, on the condition that at least three months have to pass between the decision of the *Riigikogu* to submit the proposal to a referendum and the day of the referendum; in contrast to referendums on non-constitutional proposals, the referendum may be postponed until after new parliamentary elections have taken place.[215] If a majority of the voters is in favour, the bill is adopted; a minimum turnout is not required. If the bill is not adopted, the President of the Republic is required to order new elections for the *Riigikogu*. As already indicated, a referendum is mandatory if the bill concerns an amendment of the 'General Provisions' in Chapter I of the Constitution; this is also the case if it concerns amendment of provisions on the constitutional amendment procedure in Chapter XV of the Constitution.

A bill to amend the Constitution shall be debated for three readings in the Riigikogu, in which the interval between the first and second readings shall be not less than three months, and the interval between the second and third readings shall be not less than one month. The manner in which the Constitution is to be amended shall be decided at the third reading.
Article 164. A three-fifths majority of the membership of the Riigikogu is required to submit a bill to amend the Constitution to a referendum. The referendum shall be held not earlier than three months after the passage of a resolution to this effect by the Riigikogu.
Article 165. In order to amend the Constitution by two successive memberships of the Riigikogu, a bill to amend the Constitution must be supported by a majority of the membership of the Riigikogu.
If the bill to amend the Constitution which receives the support of the majority of the preceding membership of the Riigikogu is passed by the succeeding Riigikogu, unamended, on its first reading and with a three-fifths majority, then the Constitution Amendment Act is passed.
Article 166. A resolution to consider a bill to amend the Constitution as a matter of urgency shall be passed by a four-fifths majority of the Riigikogu. In this case, the Constitution Amendment Act shall be passed by a two-thirds majority of the membership of the Riigikogu.
Article 167. The Constitution Amendment Act shall be proclaimed by the President of the Republic and shall enter into force on the date specified therein, but not earlier than three months from the date of proclamation.
Article 168. An amendment to the Constitution regarding the same issue shall not be initiated within one year after the rejection of a corresponding bill by a referendum or by the Riigikogu.

[215] Art. 3(3) Referendum Act.

A majority of the members of the *Riigikogu* can also decide that the second stage of the constitutional amendment procedure consists of the submission of the bill to a second, newly elected parliament. In that case the second, newly elected *Riigikogu* has to adopt the bill with a two-thirds majority of its members without amendments.

The third possibility for the second stage is an urgency procedure. If the *Riigikogu* with a four-fifths majority, considers the bill a matter of urgency, it may subsequently adopt it with a two-thirds majority.

Once adopted, the amendment act has to be proclaimed by the president of the republic. Regarding a constitutional amendment, the president may not exert his (suspensive) veto right.

3.4. REFERENCES

Anneli Albi, 'The Central and Eastern European Constitutional Amendment Process in Light of the Post-Maastricht Conceptual Discourse: Estonia and the Baltic States', *European Public Law* (2001), p. 433.

Anneli Albi, 'Estonia's Constitution and the EU: How and to What Extent to Amend it', *Juridica International* (2002) p. 39.

Anneli Albi, '"Europe" Articles in the Constitutions of Central and Eastern European Countries', *CML Review* (2005) p. 399.

Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP 2005).

Carri Ginter, 'Constitutional Review and EC law in Estonia', *E.L.Rev.* (2006) p. 912.

Carri Ginter, 'Effective Implementation of the Trade Mark Directive in Estonia, *E.C.L.R.* (2007) p. 337.

Carri Ginter, *Application of Principles of European Law in the Supreme Court of Estonia* (Dissertationes Iuridicae Universitatis Tartuensis 21, Tartu University Press 2008).

Carri Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty', EuConst (2013) p. 335, at p. 340.

Carri Ginter and Raul Narits, 'The Perspective of a Small Member State to the Democratic Deficiency of the ESM', *Review of Central and East European Law* (2013) p. 55.

Tanel Kerikmae and Katrin Nyman-Metcalf, 'Karlsruhe v. Lisbon An Overture to a Constitutional Dialogue from an Estonian Perspective', *European Journal of Law Reform* (2010) p. 373.

H. Kalmo, 'What is Left of the Estonian Constitution? Revisiting the Primacy of Community Law', *Juridica* (2008) [in Estonian] p. 583.

H. Küpper, 'Die Ratifikation der Unionsverfassung in den neuen Mitgliedstaaten' in: K. Beckmann/J. Dieringer/U. Hufeld (ed.), *Eine Verfassung for Europa* (second edition;Mohr Siebeck 2005), p. 273.

Mikko Lagerspetz and Konrad Maier, 'Das politische System Estlands' , in Wolfgang Ismayr (ed.), *Die politische Systeme Osteuropas*, second edition (Opladen: Leske + Budrich, 2004), p. 71 (85).

Julia Laffranque, 'Enlargement and Further Integration of the European Union: a Uniform Vision for Europe? The Constitution of Estonia and Estonia's Accession to the European Union', *Baltic Yearbook of International Law* (2004) p. 1.

Julia Laffranque, 'A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act', *Juridica International* (2007) p. 55.

Julia Laffranque, 'Ratification of the European Constitution: A new Constitution for Estonia?', in: A. Albi and J. Ziller, *The European Constitution and national Constitutions* (Kluwer Law International, 2007) p. 79.

Julia Laffranque, 'The Constitution of Estonia and Estonia's accession to the European Union', *Baltic Yearbook of International Law online* (2011) p. 1 (19).

Julia Laffranque 2012, 'Who Has the Last Word on the Protection of Human Rights in Europe?' *Juridica International* (2012) p. 117.

Raul Narits, 'About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia', *Juridica International* (2009) p. 58.

Ivo Pilving (Tallinn Circuit Court) Villem Lapimaa (Tallinn Administrative Court), 'Annual meeting of administrative judges, Bealieu-sur-mer, March 10-11, 2006 Estonian report', p. 2.

Heinrich Schneider, 'Constitution in a Blast of Changes, *Juridica International* (2007) p. 4.

4. FINLAND*

4.1. GENERAL CONSTITUTIONAL FEATURES

Finland became independent in 1917 (Declaration of the Independence of Finland on 6 December 1917). The constitutional framework of the newly independent state was laid down between 1917 and 1928, when the 1919 Form of Government (Constitution) Act (94/1919) and three subsequent constitutional enactments were adopted.[216] In 1995, a major constitutional amendment was effectuated, thoroughly revising the domestic system for the protection of fundamental rights, and effectively incorporating the European Convention of Human Rights (ECHR) and other international human rights treaties binding upon Finland in Chapter II of the Constitution Act of 1919 in a substantive sense: human rights treaties, with the ECRH at their apex, provided guidelines for rewriting the constitutional provisions on fundamental rights.[217] The outcome of the reform was a very comprehensive catalogue of fundamental right, with a range of economic, social and cultural rights, in addition to the more traditional civil and political rights. Moreover, there are specific provisions on responsibility for the environment and environmental rights, as well as for the right to good administration. Almost all of these rights are granted to everyone, an exception being made only with regard to freedom of movement and certain electoral rights.

In 1995, accession of Finland to the European Union was implemented in the Constitution by way of amendment of some constitutional provisions on the domestic distribution of powers between Parliament, the Government and the President in EU affairs. Basically, competence constellations were arranged according to the same ratio as those used in domestic legislative affairs, instead of the competence arrangements typical of foreign policy. From the very beginning, EU issues were thus regarded, in substance, as domestic matters in Finland.

In 1994, the Government had already launched a thorough revision of the entire Constitution to achieve a single and unified constitutional text. In 1999, Parliament then adopted a new Constitution of Finland, which entered into force on 1 March 2000. The Constitution of Finland is a modern and unified constitutional document with a concise and uniform style. Apart from defining the foundations of the constitutional-political system of Finland (Chapter 1), it includes distinct chapters on fundamental rights (Chapter II), the composition and activities of Parliament (Chapters III and IV), the Government and the President of the Republic (Chapter V), Legislation (Chapter VI), State Finances (Chapter VII), International relations (Chapter VIII), Administration of Justice (Chapter IX), Supervision of Legality (Chapter X), Administration and Self-Government (Chapter XI), National Defence (Chapter XII) and Final Provisions (Chapter XIII).

However, the entry into force of the Constitution failed to unlock some questions pertaining to the President of the Republic and the EU. In 2012, several amendments to the Constitution entered into force. EU membership is now explicitly mentioned in Section 1 of the Constitution. In addition, Section 95 of the Constitution was supplemented by a provision providing that a ”significant” transfer of state powers to the EU or international organizations requires a two-third majority of the votes in Parliament. *A contrario*, the transfer of powers failing to be significant are decided by simple majority. In addition, some modifications were made as regards the distribution of power between the President and the Government, including the Prime Minister, in international and EU affairs.

The Constitution has traditionally been held in high esteem in Finland. No other enactment may contradict the Constitution, as is emphasized by several provisions of the Constitution.

* Many thanks to Tuomas Ojanen for his valuable comments.
[216] The 1922 Ministerial Responsibility (Constitution) Act, the 1922 Court of the Realm (Constitution) Act and the 1928 Parliament (Constitution) Act.
[217] Husa, 2011

Finland does not have a constitutional court, and courts still play a secondary role in the review of the constitutionality of legislation, even though the trend has increasingly been from classic legislative supremacy to multiple forms of constitutional review since the 1990s.

The primary control mechanism for ensuring the constitutionality of legislation and constitutional amendments, including international obligations and EU affairs, is the (abstract) *ex ante* review carried out by the Constitutional Law Committee of Parliament. In practice, the Committee takes a position on the constitutionality of the bills and other matters submitted to it, as well as on their relation to the international human rights treaties binding upon Finland (Section 74 of the Constitution of Finland). It should be underlined that, aside from the constitutional review of legislative proposals, the activities of the Committee include the supervision of constitutional amendments, international treaties and the examination of proposals for EU measures, such as regulations and directives, for their compatibility with the Constitution.

In addition, Section 106 of the Constitution now acknowledges a limited role for courts in reviewing the constitutionality of Acts of Parliament by providing that courts must give primacy to the provision in the Constitution if, in a matter being tried by a court, the application of an Act would be in evident conflict with the Constitution. Yet, Section 106 of the Constitution is not intended to tilt the balance in the review of the constitutionality of Acts of Parliament from the Constitutional Committee towards the judiciary. Instead, the abstract *ex ante* review carried out by the Constitutional Law Committee of Parliament continues to be the primary mechanism for reviewing the constitutionality of legislation.

Finland today is a republican parliamentary democracy. It was traditionally a presidential system, but since the mid-1980s the trend has been towards parliamentarism. Sovereign power lies with the people represented by the Parliament that exercises the legislative powers and decides on State finances. Finnish constitutional history reflects the search for a working balance between the presidential and the parliamentary focus of authority, which emerged as the main problem of constitutional practice. The 2000 Constitution emphasises the parliamentary traits of the Finnish political system and the status of the Parliament as the supreme state organ: the Government must enjoy its confidence.

The President of the Republic is directly elected for a term of six years, and may be re-elected for one consecutive term, i.e. for altogether twelve years. The President takes most decisions on a proposal of the Government. S/he directs the foreign policy of Finland in conjunction with the Government. Also in foreign policy, presidential acts are based on preparations by and cooperation with the Government.

The Government has to enjoy the confidence of the Parliament. After parliamentary elections, the parliamentary groups negotiate and agree on the formation of a new government. The Parliament elects the Prime Minister who is appointed by the President. The other ministers are appointed by the President on the basis of a nomination by the Prime Minister. The Prime Minister heads the work of the Government. The most important issues – such as law and budget bills – are decided in governmental sessions.

The Parliament is unicameral. Finland stands out among the states of Western Europe as a highly consensual political community.[218]

According to the Constitution, Finland participates in international cooperation in order to promote peace and to safeguard human rights. The President of the Republic directs foreign policy in cooperation with the Government. If there is a disagreement between the President and the Government in the decision-making, the decision is made in accordance with the position adopted by the Parliament.

[218] Nousiainen (2001)

Finland joined the European Union in 1995 under the 1919 Constitution, by way of an exceptive enactment (discussed below).

Finland follows essentially the dualist tradition. The most frequently used method of implementing international treaties is incorporation through an Act of Parliament.[219] Treaties assume the same status as the incorporating act. Finland joined the Council of Europe in 1989 (when the fear of negative Soviet reactions evaporated);[220] the ECHR entered into force for Finland in 1990, and in 1995 it was effectively incorporated (see supra). Since then, there has been a marked rise in the number of references to human rights treaties by the courts. International human rights treaties, especially the ECHR, have brought a marked change in the Finnish constitutional and human rights culture. These treaties and the case law of the ECtHR are used to interpret the Constitution and Finnish law in general.

In addition to the impact of the ECHR, EU membership has given an important impetus for change in Finnish constitutional law over the past years, including also Finnish constitutional culture and identity.[221] Indeed, several traditional hallmarks of Finnish constitutionalism, such as the legislative sovereignty doctrine and the conception of democracy as majority rule, combined with a relatively marginal role of rights and courts, have significantly changed due to European integration. EU membership has provided the decisive incentive to reconsider the prohibition stopping courts from examining the constitutionality of Acts of Parliament.[222]

4.2. THE SITUATION UNDER THE CURRENT SYSTEM

4.2.1. Enabling Clauses – allowing for membership

The very first sentence of the Constitution of Finland provides that 'Finland is a sovereign republic' (Section 1, subsection 1). In 1994, the Accession Treaty was deemed to be in conflict with Finland's sovereignty proclaimed in this first section. In fact, prior to European integration, the sovereignty doctrine was markedly formal and strict: international obligations were almost automatically deemed to be in conflict with the sovereignty of Finland if these obligations entailed even a minor transfer of powers to international organizations or the authorities of other states. The Constitution assumed a notoriously minimalist approach to international affairs and, accordingly, lacked a constitutional provision permitting limitations of sovereignty or the transfer of powers to international organizations, not to speak of the EU in particular.

However, instead of amending the Constitution, the Accession Treaty was incorporated into Finnish law through an exceptive enactment (Act No 1540 of 1994) approved by a two-thirds majority in Parliament. Such 'exceptive enactment' enables the adoption of legislation that in substance conflicts with the Constitution without amending the text thereof, if it is approved in a special procedure. These enactments are then considered to make a "hole" in the Constitution and fill it with the relevant norms of the exceptive enactment, allowing circumventing a formal amendment of the Constitution.[223] This has made EU law resistant to the demands stemming from Finnish constitutional law.

[219] Ojanen (2009).
[220] Husa (2011).
[221] Ojanen (2013).
[222] Ojanen (2009).
[223] The practice of exceptive enactments is based on the understanding that, in the legislative life of a nation, there may be moments when a law needs to be adopted, which is against the formal letter of the Constitution. In such cases, parliament may, by using the procedure for constitutional amendment, pass an 'ordinary' Act of Parliament which is, from a substantive point of view, in breach of the Constitution. This practice finds its basis in section 95 of the Form of Government (Constitution) Act and section 94 of the 1928 Parliament (Constitution) Act, Suksi (2011) 101.

In addition, there was also a fear that EU membership may, in the end, threaten the level of protection of fundamental rights developed in Finland. Several of the provisions of the 1995 constitutional amendment can be seen as a reaction, a form of constitutional self-defence against these possible 'threats', such as the right of access to information (section 12) and the provision on social security for all (and not only EU citizens, section 19).[224]

Accession was subjected to a consultative referendum (16 October 1994). However, the referendum was not a constitutional condition for accession: it was held in order to ensure the domestic legitimacy of membership. A majority of 56,9% of those who voted were in favour of accession, with a turnout of 74 %.

The Amsterdam Treaty and the Nice Treaty required further constitutional and legislative adjustments. Regarding the Amsterdam Treaty, the essential constitutional question was whether or not this treaty expanded the "hole" in the Constitution of Finland made by the original exceptive enactment of 1994. The Constitutional Law Committee decided that it did. In essence, the call for an exceptive enactment arose because the Amsterdam Treaty was considered to have transferred qualitatively new powers from Finnish State organs to the institutions of the EU, thereby entailing a further intrusion into the sovereignty of Finland. In the case of the Nice Treaty, an exceptive enactment was not considered necessary. The Constitutional Law Committee regarded such changes as normal evolutionary corollaries and necessities and, above all, as largely irrelevant from the point of view of Finland's sovereignty. However, this is not to imply that the Nice Treaty was constitutionally insignificant. In fact, the acceptance by Parliament of the ratification of the Nice Treaty was deemed to be necessary on the basis that the Treaty was "otherwise significant" within the meaning of Section 94, subsection 1, of the Constitution, in addition to the fact that the Nice Treaty comprised a host of articles of a legislative nature.[225]

The Lisbon Treaty was equally incorporated into Finnish law through an exceptive enactment (Act No 947 of 2009).

Today, the construction of 'sovereignty' is profoundly different. It is shaped by the assumption that the sovereignty of Finland is qualified by international obligations binding on Finland and, especially, by its EU membership. This mode of thinking made its breakthrough in the practice of the Constitutional Law Committee of Parliament in the late 1990s, when the challenges of European integration were integrated into the construction of sovereignty.

The new understanding of sovereignty was further developed by the entry into force of the new 2000 Constitution. One of the express intentions of the new Constitution was to replace the traditional formal and strict understanding of sovereignty with a much more modern European and international-oriented construction. The new Constitution placed an entirely new emphasis on international co-operation by expressing a positive attitude towards international co-operation in Section 1, subsection 3:

> 'Finland participates in international co-operation for the protection of peace and human rights and for the development of society'.

On the other hand, the new 2000 Constitution did not introduce an explicit mention of the European Union in the text of the Constitution. Nevertheless, the modern Finnish sovereignty doctrine is based on the idea of the EU as something more than a conventional international organization, yet something less than a (federal) state. In essence, the distinction between the EU and other international organizations results in a greater

[224] Ojanen (2013).
[225] Ojanen (2002).

tolerance of limitations on sovereignty stemming from EU membership than those derived from other international obligations.[226]

Finally, it was considered appropriate to sharpen the constitutional approach to EU membership. A constitutional amendment entered into force on 1 March 2012.

EU membership is now explicitly mentioned in the opening provision of the Constitution which now reads:

> Section 1 - The Constitution
>
> 'Finland is a sovereign republic.
>
> The Constitution of Finland is established in this constitutional act. The Constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society.
>
> Finland participates in international co-operation for the protection of peace and human rights and for the development of society. Finland is a Member State of the European Union.'

With respect to the applicable procedure for the transfer of powers, since 2012 the Constitution provides:

> Section 94 - Acceptance of international obligations and their denouncement
>
> 'The acceptance of the Parliament is required for such treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require approval by the Parliament under this Constitution. The acceptance of the Parliament is required also for the denouncement of such obligations.
>
> A decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. However, if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the decision shall be made by at least two thirds of the votes cast.
>
> An international obligation shall not endanger the democratic foundations of the Constitution.'
>
> Accordingly, since the entry into force of this constitutional amendment in 2012, amendments to the EU Treaties which are considered to be 'of significance to Finland's sovereignty', have to be approved by two thirds of the votes cast. 'Run-of-the-mill' revisions of the Treaties which are not so significant can be ratified with simple majority vote.
>
> In addition, article 95 proclaims:
>
> Section 95 - Bringing into force of international obligations
>
> 'The provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree.

[226] Ojanen (2013).

A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two thirds of the votes cast.

An Act may state that for the bringing into force of an international obligation its entry into force is provided by a Decree. General provisions on the publication of treaties and other international obligations are laid down by an Act'.

4.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions
In 2007, the Constitution was amended to allow for the surrender of Finnish nationals, on the condition that their human rights and legal protection are guaranteed (Section 9). When the EAW framework decision was discussed in Parliament, the Constitutional Law Committee was of the opinion that, while the surrender of Finnish nationals would go against the text of the Constitution, it was already possible in practice to extradite Finnish nationals to other Nordic countries, and the Constitution no longer reflected actual practices. Accordingly, the EAW was implemented by way of exceptive enactment. In 2007, then, the Constitution was adapted.

With respect to the EMU, at the time of accession, while it was emphasised that EU membership involved obligations concerning EMU, including a need to fulfill the Treaty-based criteria for participation, it was also stressed that the move to its third stage would necessitate a decision approving the move by the Finnish parliament based on a separate government proposal. Later, when the move to the third stage was taking place, the commitment to participate was seen as constitutionally settled as a part of the EU membership obligations. There was a strong political will to join the third stage among the first wave of states, and in April 1998 the Finnish Parliament (*eduskunta*) decided on Finnish participation by simple majority, based on a government statement.

Adapting the constitutional framework and the functioning of the system
One of the main constitutional issues concerning EU membership has been that of the relations between the Parliament, the Government and the President in the context of decision-making in European affairs. At the time of accession, the discussion was conducted against the background of a broader process of re-balancing of the powers of the three organs in the direction of parliamentarism. The transfer of legislative competences to the EU has been rather successfully compensated by providing Parliament with the possibility of participating in the *ex ante* preparation of national positions in EU affairs. The core provisions can now be found in Chapter 8 of the Constitution, especially Sections 93(2), 96 and 97. Finland thus has a model of national decision-making in EU affairs that gives extensive participation and information rights to the Finnish parliament, *eduskunta*. In fact, matters qualified as 'Union matters' under Sections 96/97 activate the strong prerogatives of the *eduskunta* as regards its rights of both information and participation in decision-making.

Membership of the EEA and, later on, accession to the EU have functioned as a catalyst in the process. Domestic competence constellations were arranged according to the same patterns as those used in domestic legislative affairs, instead of the competence arrangements typical of foreign policy, which gave more power to the president. The main responsibility for the national preparation of EEA affairs and later EU affairs was given to the Government, whose members are individually and collectively accountable to Parliament. In addition, specific constitutional provisions were enacted for the purpose of ensuring the participation of Parliament in considering those EU affairs that would,

according to the Constitution, otherwise fall within the competence of Parliament.[227]

The Government leads the preparations for decisions taken by the Union and sees to their enforcement. The Prime Minister represents Finland in activities of the European Union requiring the participation of the highest level of State authorities. The Government has to inform the Parliament of issues considered by the Union. The Parliament may issue directions to the ministers participating in EU meetings. This is laid down in Sections 96 and 97 of the Constitution.

Section 96 - Participation of the Parliament in the national preparation of European Union matters

'The Parliament considers those proposals for acts, agreements and other measures which are to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament.

The Government shall, for the determination of the position of the Parliament, communicate a proposal referred to in paragraph (1) to the Parliament by a communication of the Government, without delay, after receiving notice of the proposal. The proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee. However, the Foreign Affairs Committee considers a proposal pertaining to foreign and security policy. Where necessary, the Grand Committee or the Foreign Affairs Committee may issue to the Government a statement on the proposal. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made by the Parliament.

The Government shall provide the appropriate Committees with information on the consideration of the matter in the European Union. The Grand Committee or the Foreign Affairs Committee shall also be informed of the position of the Government on the matter'.

Section 97 - Parliamentary right to receive information on international affairs

'The Foreign Affairs Committee of the Parliament shall receive from the Government, upon request and when otherwise necessary, reports of matters pertaining to foreign and security policy. Correspondingly, the Grand Committee of the Parliament shall receive reports on the preparation of other matters in the European Union. The Speaker's Council may decide on a report being taken up for debate in plenary session, during which, however, no decision is made by the Parliament.

The Prime Minister shall provide the Parliament or a Committee with information on matters to be dealt with in a European Council beforehand and without delay after a meeting of the Council. The same applies when amendments are being prepared to the treaties establishing the European Union.

The appropriate Committee of the Parliament may issue a statement to the Government on the basis of the reports or information referred to above'.

Nevertheless, while the Government is responsible for the national preparation of the decisions to be made in the EU, including the EU's common foreign and security policy under Section 93 (2) of the Constitution, the foreign policy of Finland is still directed by

[227] Ojanen, 2013.

the President, in co-operation with the Government in pursuance of Section 93 (1) of the Constitution. Tensions and power struggles have remained between presidents and governments/prime ministers, for instance on who should represent Finland in the European Council. Since the Lisbon Treaty and the changes to the European Council, the Constitutional Law Committee has insisted that the prime minister alone should represent Finland.

The 2012 constitutional reform confirmed the new distribution of powers between the President and the Government, including the role of the Prime Minister and further reducing presidential powers. Under the new Section 66, paragraph 2, the Prime Minister represents Finland in activities of the EU requiring the participation of the highest level of State. The new Section 58, paragraph 2 stipulates that, in case of disagreement between the President and the Government in the decision-making, the matter will be decided in accordance with the position adopted by the Parliament.

4.2.3. Status, effect and rank of EU law in the domestic legal order

The incorporation Act of the Accession Treaty (Act No 1540 of 1994) and the Constitution are silent on the issue of the domestic effects and status of EU law within the Finnish legal order. However, the prevailing view is that EU law enjoys, within the Finnish legal order, such legal effects and status as are prescribed by EU law itself and as interpreted by the CJEU. Yet, while direct effect and primacy are accepted in principle, there are only few cases where the courts have actually set aside Finnish legislation.

Occasionally, the constitutional requirement that the domestic standard of protection of constitutional and human rights is not compromised has limited the "maximal" implementation of EU law. Examples include the implementation of the Council Framework Decision of 13 June 2002 on combating terrorism and the implementation of the Framework Decision on the European arrest warrant. In both situations, the express starting point of the Government proposals was the necessity of taking account of the obligation to safeguard the observance of constitutional rights and international human rights in the implementation of the EU measures in question.[228] A number of additional changes and specifications in the bills were made by the Constitutional Law Committee in order to ensure the appropriate observance of constitutional rights and human rights.

4.2.4. Conditioning participation in EU integration

Substantive Limits

The idea that EU membership may, in the long run, threaten the Finnish level of fundamental rights protection has been prevalent since Finland joined in 1995. In this light, the constitutional bill of rights has been adapted in that same year. There are no landmark cases containing a sort of *controlimiti* position.[229] Yet, the Constitutional Law Committee has stated that the domestic implementation of EU law may not lower the national standard of constitutional rights protection and the implementation of EU measures should conform to the requirements originating in the domestic system for the protection of constitutional and human rights.[230] Indeed, the Constitutional Law Committee reviews implementing legislation in the same way as it reviews purely domestic legislation. In addition, the review of the Constitutional law Committee may also cover the constitutionality of proposals for EU secondary legislation in the course of the decision-making procedure.

[228] Ojanen, 2009
[229] For a definition of this term, please refer to the glossary (annex IV).
[230] Ojanen, 2009.

Procedural Limits

The main responsibility for the monitoring and preparation of EU affairs and for the definition of Finland's EU positions is vested in the Prime Minister's Office and the Ministries. The Ministry for Foreign Affairs is responsible for the definition of Finland's positions on topics pertaining to the Union's external relations, enlargement and EU law issues. Each ministry is responsible for the preparation of EU affairs in its own field and participates in the related decision-making in the Union's institutions.

Yet, the Finnish Parliament plays a very strong role in EU decision-making when compared to many other Member States. Parliament actively participates in the national stages of the EU decision-making procedures through the Grand Committee and other committees. The Government must consult Parliament on proposals discussed in the Union and must justify the Government's policy in EU matters. Thus, the transfer of powers to the EU institutions has been in a certain way compensated by granting the *eduskunta* the power to participate *ex ante*, in the preparation of national positions in debates at the EU institutions. The core provisions can be found in Chapter 8 of the Constitution, and more specifically in Sections 93.2, 96 and 97 of the Constitution.[231]

This role of Parliament is exemplified by the measures adopted in the context of the management of the economic crisis. They have been extensively discussed in Parliament, including also in its Committee on Constitutional Law. This demonstrates that the measures relating to the crisis were considered to have a constitutional dimension. The Constitutional Law Committee has considered the measures combating the euro crisis as matters belonging to Section 96 or 97, whether formally taken within the EU framework or not. It has thereby allocated the primary competence in these matters to the government under Section 93.2, but placing it under a strict obligation to report to the parliament in all matters falling under the competence of the latter. Because they already had been considered *ex ante* by the *eduskunta* in detail, the approval stage no longer raised significant problems.

4.3. FURTHER TREATY REFORM

4.3.1. Substantive reservations

Since 2012, the Constitution requires a two thirds majority of the votes cast in Parliament for the acceptance of international obligations 'if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body *that is of significance with regard to Finland's sovereignty*' (Section 94). The crucial question will be therefore whether the relevant Treaty does indeed fall under this category of treaties requiring a special majority. Yet, the Constitution does not mark off certain areas which could not be transferred.

Nevertheless, Section 94.3 of the Constitution does insist on democracy:

> 'An international obligation shall not endanger the democratic foundations of the Constitution.'

The sentence seems to suggest that there are indeed limits to what can be transferred to the EU.

The question of what limitations of sovereignty are constitutional and what constitutes a *significant* limitation of sovereignty has recently been considered in the context of the crisis management measures. Be it reluctantly, the Constitutional Law Committee has

[231] Leino and Salminen (2013), 457.

ultimately concluded that the European stability mechanisms, sometimes after some adjustments, are compatible with the Constitution. Participation in these mechanisms has not been understood as a significant limitation of sovereignty in terms of Sections 94.2 and 95.2 of the Constitution, even though they involve serious economic liabilities with potential consequences for a state's future democratic choices. In some matters, the Committee saw unanimous decision-making in the stability mechanisms as a precondition for compatibility with Finnish sovereignty and the Finnish Constitution.[232] The insistence on unanimous decision-making is to be seen as protecting Finnish sovereignty and the budgetary powers and legislative powers of the *eduskunta.* In the end, the transfer of powers to the European Stability Mechanism (ESM), and to the European Financial Stability Facility (EFSF), was not considered significant with regard to Finnish sovereignty. Thus, both international instruments were accepted in the *eduskunta* and brought into force nationally, in accordance with the ordinary legislative procedure pertaining to an act of parliament. If the ESM Treaty is to be amended in order to raise the ESM capital, the matter would – since it involves an amendment of an international agreement – need to be approved by the parliament on the basis of Section 94 of the Constitution.

4.3.2. Procedural hurdles for further integrations

As explained in the previous section, the Constitution requires a two thirds majority of the votes cast in Parliament for the acceptance of international obligations 'if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body *that is of significance with regard to Finland's sovereignty*' (Section 94). The crucial question will be therefore whether the relevant Treaty does indeed fall under this category of treaties requiring a special majority. Yet, the Constitution does not mark off certain areas which could not be transferred.

4.3.3. Overcoming the hurdles

Since the new Constitution was adopted in 2000, representing the results of a long process of piecemeal adjustments and constitutional debate, it has been amended several times. When the first amendment was prepared in 2005, the parliamentary Constitutional Law Committee drafted a number of amendment principles to guide amendment processes. These principles are: restrictiveness (everyday politics should not determine the need for constitutional amendments), correctness (the Constitution should in principle give an accurate picture of the constitutional reality), consensus (amendments should be thoroughly prepared, and be surrounded by broad discussion and consensus), and finally the principles concerning drafting: transparency and completeness.[233] In 2010, the 2000 Constitution was evaluated, and this led to the 2012 constitutional reform, which to a large extent concerned the European Union.

The normal procedure under Section 73 is the 1/2 + elections + 2/3 procedure (majority in Parliament, then elections and a two-third majority in the new Parliament). The fast track formula of 5/6 + 2/3 (five-sixth majority to declare urgency followed by a two-thirds majority to approve the amendment) is reserved for situations where a quick amendment is absolutely necessary. Both procedures require a high level of agreement among political forces in Parliament.[234] Yet, there is also the alternative of exceptive enactments, which allows deviating from the Constitution without amending it. Yet, the system is circumscribed in the new Constitution: is cannot be used for core features of the Constitution.

Constitutional amendments, like any other types of legislation as well as the approval of international Treaties, are subject to the *ex ante* review of the Constitutional Law

[232] Leino and Salminen (2013) 646.
[233] Suksi (2011), 98-101.
[234] Suksi (2011), 113.

Committee. Under Section 74 of the Constitution, it reviews the constitutionality of the proposed amendment, as well as their relation to international human rights treaties.

Experience over the past decades has shown that the EU has worked as a catalyst on the process of constitutional amendments, which suggests an open attitude to pressures from the EU and a willingness to adapt to the requirements of European integration.[235] Nevertheless, here too, any amendment will have to comply with the principles of restrictiveness, correctness, consensus, transparency and completeness.

Whether the new provision on the primacy of the Constitution will change the existing practices is not yet clear.

4.4. REFERENCES

J Husa (2011), *The Constitution of Finland. A Contextual Analysis* (Oxford, Hart Publishing, 2011).

P Leino and J Salminen (2013), 'The Euro Crisis and Its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?' (2013) *EUConst* 451-479.

Nousianen (2001) 'The Finnish System of Government: From a Mixed Constitution to Parliamentarism', available on the website of the government http://oikeusministerio.fi/material/attachments/om/toiminta/laitjalainvalmistelunkehittaminen/6HC1ymikp/Nousiainen_english.pdf

T Ojanen (2013), 'The EU at the Finnish Constitutional Arena' (2013) *Tijdschrift voor Constitutioneel Recht* 242-255.

T Ojanen (2013), 'Constitutional amendment in Finland' in Contiades, X. (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (London and New York: Routledge) 83-103.

T Ojanen (2009), 'From Constitutional Periphery toward the Center – Transformations of Judicial Review in Finland', 27 (2009) *Nordic Journal of Human Rights/ Nordisk Tidsskrift for Menneskerettigheter* 194-207

T Ojanen (2007), 'EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament' (Scandinavian studies in law, Stockholm) 203-225

M Suksi (2011), 'Finland', in D Oliver and C Fusaro, How Constitutions Change. A Comparative Study (Oxford, Hart Publishing) 87-114.

[235] According to Suksi (2011), at 114.

5. FRANCE*

5.1. GENERAL CONSTITUTIONAL FEATURES

France, one of the founding members of the EU, is under the Constitution of 4 October 1958 a decentralized republic with a semi-presidential system of government and a bicameral parliament. The parliament consists of the *Assemblée nationale*, whose members are directly elected for five years, and the *Sénat,* whose members are indirectly elected for six years. The *Assemblée* is politically and legislatively the most important of the two; in the legislative process, the *Sénat* can be outvoted and only the *Assemblée* can send the government home with a motion of no-confidence.[236] The relationship between the government and the parliament is strictly regulated by the Constitution (*parlementarisme rationalisé*); among other things, the government has a dominant position in the legislative process, which has been somewhat relaxed by the constitutional act of 23 July 2008.

Although the competence to determine and conduct 'the policy of the Nation' *de iure* belongs to the government, under the direction of the prime minister,[237] it is *de facto* the president of the republic who decides on it, at least on the whole. This is due to the fact that the President, whose formal constitutional competences are rather limited, is directly elected since 1962 (since 2002, for a five year term); his election is the main political event in France and the president is therefore the most important French politician. While the government is accountable to the *Assemblée nationale*, the president is not: he is only accountable to the French people. It is on the basis of these features that the French system of government is said to be semi-presidential.

The *Conseil Constitutionnel* is France's constitutional court. The Constitutional Council *inter alia* has the exclusive competence to review the constitutionality of treaties and acts of parliament. Regarding treaties, the review is preventive only. Prior to its approval or ratification, a treaty can be referred to the Council by the president of the republic, the prime minister, the presidents of the houses of parliament or, since 1992, (at least) 60 deputies or 60 senators.[238] Regarding acts of parliament, the review can take place either prior to (preventive review) or after (repressive review) the promulgation of the act by the president of the republic. The political authorities which can refer treaties can also refer acts of parliament to the Constitutional Council, prior to their promulgation by the president of the republic.[239] Since 2010 individual parties in court proceedings can allege that a promulgated act of parliament violates constitutional rights or freedoms (so called *question prioritaire de constitutionnalité)*. If the contested act is referred to the Constitutional Council by (one of) France's highest non-constitutional courts, the *Conseil d' Etat* or the *Cour de cassation*, either on their own initiative or after the act has been referred to these courts by lower courts, the Constitutional Council can review the compatibility of the act with the rights and freedoms concerned.[240]

When it comes to civil and penal cases, the non-constitutional courts comprise the courts of instance (*tribunal d'instance*), courts of appeal (*Cour d'appel*) and the *Cour de cassation.*

* Many thanks to François-Xavier Millet for his valuable comments.

[236] Resp. Art. 45(4) (3) and Art. 49 (2) jo. Art. 50 Constitution.

[237] Art. 20 Constitution.

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

[239] Art. 61(2) Constitution: '…Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.'

[240] Art. 61-1(1) Constitution: '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 *Conseil d'Etat* or by the *Cour de Cassation* to the Constitutional Council which shall rule within a determined period.'

The court of first instance in administrative case is the *tribunal administratif*, in second instance the *Cour administrative d'appel* and in last instance the *Conseil d'Etat.* The *Conseil d'Etat* is also the government's most important legal advisor and its advice on government bills is obligatory.[241]

Regarding the relationship between national and international law, France is monistic. Duly ratified or approved treaties have a supra-legislative and an infra-constitutional status: they prevail over acts of parliament,[242] but not over the Constitution.[243]

5.2. THE SITUATION UNDER THE CURRENT SYSTEM

5.2.1. Enabling Clauses – allowing for membership

The Treaty on the European Economic Community (EEC) of 1957 was signed, approved and ratified under the Constitution of 27 October 1946, i.e. the constitution of the Fourth French Republic. The 15th paragraph of the preamble of that Constitution expressed France's willingness to limit its sovereignty to the extent necessary for the organisation and the defense of peace;[244] Article 27 of the Constitution stipulated that treaties concerning international organisations had to be ratified by act of parliament. These provisions allowed for membership of the EEC under the 1946 Constitution.

Under the Constitution of 4 October 1958, there is a plethora of constitutional provisions which allow for what is now EU membership. In addition to general constitutional provisions allowing for membership of an international organisation, France has since 1992 a European Union clause, or, more precisely, a European Union chapter, in its Constitution.

The treaty regime under the 1958 Constitution is roughly similar to that of the 1946 Constitution. The preamble of the 1958 Constitution refers to the preamble of the 1946 Constitution and therewith to the latter's 15th paragraph; Article 53 of the 1958 Constitution stipulates that 'treaties or agreements relating to international organisation have to be approved by act of parliament'. In its (first) decision on the Treaty of Maastricht of 9 April 1992, the *Conseil constitutionnel* relied on these provisions for its basic assumption that respect for national sovereignty, as expressed in several constitutional provisions,[245] does not preclude France from belonging to 'a permanent international organisation enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States, subject to reciprocity'.[246] In the same decision, the Constitutional Council declined competence to adjudicate ratified treaties. The 14th paragraph of the preamble of the 1946 Constitution states that the 'French republic, loyal to its traditions, sticks to the rules of public international law'. Among these is the '*pacta sunt servanda*' rule. Reviewing ratified treaties against the Constitution would violate this rule.[247]

[241] Art. 39(2) Constitution.
[242] Art. 55 Constitution: 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'
[243] *Conseil constitutionnel* decision 2004-505 DC of 19 November 2004, par. 10; *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 8; *Conseil d'Etat* 30 October 1998 (Sarran) ; *Cour de cassation* 2 June 2000 (Fraisse).
[244] 'Sous réserve de reciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix.'
[245] In the Preamble to the 1958 Constitution, the French people declares its solemn attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of Human and Civic Rights of 1789, confirmed and complemented by the Preamble to the Constitution of 1946; Article 3 of the 1789 Declaration states that 'The principle of sovereignty lies primarily in the Nation'; the first paragraph of Article 3 of the 1958 Constitution provides that 'national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum'.
[246] *Conseil constitutionnel* decision 92-308 of 9 April 1992, par. 13.
[247] *Conseil constitutionnel* decision 92-308 DC of 9 April 1992, par. 7-8.

To enable parliamentary approval and ratification of the Treaty of Maastricht, which was initially declared unconstitutional, a new chapter was inserted in the Constitution. This chapter, which is currently chapter XV, was originally entitled 'Of the European Communities and the European Union', these days 'On the European Union'. The chapter originally consisted of four Articles. The first of these stated that 'France shall participate in the European Communities and the European Union, constituted by States which on the basis of the founding treaties have freely chosen to exercise some of their powers in common.'[248] In the next two Articles 88-2 and 88-3, France *expressis verbis* consented to those provisions of the Treaty of Maastricht which the Constitutional Council had declared unconstitutional. In Article 88-2, France expressed its consent to the transfers of competence necessary for the establishment of the economic and monetary union and the common rules on the crossing of the external borders of the Member States of the European Community; Article 88-3 authorised to give (passive and active) voting rights to non-French EU citizens residing in France at municipal elections. Finally Article 88-4 obliged the French government to submit certain draft Community acts to both houses of the French parliament at the moment they were submitted to the EU Council and authorized each house to adopt resolutions regarding these drafts.

This European chapter of the 1958 Constitution has been adapted several times, in 2003 to enable France to adopt legislation for the execution of European Arrest Warrants as foreseen by acts adopted by the EU institutions, and in 1999, 2005 and 2008 in the wake of the rulings of the *Conseil constitutionnel* on the Treaty of Amsterdam, the Treaty establishing a Constitution for Europe and the Treaty of Lisbon, all of which contained unconstitutional provisions.

Currently Article 88-1 reads:

> 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.

The European chapter further consists of six Articles. Articles 88-2 and 88-3 respectively authorise the execution of European arrest warrants and the attribution of voting rights to non-French European Union citizens for municipal elections. The remaining four Articles subject the approval of the accession of new states to the European Union in principle to a referendum (Article 88-5) and regulate the French parliament's participation rights in EU decision making, both at the national and at the European level (Articles 88-4, 88-6 and 88-7).

Since 2004, the *Conseil constitutionnel* underlines the specificity of the EU vis-à-vis other international organisations. In the decision on the European Constitutional Treaty, the Constitutional Council for the first time stated that the Constitution enables France to participate in the creation and development of a 'permanent *European organisation*' (instead of a 'permanent international organisation') and that with Article 88-1 'the constituent authority (…) enshrined the existence of a European Union legal system incorporated into the national legal order which is distinct from international law'.[249]

5.2.2. Adaptation of the constitutional framework to facilitate membership

In the decisions concerning the Treaty of Maastricht, the Treaty of Amsterdam, the European Constitutional Treaty and the Lisbon Treaty the *Conseil constitutionnel* declared several provisions to be unconstitutional. Each time France adapted its Constitution in order

[248] 'La République participe aux Communautés européennes et à l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences.'
[249] *Conseil constitutionnel* decision n° 2004-505 DC of 19 November 2004, par. 6 and 11; *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 7 and 9.

to be able to ratify these treaties. Moreover, on advice of the *Conseil d'Etat*, the Constitution was amended in order to be able to implement the European Arrest Warrant Framework Decision. In the following sections, the provisions necessitating constitutional amendment will be reviewed.

Adaptations of specific provisions

Voting rights for non-French EU citizens at local elections
The provisions in the Treaty of Maastricht concerning active and passive voting rights for EU citizens nationals of other Member States at municipal elections in France infringed Articles 3, 24 and 72 Constitution. Article 3 *inter alia* provides that

> National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum (…) All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute.

Article 24 states that the *Sénat* is elected by indirect suffrage and represents the territorial units of the Republic, among which the municipalities; and Article 72 (at that time) that

> the territorial units of the Republic … shall be self-governing through elected councils and in the manner provided by statute.

The *Conseil constitutionnel* deduced from these provisions that only French citizens were allowed to vote and stand as candidates at municipal elections. Giving these rights to non-French EU citizens would allow them (indirectly) to take part in the exercise of national sovereignty, because the senators are chosen *inter alia* by (representatives) of the municipal councillors.[250]

The Constitution was adapted by the insertion of Article 88-3:

> Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France. Such citizens shall neither hold the office of Mayor or Deputy Mayor nor participate in the designation of Senate electors or in the election of Senators. An Institutional Act passed in identical terms by the two Houses shall determine the manner of implementation of this article.

Single monetary policy and a single exchange-rate policy
The *Conseil constitutionnel* declared unconstitutional the provisions in the Treaty of Maastricht regarding the single monetary policy and the single exchange-rate policy, in other words regarding the future introduction of the Euro, because they deprived France of a competence in a field which is fundamental for the exercise of national sovereignty.[251] Article 133 TFEU, regarding the competence to take measures necessary for the use of the euro as the single currency, introduced by the Treaty of Lisbon, was declared unconstitutional for the same reason.[252]

Originally, a specific authorisation for the transfer of monetary competences was contained in Article 88-2 Constitution. Since the constitutional amendment required for the ratification of the Treaty of Lisbon, the authorisation is embodied in the general EU clause of Article 88-1 Constitution.

[250] *Conseil constitutionnel* decision 92-308 DC of 9 April 1992, par. 21-27.
[251] *Conseil constitutionnel* decision 92-308 DC of 9 April 1992, par. 21-27.
[252] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 21.

Area of Freedom, Security and Justice
In its decisions on the Treaty of Maastricht, the Treaty of Amsterdam, the European Constitutional Treaty and the Treaty of Lisbon, the *Conseil constitutionnel* declared unconstitutional a whole series of provisions regarding what is now called the Area of Freedom, Security and Justice. The reason was that they deprived France of some fundamental conditions for the exercise of national sovereignty by allowing for qualified majority voting in the Council, by giving the European Parliament (co-)decision-making competences or by depriving France of any power to act on its own initiative.[253] In the Treaty of Maastricht judgment, the decision concerned the competences regarding visas; in that on the Amsterdam Treaty, those regarding asylum, immigration and the crossing of the internal and external borders.[254] In the judgment on the Treaty of Lisbon, the decision concerned administrative measures with regard to capital movements and payments aimed at preventing and combating terrorism (Article 75 TFEU), the loss of the individual right of initiative of Member States in the fields of the former Third Pillar (Article 76 TFEU), borders checks and immigration (Articles 77 and 79(2)(d) TFEU), judicial cooperation in civil matters (Article 81 TFEU) and judicial cooperation in criminal matters (Articles 82, 83, 85, 86 to 89).

The Constitutional Council also declared the mere possibility of the introduction of qualified majority voting in Council or of the ordinary legislative procedure via passerelle clauses to be unconstitutional, in so far as it would affect fundamental conditions for the exercise of national sovereignty.[255] In the decision on the Treaty of Lisbon, the declaration of unconstitutionality concerned the general passerelle clause in Article 48(7) TEU and the special passerelle clause in Article 83(1)(3).

Specific authorisations for the transfer of competences in these fields were originally placed in Article 88-2 Constitution. Since the constitutional amendment required for the ratification of the Treaty of Lisbon, they are embodied in the general EU clause (Article 88-1 Constitution).

Common Foreign and Security Policy & International Agreements
The *Conseil constitutionnel* declared the (potential) introduction of qualified majority voting in the Council in the field of the CFSP under Article 31(2) and 31(3) TEU unconstitutional for (potentially) depriving France of fundamental conditions for the exercise of national sovereignty. The same was held for the competence of the Council to conclude agreements between the EU and third countries or other international organisations (mentioned in Article 218(6)(a)(v)TFEU) with qualified majority and with the consent of the European Parliament.[256]

There are no specific constitutional provisions allowing for the transfer of these competences; the authorisation for their transfer is embodied in the general EU clause of Article 88-1 Constitution.

Enhanced cooperation
The *Conseil constitutionnel* declared Article 329(1) TFEU, introduced by the Treaty of Lisbon, unconstitutional to the extent that a Council decision installing enhanced cooperation requires the consent of the European Parliament and thereby deprives France of a competence fundamental for the exercise of national sovereignty.[257]

There is no specific constitutional provision allowing for the transfer of this competence; the authorisation for the transfer is embodied in the general EU clause of Article 88-1 Constitution.

[253] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 20.
[254] *Conseil constitutionnel* decision 97-394 DC of 31 December 1997, par. 21-30.
[255] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 18-22.
[256] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 18-22.
[257] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 21.

Implementing the European Arrest Warrant Framework Decision
According to the *Conseil d'Etat*, in an advice solicited by the government, the implementation of the European Arrest Warrant Framework Decision in France would run counter to the principle that the French state has to refuse extradition if it is sought for '*infractions à caractère politique'* (political crimes). This principle is considered to be one of the 'fundamental principles recognised by the statutes of the Republic'; these principles have a constitutional rank on the basis of the preamble of the 1946 Constitution, to which the preamble of the 1958 Constitution refers.[258]

The Constitution was adapted by the insertion of Article 88-2 Constitution:

> Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union.

Adapting the constitutional framework and the functioning of the system
The principal aim of the 1958 Constitution was the restoration of the authority of the executive, among other things by limiting the prerogatives of the French parliament. In line with this, the *Conseil constitutionnel* in one of its earliest judgments ruled that the houses of parliament only have those competences the Constitution explicitly bestows on them and that they may only vote those motions which the Constitution explicitly foresees.[259] The competence of the houses to issue resolutions on draft EU acts was not inscribed in the Constitution. The wish, at the occasion of the approval of the Treaty of Maastricht in 1992, to cloak them with this competence therefore required a constitutional amendment. Similarly, the Constitution did not provide for parliamentary motions opposing simplified Treaty revisions under Article 48(7) TEU, or regarding compliance with the principle of subsidiarity in accordance with protocol 2 on the application of the principles of subsidiarity and proportionality. The Constitutional Council therefore declared the relevant provisions in the Lisbon Treaty unconstitutional.[260]

In the current (2008) version of the Constitution, Article 88-4 gives both the *Assemblée nationale* and the *Sénat* the right to adopt resolutions on draft EU acts.

> Article 88-4: The government shall lay before the National Assembly and the Senate drafts of European legislative acts as well as other drafts of or proposals for acts of the European Union as soon as they have been transmitted to the Council of the European Union.
>
> In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union Institution.
>
> A committee in charge of European affairs shall be set up in each parliamentary assembly.

Article 88-6 concerns subsidiarity review. Each house may issue reasoned opinions regarding the conformity of a draft legislative European act with the principle of subsidiarity (Article 88-6 Constitution). Furthermore, each house may institute an action before the Court of Justice of the EU against an adopted European legislative act for non-compliance with the principle of subsidiarity; the action will be referred to the Court by the

[258] Advice of the *Conseil d'Etat* 368-282 of 26 September 2002.
[259] *Conseil constitutionnel* decision 59-2 DC of 24 June 1959.
[260] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 29.

government.[261] An action must be brought in case at least 60 deputies, or respectively at least 60 senators, file a request thereto.[262]

> Article 88-6: The National Assembly or the Senate may issue a reasoned opinion as to the conformity of a draft proposal for a European Act with the principle of subsidiarity. Said opinion shall be addressed by the President of the House involved to the Presidents of the European Parliament, the Council of the European Union and the European Commission. The Government shall be informed of said opinion.
>
> Each House may institute proceedings before the Court of Justice of the European Union against a European Act for non-compliance with the principle of subsidiarity. Such proceedings shall be referred to the Court of Justice of the European Union by the Government.
>
> For the purpose of the foregoing, resolutions may be passed, even if Parliament is not in session, in the manner set down by the Rules of Procedure of each House for the tabling and discussion thereof.

Article 88-7 gives the French parliament the right to oppose simplified Treaty amendments under 48(7) TEU (general passerelle clause) or the use of the passerelle clause in Article 81(3)(3) TFEU, which provides that the national parliaments may veto a Commission proposal to make the ordinary legislative procedure applicable to decision concerning family law with cross-border implications. A parliamentary veto requires the passing of a motion in identical terms by the *Assemblée nationale* and the *Sénat.*

Article 88-7: Parliament may, by the passing of a motion in identical terms by the National Assembly and the Senate, oppose any modification of the rules governing the passing of Acts of the European Union in cases provided for under the simplified revision procedure for treaties or under judicial cooperation on civil matters, as set forth in the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on December 13, 2007.

5.2.3. Status, effect and rank of EU law in the domestic legal order

Article 88-1 of the Constitution provided, since 1992, that France participates in the EC and the EU. In 2004, the *Conseil constitutionnel* drew two important conclusions from this provision. The first is that with the provision 'the constituent authority (…) enshrined the existence of a European Union legal system incorporated into the national legal order which is distinct from international law'.[263] This implies not only that the Constitutional Council accepts the autonomy of the EU legal order vis-à-vis the international legal order and the national legal orders, but also that the EU legal order is incorporated in the French legal order. This as such is in line with the case law of the Court of Justice of the EU. However, in contrast to the Court of Justice, the Constitutional Council is of the opinion that this incorporation is due to French constitutional law, not to the autonomous strength of the EU legal order itself, as the Court of Justice has it.[264]

The second conclusion that the Constitutional Council drew from Article 88-1 is that it contains a constitutional duty (for French authorities) to implement EU directives in national law, save in exceptional cases, when French constitutional identity is at stake, as the Constitutional Council called it later (see *infra*).[265] The effects of the jurisprudence are

[261] Art. 88-6 Constitution.
[262] Art. 151-11 *Règlement Assemblée nationale;* Art. *73*nonies *Règlement Sénat.*
[263] *Conseil constitutionnel* decision n° 2004-505 DC of 19 November 2004, par. 6 and 11; *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 7 and 9.
[264] ECJ 15 July 1964, case 6/64 (Costa/ENEL).
[265] *Conseil constitutionnel* decision 2004-498 DC of 29 July 2004, par. 4; *Conseil constitutionnel* decision 2006-540 DC of 27 July 2006, par. 19. France's highest administrative court, the *Conseil d'Etat*, took a similar position in its *Arcelor* decision of 8 February 2007 (see *infra*). The *Tribunal des conflits,* the court resolving issues relating to the

threefold. First, acts implementing mandatory provisions of directives are not subject to a review of their compatibility with the Constitution (unless France's constitutional identity is at stake), as this would amount to an indirect review of the directive itself. Second, this jurisprudence gives directives *de facto* (or indirectly, on the basis of Article 88-1 Constitution) force of constitutional law: an implementing act contrary to the directive it intends to implement is unconstitutional. Third, the Constitutional Council accepts the primacy of application of EU law even on constitutional provisions, unless these are part of French constitutional identity.

Must the implementation or execution of other (primary or secondary) EU law also be considered as a constitutional duty on the basis of Article 88-1 Constitution? We may assume it does, for there is no good reason to distinguish between the implementation of a directive and the execution of other EU law.[266]

That EU law *de facto* may be said to have force of constitutional law in France does not mean that the *Conseil constitutionnel* is generally competent to review acts of parliament against EU law. In this respect the Council generally makes no distinction between EU law and other international treaty law. Treaties have supra-legislative status in the French legal order,[267] but the *Conseil constitutionnel* does not review acts of parliaments against treaty law. This is due to a difference in nature between constitutional review and treaty review. According to the Constitutional Council, decisions regarding the constitutionality of acts of parliament are 'unconditional and final, while the prevalence of treaties' over acts of parliament 'is relative and contingent, being restricted to the ambit of the treaty and subject to reciprocity, which itself depends on the behaviour of the signatory state or states and on the time at which it is to be assessed'.[268] This entails that an act of parliament which is inconsistent with a treaty is not for that reason also automatically unconstitutional. The insertion of Article 88-1 in the Constitution has not persuaded the Council to change its position. To the contrary, in a decision of 12 May 2010 the Council has strongly confirmed its incompetence and extended it to the new procedure under Article 61-1 of the Constitution (see *supra*).[269] It is, in general, for the non-constitutional French courts, i.e. the civil, penal and administrative courts, to ensure the primacy of European Union law, including secondary law, on acts of parliament.[270]

The Constitutional Council's incompetence to review acts of parliament against EU law is subject to three exceptions, the first two being more or less incidental, the third more general. The first exception concerns the rights of non-French EU citizens to vote and stand as a candidate at municipal elections. In the decision of 9 April 1992 on the Treaty of Maastricht, the Council declared the relevant Treaty provisions unconstitutional.[271] Subsequently, Article 88-3 was inserted in the Constitution (see *supra*). The provision stipulates that the rights shall be accorded to EU citizens residing in France 'in accordance with the terms of the Treaty on the European Union signed on 7 February 1992' as implemented by an organic act. In a decision of 20 May 1998, the *Conseil constitutionnel*

delineation of the jurisdiction of the administrative courts in relation to that of the ordinary (civil) courts and vice versa, based itself on Art. 88-1 to allow for a limited exception in favour of EU law to the rule that ordinary courts are not competent to rule on the legality of administrative acts (decision of 17 October 2011 (*SCEA du Chéneau c/Préfet de la Région Bretagne);* see Millet (2013), p. 137-138).

[266] Cp. Renoux and De Villiers, p. 872.

[267] Article 55 Constitution.

[268] *Conseil constitutionnel*, decision 74-54 DC of 15 January 1975, par. 4 and 5.

[269] *Conseil constitutionnel*, decision 2010-605 DC of 12 May 2010, par. 16: 'it is not incumbent upon the Constitutional Council, under a referral made pursuant to Article 61 or 61-1 of the Constitution, to review the compatibility of a statute with international and European commitments entered into by France. Thus, notwithstanding the reference on the Treaty signed in Lisbon on December 13th 2007, it is not its task to review the compatibility of a statute with the provisions of this Treaty. The referral for review of the compatibility of the impugned statute with international and European commitments entered into by France, in particular with the law of the European Union, should therefore be dismissed.'

[270] *Cour de Cassation* 24 May 1975 (Jacques Vabre); Conseil *d'Etat* 20 October 1989 (Nicolo). The *Conseil d'Etat* in its decision of 30 October 2009 (Mme Perreux*)* abandoned its long standing case law that EU directives cannot have direct effect; see on this Charpy (2010).

[271] *Conseil constitutionnel* decision 308-92 of 9 April 1992, par. 21-27.

tested the organic act concerned not only against the Constitution, but also against Article 8b of the Treaty instituting the European Community and Council Directive 94/80/EC of 19 December 1994.[272] It did so because 'Article 88-3 of the Constitution expressly subordinates the constitutionality of the institutional act to conformity with community rules'.[273] This exception is also applicable to potential amendments of the Directive referred to in the same decision. The second exception is essentially similar to the first and concerns European Arrest Warrants. To be able to execute them, France had to amend its Constitution, with Article 88-2 as a result. On the basis of this constitutional provision, the Constitutional Council will undoubtedly review acts of Parliament implementing EU acts relating to the European Warrant, if they are referred to.[274]

The third exception is of a more general nature. Since 27 July 2006, the Council itself checks whether the French parliament has complied with its constitutional duty - based on Article 88-1 Constitution - to implement directives, when the Council, on the basis of Article 61 Constitution, is asked to review the constitutionality of an act of parliament which specifically purports to implement a directive. The review exercised is however of a limited nature.

First, as already indicated, only acts with which the legislature intends to implement a (specific) directive will be reviewed against that directive; thus, this review does not imply a review of any act against any directive. Second, the time limit imposed on the *Conseil constitutionnel* for rulings under Article 61 Constitution (one month and, in urgent cases, only eight days!) according to the Constitutional Council itself makes it impossible to request a preliminary ruling of the Court of Justice of the European Union;[275] the Council therefore can only declare unconstitutional those provisions of the implementing act which are manifestly incompatible with the implemented directive. To bridge the resulting gap in the review of the compatibility of implementing acts with the directives they intend to implement, the *Conseil constitutionnel* has instructed ordinary courts to exercise this review, if need be with the help of the Court of Justice of the EU (preliminary procedure).[276]

5.2.4. Conditioning participation in EU integration

Substantive Limits

The theme of *ultra vires* review of secondary EU law is not developed in the case law of the French courts. In contrast, the issues of constitutional identity and fundamental rights review have been addressed, the first in the case law of the *Conseil constitutionnel,* the second in that of the *Conseil d'Etat,* France's top administrative court.

In a ruling of 10 May 2004, the *Conseil constitutionnel* stated that implementing EU directives is a constitutional duty, based on Article 88-1 Constitution, except when this runs counter to 'an express contrary provision of the Constitution'.[277] This exception to the primacy of application of EU directives even on constitutional provisions has been swapped by the *Conseil constitutionnel* for another in a ruling of 27 July 2006. In that ruling, the *Conseil* stated that 'the transposition of a Directive cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power

[272] Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.
[273] *Conseil constitutionnel* decision 98-400 DC of 20 May 1998, par. 4.
[274] Cp. *Conseil constitutionnel* decision 2013-314P QPC of 14 June 2013, par. 7; Millet (2014).
[275] Concerning *questions prioritaires de constitutionalité*, the Constitutional has three months to decide and in this context it may ask preliminary questions to the ECJ, see *Conseil constitutionnel* decision 2013-314P QPC of 4 April 2013.
[276] *Conseil constitutionnel* decision 2006-540 DC of 27 July 2006, par. 18 and 20; decision 2010-605 DC of 12 May 2010, par. 17 and 18. For an example of such a test and a declaration of unconstitutionality, see decision 2006-543 DC of 30 November 2006, par. 8 and 9.
[277] *Conseil constitutionnel* decision 2004-498 DC of 29 July 2004, par. 4.

consents thereto'.[278] This has been the Constitutional Council's position ever since. The Constitutional Council holds the view that this *réserve de constitutionnalité* is compatible with the rule of precedence of EU law and justified by the national identity clause (currently Article 4(2) TEU).[279] Does what holds for acts of parliament implementing directives also hold for other national acts, whatever their nature, executing other secondary EU law? In other words, may other French acts, including court judgments, giving effect to other secondary EU law infringe French constitutional identity, even if the constituent power has not consented to it? That would not be logical.[280]

So far, EU law which runs counter to French constitutional identity has not been identified and the notion has not been clarified, and intentionally so if we go by the present president of the Constitutional Council, Jean-Louis Debré.[281] The most important ruling on this issue still is the one of 29 July 2004 (Bioethics), which was given under the reign of the former 'express contrary provision of the Constitution' exception.[282] In that decision, the *Conseil constitutionnel* refused to test a provision in an Act of Parliament implementing a Community Directive against Article 11 of the Declaration of the Rights of Man and Citizens of 1789 (freedom of expression). The reason was that this freedom is also protected by Article 10 ECHR (and hence also in the EU legal order) and that it was therefore up to the Court of Justice of the EU to rule on potential intrusions on that freedom.[283] The idea behind the reasoning seems to have been that if a (constitutional) rule or principle is common to both legal orders, it does not belong to the French constitutional identity. In other words, in this view the French constitutional identity only includes those French constitutional rules and principles which are specific to France, i.e., those that are protected in the French legal order but *not* also in the EU's legal order. In this sense, the French constitutional identity is defined by the constitutional '*exception française'* in relation to the Union.[284] The principle of *laïcité*, the definition of the persons entitled to vote in French political elections, the prohibition to give specific rights to ethnic, linguistic and other minorities[285] and the definition of the criteria for access to public functions[286] have been offered as examples of this identity.[287] If indeed this is the way the *Conseil constitutionnel* interprets French constitutional identity, its scope is rather limited.

However, it has also been argued that, by swapping the notion of 'an express contrary provision of the Constitution' for that of French constitutional identity as an exception to applicability of EU law in France, the *Conseil constitutionnel* has actually widened the scope of the exception.[288] Camby, for instance, is of the opinion that French constitutional identity encompasses *inter alia* the 'fundamental principles recognised by the statutes of the

[278] *Conseil constitutionnel* decision 2006-540 DC of 27 July 2006, par 19; cp. Vranes, p. 546-548.
[279] *Conseil constitutionnel* decision 2005-505 DC of 19 November 2004, par. 13.
[280] Charpy (2007), p. 466.
[281] In foreword to Millet (2013), Debré wrote, referring to the notion of French constitutional identity, that 'le Conseil constitutionnel s'est toujours bien gardé d'en definir précisément le contenu' (The Constitutional Council has always carefully refrained to define its contents precisely'; p. XII).
[282] *Conseil constitutionnel* decision 2004-498 DC of 29 July 2004, par. 4.
[283] *Conseil constitutionne*l decision 2004-498 DC of 29 July 2004, par. 4-7. As is written in the 'official' *Commentaire* on the ruling in *Les Cahiers du Conseil constitutionnel* no. 17, p. 29: 'Les seules normes constitutionnelles opposables à la transposition d'une directive communautaire sont les dispositions expresses de la Constitution française et propres à cette dernière'.
[284] See on this also Mathieu, p. 675; Charpy (2007), p. 436; Renoux and De Villiers, p. 870; cp. also the 'official' Comment on the decision of 29 July 2004 in *Les Cahiers du Conseil constitutionnel* no.17, p. 28/29 .
[285] Derived from Art. 1 and 3 Constitution. Art. 1 Constitution (as far as relevant here): 'France shall be an indivisible, secular, democratic and social Republic'; Art. 3 Constitution: 'National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute.'
[286] Article 6 of the Declaration of 1789 : 'Tous les Citoyens (…) sont (…) admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents'.
[287] See the comment on the decision of 10 June 2004 in *Les Cahiers du Conseil constitutionnel* no. 17, p. 17 ; Mathieu, p. 186-187.
[288] Charpy (2007), p. 445-446.

Republic', the principles to which the notion of the 'republican form of government' in Article 89(5) Constitution refers, the principle of equality and the interdiction of capital punishment.[289]

France's highest administrative court, the *Conseil d'Etat*, seems to conceive the constitutional '*exception française*' more broadly than the Constitutional Council, at least when it comes to fundamental rights protection. In its decision in the *Arcelor* case of 8 February 2007, the *Conseil d'Etat* has followed the Constitutional Council in its interpretation according to which Article 88-1 Constitution entails a constitutional duty to implement directives. But according to the *Conseil d'Etat*, the non-applicability of secondary Union law may derive not only from the presence of a constitutional provision or principle specific to France, but also from a difference in intensity and/or scope of protection of a provision or principle which is found in both legal orders.[290] This means for instance that if a case falls within the scope of EU law and EU fundamental rights as interpreted by the Court of Justice of the EU offer no effective protection, the administrative court will have recourse to French constitutional law, insofar as it offers additional protection.[291]

An infringement of French constitutional identity has to be accepted if the French constituting power consents to it. If the *Conseil constitutionnel* encountered a directive violating French constitutional identity, the Constitution would need to be amended before the directive could be implemented. For the constitutional amendment procedure, see III.c. Of course, an alternative to a constitutional amendment is modification of the directive itself.

Procedural Limits

Since the constitutional amendment of 23 July 2008, the government transmits to the *Assemblée nationale* and the *Sénat* all draft acts which are submitted to the EU Council, at the moment they are submitted to the said Council.[292] The houses may pass 'European resolutions' on any document issued by an EU institution (Article 88-4 Constitution). If, within the prescribed time limit, a proposal for a resolution on a draft EU act is tabled in one of the houses of parliament, ministers have to make full use of any procedural means available to postpone the adoption by the EU council until the house concerned has voted on the proposal.[293] Adopted resolutions are not binding for the government, but need to be discussed in the inter-ministerial committee on Europe (*Comité interministériel sur l'Europe*).[294] This committee is presided by the prime minister and comprises further the ministers of foreign affairs, those of the economy and finances, of European affairs and other ministers depending on the agenda of the meeting.

---

[289] Camby (2009), p. 1222-1223; Cp. Chaltiel, p. 369; Burgorgue-Larsen, p. 160; Dubout; Millet (2013), p. 120 ff., according to whom French constitutional identity 'avant tout' is the heritage of the French Revolution and which finds its expression in the equality principle, the (French) conception of the separation of powers, the right to asylum and the principles concerning the law of extradition.

[290] Conseil d'Etat 8 February 2007 (Arcelor); 'il appartient au juge administratif, saisi d'un moyen tiré de la méconnaissance d'une disposition ou d'un principe de valeur constitutionnelle, de rechercher s'il existe une règle ou un principe général du droit communautaire qui, eu égard à sa nature et à sa portée, tel qu'il est interprété en l'état actuel de la jurisprudence du juge communautaire, garantit par son application l'effectivité du respect de la disposition ou du principe constitutionnel invoqué ; que, dans l'affirmative, il y a lieu pour le juge administratif, afin de s'assurer de la constitutionnalité du décret, de rechercher si la directive que ce décret transpose est conforme à cette règle ou à ce principe général du droit communautaire ; qu'il lui revient, en l'absence de difficulté sérieuse, d'écarter le moyen invoqué, ou, dans le cas contraire, de saisir la Cour de justice des Communautés européennes d'une question préjudicielle, dans les conditions prévues par l'article 234 du Traité instituant la Communauté européenne ; qu'en revanche, s'il n'existe pas de règle ou de principe général du droit communautaire garantissant l'effectivité du respect de la disposition ou du principe constitutionnel invoqué, il revient au juge administratif d'examiner directement la constitutionnalité des dispositions réglementaires contestées' ; see on this judgment, Chaltiel; Anne Levade (2007); Mayer, Lenski & Wendel.

[291] Here lies potential source of conflict with ECJ 26 February 2013, C-399-11, *Melloni.*

[292] Article 88-4 Constitution.

[293] Art. IV (1) of the *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen.*

[294] Art. IV (2) of the *Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen.*

5.3. FURTHER TREATY REFORM

5.3.1. Substantive reservations

Criteria for review of EU (amendment) treaties

Article 54 Constitution provides that 'If the Constitutional Council (…) has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.' According to the *Conseil constitutionnel*, an EU (amendment) treaty is unconstitutional in case it contains a clause which (1) runs counter to the Constitution, (2) calls into question constitutionally guaranteed rights and freedoms or (3) adversely affects the fundamental conditions for the exercise of national sovereignty.[295] The Council has used the same criteria to review the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (henceforth Fiscal Compact),[296] which as to the form is not part of the EU framework.

(1) EU Treaty provisions directly violating the Constitution have been scarce until now. Actually, the provisions in the Treaty of Maastricht concerning the active and passive voting right for EU citizens at municipal elections are the only examples: they infringed Articles 3, 24 and 72 Constitution.[297] As with the other criteria, it is very hard in general to indicate beforehand which constitutional provisions might form a barrier for further European integration: very much depends on the details of the treaty provisions and also on how they are interpreted by the Constitutional Council. Nevertheless, with the *a contrario* method of reasoning some potential future treaty provisions which would be directly contrary to the Constitution can be identified. The decision on the Fiscal Compact for instance entails that a treaty obligation to insert a balanced budget rule into the Constitution would be contrary to Articles 34 and 47 Constitution;[298] the same would be true for a treaty giving EU institutions the competence to prescribe which measures would have to be taken by France to correct a potential deviation from the balanced budget rules in EU law.[299]

(2) So far, the *Conseil constitutionnel* has found no EU Treaty provisions which were contrary to French fundamental rights. In its decision on the European Constitutional Treaty, the Constitutional Council reviewed the EU Charter of Fundamental Rights. However, the emphasis of the scrutiny was actually not so much on the question whether the Charter provides a sufficient level of protection, but on the issue whether France, under the Charter, would still be able to maintain traditional French restraints imposed on the exercise of fundamental rights in the name of other constitutional principles, such as the prohibition of group (or collective minority) rights, the *laicité* principle, and the protection of law and order and of national security.[300] In other words, the lens of the Constitutional Council was more focussed on the preservation of French sovereignty, or more precisely French constitutional identity, than on the level of fundamental rights protection as such. The Council declared the Charter provisions concerned in conformity with the Constitution on the basis of the assumption and on the condition that they would be interpreted in line with the French constitutional tradition (*conformités sous réserve)*.[301]

(3) The third criterion regarding the scrutiny of the constitutionality of EU (amendment) treaties concerns the fundamental conditions for the exercise of national sovereignty. This is quantitatively the most important criterion. The fundamental-conditions-for-the-exercise-of-national-sovereignty test is a two tier test. The first element of the test concerns the

[295] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 9.
[296] *Conseil constitutionnel* decision 2012-653 DC of 9 August 2012, par. 10-11.
[297] *Conseil constitutionnel* decision 92-308 DC of 9 April 1992, par. 21-27.
[298] *Conseil constitutionnel* decision 2012-653 DC of 9 August, par. 21.
[299] *Conseil constitutionnel* decision 2012-653 DC of 9 August, par. 25.
[300] *Conseil constitutionnel* decision 2004-505 DC of 19 November 2004, par. 14-22.
[301] Millet (2012), p. 256-261 (especially 259 ff.).

'quality' of the competences transferred: it concerns competences which are 'inherent in the exercise of national sovereignty'.[302] It concerns competences which historically form the nucleus, the core of national sovereignty:[303] foreign affairs and defense, home affairs and justice (including immigration, border controls, visa policy, judicial cooperation in civil and criminal matters) and monetary policy (see further under II.b.1). The transferral of these competences is not unconstitutional per se. That is only the case if they may be exercised at the level of the EU by the Council acting with qualified majority, if the European Parliament (or another independent EU institution) begets (co-)decision-making competences or if France is deprived of any power to act on its own initiative.[304] In short, the transfer of competences which are fundamental for the exercise of national sovereignty is unconstitutional only if France loses grip on the exercise of the competence. The duality of the test also explains why the *abandonment* of competences inherent in the exercise of national sovereignty, i.e. their transfer to an independent European institution such as the European System of Central Banks (ESCB, for monetary policy) or, potentially, the European Public Prosecutor's Office (prosecution of offences against the Union's financial interests) is *a fortiori* unconstitutional.[305]

The duality of the test further explains why, with the Treaties of Maastricht and Amsterdam, France could transfer competences fundamental for the exercise of national sovereignty in the fields of home affairs and justice to the Third Pillar of the EU, which was characterised by intergovernmental decision making, without constitutional amendments; and why the introduction in subsequent Treaties of the possibility of qualified majority voting of the Council or the applicability of the ordinary legislative procedure in these fields did require a constitutional amendment. The duality of the test further elucidates why the passerelle clauses in the Treaty of Lisbon required a prior constitutional amendment to the extent that they can make qualified majority voting or the ordinary legislative procedure applicable for the exercise of competences which are fundamental for national sovereignty. The *Conseil constitutionnel* is not competent to review the constitutionality of EU decisions which are not subjected to approval by the Member States according to their respective constitutional requirements, such as for instance simplified Treaty revision decisions under Article 48(7) TEU. Therefore the Constitutional Council declared the mere possibility of such decisions, if affecting fundamental conditions for the exercise of national sovereignty, unconstitutional. Besides Article 48(7) TEU, in the Treaty of Lisbon this concerned Article 31(3) TEU and Article 82(2)(d), Article 83(1)(3) and Article 8(3) TFEU.[306]

Relationship criteria for treaty review and French constitutional identity

The relationship between the criteria for the review of EU (amendment) treaties and French constitutional identity is not clear.[307] At least, one can say that a treaty which is contrary to French constitutional identity is for that reason also unconstitutional. But is a treaty which is unconstitutional also *per se* contrary to French constitutional identity? Not according to Millet. He argues that the notion of French constitutional identity has a more limited reach than that of the criteria for review of EU (amendment) treaties.[308] This is indeed arguably the case under the sway of the Constitutional Council's Bioethics ruling of 29 July 2004 (see *supra*). However, everything finally depends on the interpretation of the notions involved.

Limits to the transfers under the Constitution of 1958?

Transfers of competences which are fundamental for the exercise of national sovereignty require a constitutional amendment. Is there any (supra-)constitutional limit to the

[302] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 18.
[303] *Conseil constitutionnel* decision 92-308 DC, par. 49.
[304] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 20.
[305] *Resp. Conseil constitutionnel* decision 92-308 DC, par. 43; *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 19.
[306] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 23-25, 27.
[307] Cp. Camby (2009), p. 1222-1223.
[308] Millet (2013), p. 48.

possibility of constitutional authorisations for such transfers? Two closely related issues need to be discussed in this respect. The first concerns Article 89(5) Constitution, the second a possible distinction between transfers of *competences* affecting the exercise of national sovereignty and transfers of *sovereignty* itself.

Article 89-5 Constitution provides that 'The republican form of government shall not be the object of any amendment'. The notion 'republican form of government' can be interpreted extensively and it cannot be excluded that (several of) the principles which belong to French constitutional identity also fall under that notion.[309] However, although the Constitutional Council has emphasised that the constituent power has to respect the provision (as long as it exists), it has also made clear that the constituent power is sovereign and thus competent to amend or repeal the provision as it sees fit, if it wants to even implicitly.[310] Moreover, the Constitutional Council does not make a distinction between constitutional acts which are approved by referendum and those approved by *Congrès* (the joint meeting of both houses of parliament): the Council is not competent to review either.[311] In short, Article 89(5) cannot be considered to be a supra-constitutional provision *à la* Article 79(3) German Constitution, or in other words: the constituent power is sovereign in both its popular and its parliamentary manifestation.[312]

The second issue concerns the following. In the words of the *Conseil constitutionnel*, so far only competences which affect fundamental conditions for the exercise of national sovereignty have been transferred to the EU, not sovereignty (or a parcel of it) as such. That begs the question whether France, under the Constitution of 1958, would also be allowed to transfer sovereignty itself, or for instance, if that is not the same, the *Kompetenz-Kompetenz* (i.e. giving the EU the competence to decide on the scope of its competences)? The case law of the Constitutional Council gives no answer to this question. But even if the Council would indeed operate the aforementioned distinction, it is not clear what legal effect a potential transfer of sovereignty would entail. Would such a transfer call for the intervention of the sovereignty bearing entity itself, i.e. the people, and the adoption of a new constitution? Perhaps, but that doesn't fit with the current case law of the Council according to which, as we have seen, the constituent power is sovereign and in which no distinction is made between the constituent power in its popular and in its parliamentary manifestation.

5.3.2. Procedural hurdles for further integrations

(1)Treaties have to be approved by (a) parliament or (b) the people in a referendum. (2) If a treaty contains provisions contrary to the Constitution, prior to the approval the Constitution has to be amended. (3) In certain periods, a constitutional amendment procedure may not be initiated or continued.

---

[309] According to Camby (2009), p. 1223, the notion of French constitutional identity is larger than that of 'la forme républicaine des institutions'.

[310] *Conseil constitutionnel* decision 92-312 DC of 2 September 1992, par. 19 : 'Considérant que sous réserve, d'une part, des limitations touchant aux périodes au cours desquelles une révision de la Constitution ne peut pas être engagée ou poursuivie, qui résultent des articles 7, 16 et 89, alinéa 4, du texte constitutionnel et, d'autre part, du respect des prescriptions du cinquième alinéa de l'article 89 en vertu desquelles "la forme républicaine du gouvernement ne peut faire l'objet d'une révision", le pouvoir constituant est souverain ; qu'il lui est loisible d'abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu'il estime appropriée ; qu'ainsi rien ne s'oppose à ce qu'il introduise dans le texte de la Constitution des dispositions nouvelles qui, dans le cas qu'elles visent, dérogent à une règle ou à un principe de valeur constitutionnelle ; que cette dérogation peut être aussi bien expresse qu'implicite'.

[311] *Conseil constitutionnel* decision 2003-469 DC of 26 March 2003, para. 2-3: 'Considérant que l'article 61 de la Constitution donne au Conseil constitutionnel mission d'apprécier la conformité à la Constitution des lois organiques et, lorsqu'elles lui sont déférées dans les conditions fixées par cet article, des lois ordinaires ; que le Conseil constitutionnel ne tient ni de l'article 61, ni de l'article 89, ni d'aucune autre disposition de la Constitution le pouvoir de statuer sur une révision constitutionnelle'. In this case the constitutional amendment was adopted by the *Congrès*. In earlier case-law the CC already made clear that it has no power to rule on texts adopted by the people in a referendum; *Conseil constitutionnel* decision 62-20 DC of 6 November 1962; decision 92-313 DC of 23 September 1993; see further Camby (2003); Renoux and De Villiers, p. 897-898.

[312] See on this Reestman.

(1a) Article 53 of the Constitution provides that treaties or agreements pertaining to international organizations have to be approved by an act of parliament before they can be approved or ratified by the president of the republic. In combination with the 15th paragraph of the preamble of the Constitution of 1946 and Article 88-1 of the Constitution of 1958, this provision allows for (new) transfers of competences to the European Union (see *supra*). The procedure to be followed is also applicable to those EU decisions which have to be approved by the Member States according to their national constitutional requirements, such as the simplified revisions under Article 48(7) TEU.[313] Bills for acts approving treaties have to go through the ordinary legislative procedure.

(1b) Instead of by parliament, a bill approving a treaty may also be approved by referendum, on the basis of Article 11 Constitution, via two routes. First, the president of the republic has the competence to submit a treaty which affects 'the functioning of the institutions' to the popular vote. One of the conditions is that a request thereto shall have been made by the government or by the houses of parliament jointly, another that the treaty is not contrary to the Constitution.[314] This procedure has been used for the approval of the Treaty of Maastricht on 20 September 1992.

Secondly, since the constitutional amendment of 23 July 2008, one fifth of the members of parliament (at least 185 deputies and/or senators out of 925), supported by one tenth of the voters enrolled on the electoral lists, have the constitutional right to initiate a legislative referendum; this may also concern an act approving a treaty. If the combined parliamentary/societal initiative succeeds, the private members' bill which will be subjected to the popular vote first has to be 'examined' by the houses of parliament, and prior to that, by the Constitutional Council for review of its conformity with the Constitution.[315] If the houses of parliament have not 'examined' the bill within a period of six months from the date that it has received the support of one tenth of the voters,[316] the president shall put the bill to the referendum. This new constitutional provision gives the combined parliamentary and societal opposition the means to initiate a referendum on a treaty (not only to have it approved, but also to have it defeated).

Future EU accession treaties have to be submitted to referendum by the president of the republic.[317] However, the duty lapses if parliament, by the adoption of an identical motion in each house with a three-fifths majority of the votes cast, decides that the bill may be approved by the *Congrès* (the joint meeting of both houses) with the same majority (Article 88-5 Constitution).

(2) If the *Conseil constitutionnel* finds that a treaty holds a provision contrary to the Constitution, the treaty may not be approved by parliament or by the people until the Constitution is amended (and thus adapted to the treaty; respectively Article 54 and Article 11 Constitution). A treaty can be referred to the Council by the president of the republic, the prime minister, the presidents of (one of the) houses of parliament or, since 1992, by (at least) sixty deputies or sixty senators.[318]

It is constitutional practice in France that treaties whose constitutionality is seriously doubted are referred to the *Conseil constitutionnel* by the president of the republic. For instance, the Treaties of Maastricht, Amsterdam and Lisbon, and in 2004 the European Constitutional Treaty, have all been submitted to the Constitutional Council by the

[313] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 26.
[314] Article 11 Constitution.
[315] Article 2 of the *loi organique n° 2013-1114 du 6 décembre 2013 portant application de l'article 11 de la Constitution*.
[316] Idem, Article 9.
[317] The accession treaty of Croatia was excluded.
[318] On the basis of Art. 61 Constitution the same political authorities can also refer an act of parliament approving a treaty to the *Conseil constitutionnel.* In that case, the *Conseil* not only reviews the act, but also the underlying treaty. This in particular gave 60 deputies and 60 senators the possibility to challenge a treaty they originally lacked on the basis of Art. 54. This route has become obsolete since the constitutional amendment of 1992.

president. The submission of a treaty by one of the other competent authorities is very rare.[319] Referrals by the president are not a sign of opposition to the treaties concerned; to the opposite, most of these treaties were negotiated by the referring president himself. The exception is the Fiscal Compact, which was negotiated by Nicolas Sarkozy but referred to the Constitutional Council by François Hollande. But even that case is no exception to the rule that the referring president wants the treaty referred so that it may enter into force, if need be after a constitutional amendment.

(3) A constitutional amendment procedure may not be commenced or continued 'during the vacancy of the Presidency of the Republic or during the period between the declaration of the permanent incapacity of the President of the Republic and the election of his successor' (Article 7 *in fine* Constitution) and while 'the integrity of national territory is placed in jeopardy' (Article 89(4) Constitution). These provisions must be respected by the constituent power; however, the constituent power can amend or repeal these provisions (see further *supra*).[320]

5.3.3. Overcoming the hurdles

Article 89 Constitution, the only Article of Chapter XVI of the Constitution which is entitled 'On amendments of the Constitution', details the procedure for amending the Constitution. However, in 1962 the Constitution was amended via a different route, i.e. by a referendum based on Article 11 Constitution.

Amending the Constitution via Article 89 Constitution

According to Article 89 Constitution, both the president of the republic, on the basis of a proposal of the prime minister, and the members of parliament have the right to initiate constitutional amendments. The amendment procedure consists of two stages. Amendments first have to be accepted by the houses of parliament in identical terms. In the house in which the draft is (first) introduced at least six weeks have to expire between the moment of introduction and the plenary discussion, in the subsequent house at least four weeks, counted from the date of transmission. In the second stage, the amendment has to be approved by the people in a referendum if the proposal originated in parliament. In case the origin is governmental, the president may decide to have it approved by *Congrès* instead (the joint chambers of the houses of parliament) with a three-fifths majority of the votes cast.

> Article *89.* The President of the Republic, on the recommendation of the Prime Minister, and Members of Parliament alike shall have the right to initiate amendments to the Constitution.
>
> A Government or a Private Member's Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.
>
> However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.
>
> No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy.

[319] The Treaty of Amsterdam was referred to the CC by the president (Jacques Chirac) and the prime minister (Lionel Jospin) jointly.
[320] *Conseil constitutionnel* decision 92-312 DC of 2 September 1992, par. 19.

> The republican form of government shall not be the object of any amendment.

Amending the Constitution via Article 11

In 1962, the Constitution was amended by an act which was directly subjected to a referendum, i.e. without first having been accepted by parliament. The reform introduced the direct election of the president of the republic, to which the majority of *Sénat* of that time was adamantly opposed and which therefore could not overcome the first hurdle of the procedure under Article 89. The manoeuvre was based on Article 11 of the Constitution, which reads (as far as relevant here):

> The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the *Journal Officiel*, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.

The use of this provision to amend the Constitution has been condemned almost unanimously in constitutional literature. But although the provision has been revised in 1995 and 2008, the constituent power has not seized these opportunities to rule out the use of the provision for constitutional amendments in the future. This makes it possible to defend the position that, according to the constituent power, future constitutional amendments via Article 11 are not excluded. The Constitutional Council is not competent to review acts adopted by referendum.[321] However, in its Sarran judgment the *Conseil d'Etat* stated that only legislative referendums can be organized on the basis Article 11, no constitutional referendums.[322] Theoretically this opens up the possibility of review of an Article 11 amendment against treaty and EU law by the *Conseil d'Etat*.

5.4. REFERENCES

Laurence Burgorgue-Larsen, 'L'identité constitutionnelle en question(s)', in Laurence Burgorgue-Larsen (ed), *L''identité constitutionnelle saisie par les juges en Europe* (Editions Pedone 2011).

Jean-Pierre Camby, 'Supra-constitutionalité: la fin d'un mythe', *RDP* (2003) p. 671.

Jean Pierre Camby, 'Le Conseil constitutionnel, L'Europe, son droit et ses juges', *RDP* (2009) p. 1216.

Florence Chaltiel, 'Le Conseil d'Etat reconnaît la spécificité constitutionnelle du droit communautaire', *Revue Marché Commun* (2007), p. 335.

Chloé Charpy, 'The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the Conseil constitutionnel and the Conseil d'Etat', *EuConst* (2007) p. 436.

Chloé Charpy, 'Le statut constitutionnel du droit communautaire dans la jurisprudence (récente) du Conseil constitutionnel et du Conseil d'Etat', *RFDC* (2009) p. 621.

[321] *Conseil constitutionnel* decision 62-20 DC of 6 November 1962.

[322] *Conseil d'Etat* 30 October 1998 (Sarran): 'Considérant qu'il ressort de ces dispositions que seuls les référendums par lesquels le peuple français exerce sa souveraineté, soit en matière législative dans les cas prévus par l'article 11 de la Constitution, soit en matière constitutionnelle comme le prévoit l'article 89, sont soumis au contrôle du Conseil constitutionnel'.

Chloé Charpy, 'France. The *Conseil d'Etat* Abandons Its *Cohn Bendit* Case-Law; *Conseil d'Etat*, 30 October 2009, *Mme Perreux*', *Euconst* (2010) p. 123.

Edouard Dubout, '"Les règles ou principes inhérents à l'identité constitutionnelle de la France": une supra-constitutionnalité ?', RFDC 2010, p. 451.

Anne Levade, 'Le Palais-Royal aus prises avec la constitutionnalité des actes de transposition

des directives communautaires' and Xavier Magnon, 'La sanction de primauté de la Constitution sur le droit communautaire par le Conseil d'Etat, RFDA *(2007)*, p**

Franz C. Mayer, Edgar Lenski, Mattias Wendel, 'Der Vorrang des Europarechts in Frankreich – zugleich Anmerkung zur Entscheidung des französischen Conseil d'Etat von 8. Februar 2007 (Arcelor u.a.)', *Europarecht* (2008) p. 63.

Bertrand Mathieu, 'Les rapports normatifs entre le droit communautaire et le

droit national. Bilan et incertitudes relatifs aux évolutions récentes de la jurisprudence des juges constitutionnel et administratif français', *RFDC* (2007) p. 675.

François-Xavier Millet, 'The French Constitutional Council and the CJEU : Between Splendid Isolation, Communication and Forced Dialogue' in Monica Claes *et al.* (eds), *Constitutional Conversations in Europe* (Intersentia 2012), p. 251.

François-Xavier Millet, *L'Union européenne et l'identité constitutionnelle des Etats-Membres* (LGDJ 2013).

François-Xavier Millet, 'How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice', *CML Rev.* 2014 (forthcoming).

Jan-Herman Reestman, The Franco-German Constitutional Divide : Reflections on National and Constitutional Identity', *EuConst* (2009) p. 374.

Thierry S. Renoux and Michel de Villiers, *Code constitutionnel 2011* (Litec 2011).

Erich Vranes, 'Constitutional Foundations of, and Limitations to, EU Integration in France', *European Public Law* (2013) p. 525.

6. GERMANY*

6.1. GENERAL CONSTITUTIONAL FEATURES

The Federal Republic of Germany is one of the six original founders of the European Communities.

It has a parliamentary system of government. Its parliament is bicameral, and reflects the federal character of Germany. The *Bundestag* is the chamber directly elected on the basis of proportional representation, whereas the *Bundesrat* represents the *Länder* (states).

Germany has a single document constitution, embodied in the *Grundgesetz* (literally: Basic Law, hereinafter also referred to as GG).

The court system is dual in the sense that ordinary courts and administrative courts are separate. At the federal level, constitutional review is centralized in a specialized constitutional court, the *Bundesverfassungsgericht* (hereinafter: BVerfG), that holds the monopoly over issues of constitutionality; at the level of the *Länder* there are constitutional courts that have the power to review the compatibility of autonomous state law with the state constitution. The *Bundesverfassungsgericht* is competent to decide cases brought by political institutions and referred by ordinary or administrative courts, and also individuals have direct access to the constitutional court (*Verfassungsbeschwerde*) in case their rights are affected.

The relation between international law and national law has traditionally been along dualist lines.

6.2. THE SITUATION UNDER THE CURRENT SYSTEM

6.2.1. Enabling Clauses – allowing for membership

Two major constitutional clauses are of particular importance for Germany's membership of the European Union.

The Preamble of the Grundgesetz (1949) emphasizes Germany's dedication to act and promote world peace 'as an equal partner in a united Europe'.[323] Thus, constitutionally, Germany can be said to be dedicated to a united Europe.

Article 23 GG is the other core constitutional provision, to which we shall return in various sections. Its first paragraph reads:

> With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.
>
> To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.
>
> The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law,

* Many thanks to Mattias Wendel for his valuable comments.

[323] 'Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.'

> or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

This provision was introduced at the time of the conclusion of the Maastricht Treaty and was adopted prior to its approval by the German constitutional institutions; it entered into force on 25 December 1992. It is a specification of Article 24(1) GG which allows for the 'transfer of sovereign powers to international organizations'.

Article 23, first sentence, is clearly an enabling clause. Read together with the Preamble, it entails the objective for Germany to cooperate in the development of the European Union.[324] At the same time, the precise terms in which Article 23, first sentence, GG specifies the EU's commitment to 'democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and […] guarantees [of] a level of protection of basic rights essentially comparable to that afforded by this Basic Law' are ever so many conditions posed to EU membership.

Since Article 23 was inserted in its present form, the amendments to the EU treaties (i.e. the Amsterdam, Nice and Lisbon amendments) have been passed by an act of parliament under the procedural provisions of Article 79(2) and (3) GG for constitutional amendment, provisions to which Article 23(1) refers in its third sentence. That is to say that the amendment treaties – different from the original treaties for which such a requirement did not exist – are subject to adoption by two thirds of the members of the Bundestag and two thirds of the vote in the Bundesrat (Art. 79(2) GG) and that the 'eternity clause' (or *Ewigskeitsklausel*) of Article 79(3) GG applies, on the basis of which treaty amendments

> '… affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'

The applicability of the procedure under Article 79 (2), to which the third sentence of Article 23 GG refers, has not been without controversy as regards the treaties on accession of new Member States, the simplified amendment procedure and the ESM and Fiscal Compact treaties. The *Bundesrat* has taken the view that this procedure has to be followed in all cases, whereas the government and *Bundestag* have wanted to decide this on a case by case basis. The latter argue that accession of a new Member State does not alter the powers of the EU in relation to the Member States, whereas the organizational and institutional adaptations that are required by the accession do not amount to a structural reduction of the possibilities of direct influence by the Member States, and hence do not have the effect of changing the constitution.[325] So the mere fact that there is a conferral of powers to the EU in the sense of Article 23(1), second sentence, is not yet sufficient to trigger the procedure under Article 79(2) GG to which the third sentence refers.

As we shall see, the prevailing constitutional point of view reflected in the legislation (largely as a follow up to the BVerG's *Lissabon* judgment) has been that a whole range of mechanisms in the EU Treaties, from simplified treaty amendment to explicit and more specific bridging clauses as well as the flexibility clause, are considered a form of implicit treaty amendment that may involve a transfer of powers under Article 23(1) second sentence and may, as the case may be, also require a procedure under Article 79(2) GG as intended in Art. 23(1), third sentence, GG.

[324] Scholz, Maunz/Dürig/Scholz GG Art 23 (2009) Rn 5.

[325] See by way of example the respective views of the Bundestag and the German federal government on the accession of Croatia in Deutscher Bundestag, *Drucksache* 17/11872, pp. 99-100 and 101 respectively. The Bundesrat already with the accession of Austria, Finland and Sweden held this view, See Deutscher Bundestag, *Drucksache* 12/7977, p. 329. The respective views were canonized by the Bundesrat and federal government on the occasion of the accession of the ten member states in 2004, see *Durcksache* 15/1200.

The issue of the amendment of Article 136 TFEU under the simplified amendment procedure was disputed between government and Bundestag on one side and the Bundesrat on the other. The government held that the decision of the European Council of 25 March 2011 to amend Article 136 TFEU did not fall under Article 23 GG at all, whereas the Bundesrat held the contrary. The Bundestag held that it came within the remit of Article 23 GG, but not under the third sentence of Article 23(1) GG, so that there was no need of a qualified majority as stipulated in Article 79(2) GG[326].

The matter is also of some importance regarding treaties like the Fiscal Compact and ESM treaties[327], which are not strictly speaking within the usual boundaries of EU law. The act of parliament approving the ESM Treaty makes no reference to Article 23(1) GG but only to the general provision of treaty approval, whereas the act of parliament approving the Fiscal Compact states that it satisfies the requirements of Article 79(2) GG.[328]

As a matter of fact, in all cases, including the accession treaties, both houses approved the treaties and acts with a majority of more than two thirds of the vote.

We must conclude, therefore, that the substantive amendments of the EU Treaties have so far been considered to 'amend or supplement this Basic Law, or make such amendments or supplements possible' in the sense of Article 23(1) GG, third sentence, and have in a sense 'constitutional' status; but this does not apply necessarily to accession treaties and other treaties and acts.

6.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions
Article 28 of the Grundgesetz was amended in 1992 to make it possible for non-German EU citizens to vote and stand for election in county and municipal elections,[329] while in November 2000 an extra sentence was added to Article 16(2) of the Grundgesetz, so as to read:

> No German may be extradited to a foreign country. An act of parliament [*Gesetz*] may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

The act of 20 July 2006, *Europäische Haftbefehlsgesetz*,[330] further implements this provision of the *Grundgesetz* as regards the European Arrest Warrant.

Adapting the constitutional framework and the functioning of the system
The respect of federalism, already formulated in the first paragraph of Article 23 as a condition for Germany's membership of the EU, is further elaborated as to the relations between the *Bund* and the *Länder* and their respective powers in the context of EU law in the subsequent paragraphs.[331]

---

[326] Deutscher Bundestag, Drucksache 17/9047, p. 4.
[327] Bundesgesetzblatt 2012 II Nr. 28, 981 and 983.
[328] The BVerfG held that these treaties supplement EU law and hence are within the delimitation of the European Union as intended in Art. 23 GG.
[329] Art. 28(1), third sentence: 'In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law.'
[330] Bundesgesetzblatt I 1721; it replaces the earlier Act of 1994 which was declared unconstitutional by the BVerfG, BVerfGE 113, 273, according to which it was too broadly restricting the right of German nationals not to be extradited under Art. 16(2) GG.
[331] These read as follows:
(1a) The *Bundestag* and the *Bundesrat* shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The *Bundestag* is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the *Bundesrat*, exceptions from the first sentence of paragraph (2) of Article 42, and the first

Article 23 gives guarantees concerning the participation of both houses of parliament, the *Bundestag* and the *Bundesrat* (and through it, the *Länder*), in the decision-making in Germany on the position taken in the EU (paragraph 2). The *Bundestag* must constitutionally have the opportunity to give its views and formulate its position, while the federal government must 'take account of' them during the negotiations at the EU level.

Paragraph 4 guarantees parallelism in the participation of the *Bundesrat* in the federal decision-making process to what would have been the case, had the substance of that process concerned a comparable domestic matter. Insofar as, in an area within the exclusive competence of the Federation, the interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government must take the position of the *Bundesrat* into account, and must pay the greatest possible respect to its position if the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected, consistent with the responsibility of the Federation for the nation as a whole; in matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required (paragraph 5). Germany is represented in the EU institutions by a representative of the *Länder* designated by the *Bundesrat*, although acting in coordination with the federal government, when the decision to be taken concerns primarily their exclusive legislative powers as regards school education, culture or broadcasting (paragraph 6).

Further details are regulated by parliamentary legislation, notably the *Integrationsverantwortungsgesetz*,[332] and the *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (furthermore: *Zusammenarbeitsgesetz*),[333] which is a new version of the earlier Act based on Article 23 GG, adopted at the time of the approval of the Maastricht Treaty, which in its new form was urged by the *Bundesverfassungsgericht*, both in the Lisbon and ESM judgments. We return to these below.

---

sentence of paragraph (2) of Article 52, may be authorised for the exercise of the rights granted to the *Bundestag* and the *Bundesrat* under the contractual foundations of the European Union.
(2) The *Bundestag* and, through the *Bundesrat*, the *Länder* shall participate in matters concerning the European Union. The Federal Government shall keep the *Bundestag* and the *Bundesrat* informed, comprehensively and at the earliest possible time.
(3) Before participating in legislative acts of the European Union, the Federal Government shall provide the *Bundestag* with an opportunity to state its position. The Federal Government shall take the position of the *Bundestag* into account during the negotiations. Details shall be regulated by a law.
(4) The *Bundesrat* shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter, or insofar as the subject falls within the domestic competence of the *Länder*.
(5) Insofar as, in an area within the exclusive competence of the Federation, interests of the *Länder* are affected, and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the *Bundesrat* into account. To the extent that the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures are primarily affected, the position of the *Bundesrat* shall be given the greatest possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.
(6) When legislative powers exclusive to the *Länder* concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the *Länder* designated by the *Bundesrat*. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole.
(7) Details regarding paragraphs (4) to (6) of this Article shall be regulated by a law requiring the consent of the *Bundesrat*.

[332] Bundesgesetzblatt I, p. 3022

[333] A somewhat garbled version is published in English at http://www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/euzbbg.html. Note that the ESM-Finanzierungsgesetz applies to the decision-making under the ESM, in particular §§ 3 to 7.

6.2.3. Status, effect and rank of EU law in the domestic legal order

The function of Article 23 is not merely to legitimate EU membership but rather to open up the German legal order to the direct effect and priority of EU law.[334] This is nowadays also the effect of the adoption of the EU Treaties under Article 79(2) and (3) GG.

There is no doubt that the *Grundgesetz* is ultimately the source for the effect of EU law in the German legal order. The enabling clause, as indicated above, and the limits it poses to EU law confirm this. EU law has priority over conflicting national law on the basis of the *fiat* by the *Grundgesetz* of the transfer of power to the EU in Article 23(1). Yet, it has been the clear line in the case law of the *Bundesverfassungsgericht* that at least the core provisions and structural principles of the *Grundgesetz* overrule EU law, should it come the point of an overt conflict between these sets of norms. We elaborate this further in the next sections.

6.2.4. Conditioning participation in EU integration

Substantive Limits

Fundamental rights
In its famous case law on fundamental rights protection by EU law, which can safely be said to have triggered that protection at Union level, the *Bundesverfassungsgericht* initially held that 'as long as' (*solange*) European law did not provide an adequate protection as compared to the Grundgesetz, it would adjudicate relevant issues against the standard of the Grundgesetz (*Solange* I).[335] This judgment having triggered fundamental rights protection case law by the Court of Justice, the constitutional court's position was changed in its second *Solange* judgment, in as much as it held that it would no longer review European law against the standard of the *Grundgesetz* as long as that law generally ensures effective protection of fundamental rights which is substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as it generally safeguards the essential content of fundamental rights (*Solange* II).[336] After a reiteration of the possibility of review against the core of German fundamental rights standards in the *Maastricht Urteil*,[337] a final turn was taken in the so-called *Bananas judgment*, when the court held that fundamental rights complaints would be declared inadmissible from the outset if their grounds did not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has generally declined below the standard of fundamental rights required after the *Solange* II decision.[338] When that could be said to be the case and how that should be established is not fully clear.[339]

Ultra vires doctrine
The *Bundesverfassungsgericht* reserves the right to subject legal acts by European institutions and bodies to review to see that they remain within the limits of the sovereign powers granted to them or whether they break out beyond these limits. This position has been coined in the Maastricht judgment and was, somewhat similar to the Bananas judgment, turned into a more theoretical position in the so-called Honeywell judgment, where it held that *ultra vires* review only comes into play if there is an obvious overstepping of competencies by European institutions or bodies resulting in a structurally significant shift detrimental to the competencies of the Member States.[340]

[334] Von Heinegg 2013, Rn. 3-4.
[335] BVerfGE 37, 271.
[336] BVerfGE 73, 339.
[337] BVerfGE 89, 155.
[338] BVerfGE 102, 147.
[339] For some theory on this see e.g. Huber 2012.
[340] BVerfGE 126, 286.

Constitutional identity

German sovereign statehood is premised on the GG and a change into a component state of a federal Europe would be stepping out of the framework of the Grundgesetz and hence require a constituent act of the subject of the constitutional order, the German people as intended in Article 146 GG (see further below).[341] The assumption is that under the present EU Treaties, such a 'breaking out' of the present constitutional order is not actually at stake, as can be derived from both the Maastricht and Lisbon judgments of the *Bundesverfassungsgericht*. Primarily this point would need to be taken into consideration in the context of further integration beyond the present framework. At the same time, there can be no doubt that the limitations at stake when the framework of the EU Treaties is changed or amended are also to be observed in the further development within the framework of the Treaties as they presently stand.

The case law of the *Bundesverfassungsgericht* has been strongly premised on the idea that the Grundgesetz expresses the constitutional identity of the German state, and in particular the values described in Article 23(1) GG in combination with those of the 'eternity clause'.

The Lisbon judgment formulated a number of further specifications of the meaning of the principle of democracy. Thus, it demanded that there should be a significant scope for the national parliament in terms of its autonomous decision-making power with regard to a number of fields of state activity. These regard criminal law, disposing over the monopoly of the use of force by police and armed forces, fundamental decisions on public revenue and expenditure, the circumstances of life in a social state and important cultural issues such as family law, the school and educational system and the relations between the state and religious communities (see further below).

At the moment, the issue of control over public expenditure is of importance as regards the mechanisms designed in the course of the public debt crisis at EU level, notably the ESM Treaty (and to a lesser extent the Fiscal Compact). As this risks undermining the role of the budgetary powers of parliament, the *Bundesverfassungsgericht* has insisted on a significant role of the Bundestag in this field. These requirements have been codified in legislative fashion in the ESM *Finanzierungsgesetz* (furthermore also referred to as ESMFinG), in particular in §§ 3 through 7.

One notable further specification of an element of the constitutional identity of the *Grundgesetz* was the importance of the principle that individuals within the state cannot be under permanent observation by the state.[342] The BVerfG held: 'It is part of the constitutional identity of the Federal Republic of Germany that the citizens' enjoyment of freedom may not be totally recorded and registered, and the Federal Republic must endeavour to preserve this in European and international connections.' It as a consequence set further requirements on the blanket collection and retention of traffic data in the context of implementing EU legislation, thus avoiding reviewing the Data Retention Directive itself against German constitutional requirements.

Procedural Limits

The *Grundgesetz* stipulates in Article 23 that EU founding treaties and other treaties by which powers are transferred to the EU must be approved by an act under the procedure for the amendment of the *Grundgesetz* itself (Artt. 79(2 and 3) GG) if they constitute an implicit amendment of the constitution. That is to say that, in the latter case, they can only be approved by an act adopted by two thirds of the members of the *Bundestag* and two thirds of the vote in the *Bundesrat*, and the '*Ewigskeitsklausel'* applies (respect for federalism and the role of the *Länder* in legislation as well as Articles 1 and 20 GG).

[341] Art. 146 GG: 'This Basic Law [*Grundgesetz*], which is valid for the entire German people after the achievement of the unity and freedom of Germany, ceases to be valid on the day on which a Constitution [*Verfassung*] enters into force which has been adopted by a free decision of the German people.'
[342] BVerfG Data retention.

A number of procedural barriers are created in the *Integrationsverantwortungsgesetz*, and the *Zusammenarbeitsgesetz*.

The *Grundgesetz* provides in Article 23(3) that the Bundestag shall have the opportunity to express its position on legislative acts.[343] The *Zusammenarbeitsgesetz* provides further rules in its § 8, and specifies that, as regards legislative acts, '[b]efore the final decision, the Federal Government shall endeavour to reach agreement with the Bundestag' in cases in which the latter has expressed a position which on essential points cannot be made effective in the negotiations (§ 8(4)). As regards an opinion of the Bundestag in the case of the accession of a new Member State to the EU and amendments to the founding treaties, § 9(2) specifies that '[b]efore the final decision in the Council or in the European Council, the Federal Government is to reach agreement with the Bundestag'. These are not absolute obstacles for the government to come to an agreement at the EU level, because in both these cases it is provided that these 'provisions shall not prejudice the right of the Federal Government, in awareness of the Bundestag's opinion, to take divergent decisions for good reasons of foreign or integration policy'.

The *Integrationsverantwortungsgesetz* (IntVG) provides for more unconditional procedural limits, as follows.

- Approval must be given by an act of parliament in the sense of Article 23(1) GG, i.e. with the consent of the *Bundesrat*, and - if the third sentence of Art.23 GG applies - under the procedure for constitutional amendment acts (Art. 79(2) GG), for the following acts:
    - simplified treaty revisions under Artt. 48(6) second and third subparagraphs TEU (§2 IntVG);
    - international agreements concluded by the EU which require unanimity, association agreements, accession agreements as well as accession to the ECHR (Art. 218(8) second subparagraph TFEU) (§3(1) IntVG);
    - decisions on own resources of the EU (Art. 311(3) TFEU) (§3(1) IntVG);
    - decisions to create or strengthen citizenship rights in addition to those already provided for in Art. 20 TFEU (Art. 25(2) TFEU) (§3(2) IntVG);
    - approval of decisions for uniform rules on electing the European Parliament (Art. 223(1) second subparagraph TFEU) (§3(2) IntVG);
    - approval of provisions to confer jurisdiction on the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights (Art. 262 TFEU) (§3(2) IntVG);
    - decisions on the bridging clauses which provide for a switch from unanimity to qualified majority (Art. 48(7) first and second subparagraph TEU; 81(3) under (2) TFEU) (the act under Article 23(1) GG must precede the decision (§4(1) IntVG);
    - extension of the competence to define minimum elements of criminal offences and sanctions (the act under Article 23(1) GG must precede the decision) (83(1) third subparagraph TFEU) (§4(2) IntVG);
    - decisions on extending the power to introduce minimum requirements of criminal offences under Art. 83(1) sub (2), the extension of the powers of the European Public Prosecutor's Office under Art. 86 (4) TFEU and amendment of the Statute of the European Investment Bank contained in the relevant Treaty Protocol (Art. 308(3) TFEU) (the act must be prior to the decision) (§7 IntVG);
    - the extension of EU powers under the flexibility clause of Art. 352 TFEU (again a prior act under Art. 23(1) GG) (§8 IntVG).
    - In addition to approval given under the procedure for a constitutional amendment act, the German representative in the European Council must, previous to approving or abstaining from a vote in the European Council, have

[343] 'Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law.'

been backed by a decision of the Bundestag to that effect, (if there is not such decision of the Bundestag, the German representative must reject the proposal); this procedure concerns
- the decision to establish an EU common defence (Art. 42(2) TEU) (§3(3) IntVG).
- The Bundestag or the Bundesrat (the latter, unless it is a case of exclusive competence of the Federation) may decide that a European Council initiative under Art. 48(7), third subparagraph TEU and 81(3) third subparagraph TFEU – the 'general bridging clauses' – is to be rejected (§4 IntVG).
- Also the specific 'bridging clauses' (Artt. 31(3), 153(2) sub 4, 192(2) sub 2, 312(2) sub 2 and 333(1) TFEU) require a decision of the Bundestag and, in cases involving Länder competence, also the Bundesrat (§§ 5 and 6 IntVG).

The §§ 11 and 12 IntVG provide for rules to be made on parliamentary subsidiarity procedures and bringing a subsidiarity complaint to the Court of Justice, while § 13 IntVG provides detailed rules on the information of parliament by the government.

The *ESM Finanzierungsgesetz* (furthermore also referred to as ESMFinG) also provides in §§ 3 through 7 for rules guaranteeing and regulating the role of the *Bundestag* in decision-making concerning the ESM.

6.3. FURTHER TREATY REFORM

6.3.1. Substantive reservations

Article 23(1), first sentence, GG provides explicit conditions to which European integration in the context of the EU is subject. It stipulates that 'the Federal Republic of Germany shall participate in the development of the European Union that is committed to

- democratic, social and federal principles,
- the rule of law, and
- the principle of subsidiarity, and
- that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.'

These conditions bind the legislature in approving any further EU Treaties. Such approval, according to Article 23(1), third sentence, GG, must not only be adopted by qualified majorities if the adoption of the new EU treaties amount to an amendment (or the supplementing) of the German constitution, but is then also subject to the *Ewigkeitsklausel* of Article 79(3) GG, which reads:

> 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1[344] and 20[345] shall be inadmissible.'

This implies that human dignity and the core of human and fundamental rights, as well as democracy based on the will of the people and constitutionalism, are unchangeable by constitutional amendment.

[344] Article 1: '(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.'
[345] Article 20: ' (1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

There is, moreover, the presumption of statehood underlying these principles and the Grundgesetz as such on which the Grundgesetz is premised; sovereign statehood cannot be given up without giving up the Grundgesetz. Hence, the GG does not merely presume Germany's sovereign statehood: it guarantees it.[346]

The *Bundesverfassungsgericht* has held that '[t]he safeguarding of sovereignty, demanded by the principle of democracy … does not mean per se that a number of sovereign powers which can be determined from the outset or specific types of sovereign powers must remain in the hands of the state'.[347] Nevertheless, it found that there must be sufficient space to allow for politically shaping the economic, cultural and social circumstances of life. It was in this context that the *Bundesverfassungsgericht* specified the areas whose political shaping at the national level must remain possible in light of the principle of democracy. In the Court's opinion, for that principle to be meaningful, parliament's significant powers over substantial core state matters must be preserved, in particular as regards:

- the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights;
- political decisions that particularly depend on a previous understanding as regards culture, history and language and which unfold in discourses in a political public space that is organised by party politics and parliament;
- essential areas of 'democratic formative action' which comprise, inter alia,
    - citizenship,
    - the civil and the military monopoly on the use of force,
    - revenue and expenditure including external financing and
    - all elements of encroachment that are decisive for the realisation of fundamental rights, above all as regards intensive encroachments on fundamental rights such as
        - the deprivation of liberty in the administration of criminal law or the placement in an institution;
- cultural issues such as
    - the disposition of language,
    - the shaping of circumstances concerning the family and education,
    - the ordering of the freedom of opinion, of the press and of association
    - matters of the profession of faith or ideology.[348]

This leads to a distillation of five areas of state activity which must remain for the democratic decision-making within the Federal Republic of Germany:

> "[E]specially sensitive for the ability of a constitutional state to democratically shape itself are decisions
>
> [1.] on substantive and formal criminal law [i.e. procedural criminal law, ed.],
> [2.] on the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior,

[346] BVerfG, *Lissabon Urteil*, Rn 216: 'The principle of democracy is not amenable to weighing with other legal interests; it is inviolable[…]. The constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood, but guarantees it.'
[347] Lissabon Urteil, Rn 248.
[348] Lissabon Urteil, Rn 249 (the expressions reproduce the somewhat unidiomatic English translation of the judgment provided by the Bundesverfassungsgericht).

[3.] the fundamental fiscal decisions on public revenue and public expenditure, with the latter being particularly motivated, inter alia, by social-policy considerations,
[4.] decisions on the shaping of circumstances of life in a social state, and
[5.] decisions which are of particular importance culturally, for instance as regards family law, the school and education system and dealing with religious communities."[349]

More recently, the issue of the power of the purse of parliament has been at the centre of a number of judgments of the *Bundesverfassungsgericht*. In the judgment concerning the bail-out package for Greece and the euro rescue package of September 2011, the Court reaffirmed that parliament cannot give up its budgetary powers, as this is an essential element in the democratic decision-making and a fundamental part of the ability of autonomous self-determination in the constitutional state. As popular representatives, the elected members of the *Bundestag* must retain control over fundamental decisions of budgetary policy also in an intergovernmental system of governance. The Bundestag cannot transfer its budgetary responsibility by indeterminate budgetary policy authorizations on others. More specifically, it cannot hand itself over to mechanisms with a budgetary impact which would lead to unforeseeable and significant burdens for the budget without prior constitutive approval. No lasting mechanisms can be established which would lead to a taking over of liability for decisions which other states have taken, especially if this is accompanied by incalculable consequent effects. Every single support measure of solidarity with an impact on expenditures taken in the international or Union context of a larger size must be approved separately by the Bundestag. Moreover, there must be guarantees of sufficient parliamentary influence on the nature and manner of how the financial means are to be spent. The *Bundesverfassungsgericht* added that understanding the national budgetary autonomy as an essential and inalienable competence of national parliaments that are directly democratically legitimated is not in contrast with the EU Treaties: actually, the latter presuppose the former. The strict observance of that autonomy guarantees that EU measures have sufficient democratic legitimacy in Germany.[350]

In its judgment of 19 June 2012, the *Bundesverfassungsgericht* clarified the scope of the right of the Bundestag to be provided with information by the federal government (in this case, on the ESM and Fiscal Compact prior to their conclusion). It held that international treaties that complement European Union law or otherwise show particular proximity to European Union law are also matters concerning the European Union.[351] There is no single characteristic that is at the same time final and clearly delimited according to which it can be ascertained whether such proximity exists. What is important instead is an overall consideration of the circumstances, including planned contents, objectives and effects of legislation, which, depending on their weight, can prove decisive individually or in their combination. As regards the ESM, the Court held that the establishment and configuration of the European Stability Mechanism are a matter concerning the European Union within the meaning of Article 23(2) GG because in an overall perspective, the characteristics which define it show substantial connections with the integration programme of the European Treaties. For instance, the establishment of the European Stability Mechanism is to be safeguarded by amending the Treaty on the Functioning of the European Union. Furthermore, the treaty to be concluded for its establishment assigns to the institutions of the European Union, in particular to the European Commission and the Court of Justice of the European Union, new responsibilities concerning the identification, realization and monitoring of the financing program for Member States in need of assistance. Moreover, the European Stability Mechanism is to serve to complement and safeguard the economic and monetary policy, which has been assigned to the European Union as an exclusive responsibility. The fact that the European Stability Mechanism is to be established by way

[349] Lissabon Urteil, Rn 252, (translation provided by the BVerfG), further elaborated in Rn 253-260.
[350] BVerfGE 129, 124.
[351] BVerfG, 2 BvE 4/11 vom 19.6.2012, Absatz-Nr. (1 - 172).

of a separate international treaty outside the structure of Community law existing so far does not call into question its assignment to the integration programme laid down in the EU Treaties. Due to its being intertwined with supranational elements, the European Stability Mechanism is of a hybrid nature which makes it a matter concerning the European Union.

As to the Fiscal Compact, the Court held that due to its specific orientation towards the integration programme of the European Union, it is a matter concerning the European Union within the meaning of Article 23(2) sentence 1 GG. The Fiscal Compact is directed towards the Member States of the European Union; in view to its objectives of achieving a qualitative improvement of the economic policy and of the public budget situation and of strengthening financial stability, it is, with regard to its contents, oriented towards a policy area of the European Union which is laid down in the Treaties. European institutions participate in the realisation of the objectives of the Pact. The fact that the Pact operates for the most part with self-commitments of the participating Member States does not call into question its classification as a matter concerning the European Union. The Fiscal Compact affects important functions of the Bundestag. In particular, the commitments in areas within the legislative competence of the member states, such as for instance tax law and social law, and in which the legislature will in future be subjected to monitoring by institutions of the European Union, concern parliamentary responsibility and are liable to restrict the legislature's freedom of drafting. It was therefore required that the legislature should be informed at an early stage and comprehensively.

In regard to both Treaties the *Bundesverfassungsgericht* found that the government had failed to provide sufficient and timely information and had acted unconstitutionally. However, no further consequences were attached to this, although the EMSFinG now contains rules on the matter, further to this judgment.[352]

In its judgement of 12 September 2012 (on temporary injunctions as regards the ESM (and Fiscal Compact)), the Court rejected the applications. In its review in summary proceedings the Court affirmed the constitutionality of the law consenting to the ESM Treaty. But it made ratification subject to two conditions. Firstly, no provision of the treaty may be interpreted to justify higher payment obligations than the necessary €190 billion specified, without the consent of the German representative in the governing bodies of the ESM. In combination with the judgment of June 2012, this implies that there can be no increase in the liability of the Federal Republic without the renewed approval of the Bundestag. The second condition concerned the right of the Bundestag to be informed, and that in terms of international law the provisions concerning the inviolability of ESM documents and the professional confidentiality obligations of members of ESM bodies do not stand in the way of the *Bundestag* and the *Bundesrat* being comprehensively informed about ESM matters.

The same cases, in light of the ECB's Outright Monetary Transactions programme, are still pending in the main proceedings.

6.3.2. Procedural hurdles for further integrations

The procedural limits summed up above ('procedural limits' to the present stage of integration) also provide procedural hurdles for further integration. Further integration is particularly restricted by the need to approve decisions under the procedure for amending the *Grundgesetz*, which applies not only to amendment treaties but also to all decisions within the treaties as they stand which extend the powers, amend procedures and enable qualified majority where that does not yet exist. This need to apply the procedure for constitutional amendment flows from the interpretation of the principle of democracy and, flowing from that, the principle of specific conferral of powers and the respect for sovereign statehood under the *Grundgesetz*. In all these instances, the *Ewigkeitsklausel* of Article

[352] BVerfGE 131, 152.

79(3) GG must be respected. The identity of the liberal constitutional order is not at the disposal of those who hold the power to amend the Grundgesetz.[353]

6.3.3. Overcoming the hurdles

Overcoming procedural limits in the Constitution
The procedural limit involved in the approval of treaties, acts and measures under the procedure for amending the *Grundgesetz* is that of the qualified majority provided by Art. 79(2) GG. This provision is itself not part of the unchangeable provisions of the Grundgesetz, mentioned in Article 79(3) GG, and is therefore amenable to change. Though speculative, such an amendment might be either in terms of a general abolition of the qualified majorities for constitutional amendment, or in terms of a more limited abolition for reason of certain changes that might be necessitated by EU law.

Also the latter form of a more specified amendment would mean that, whenever the present rules prescribe the constitutional amendment procedure, these would procedurally be easier to pass, e.g. in the case of simplified treaty amendment, and the lesser forms of extending the scope of EU law (bridging clauses, emergency brakes etc.). This, however, might be objected to because the need to follow that procedure follows from the peremptory (and under the GG unchangeable) principle of democracy. In other words, the concern remains as to how to provide democratic legitimacy if one were to bypass (or more easily bypass) parliament.

Overcoming the substantive limits
Apart from the strictly procedural limit of Art. 79(2) GG, there is the more difficult hurdle of the eternity clause contained in Article 79(3) GG. As we shall see presently, the matter is conceptualized under German constitutional law in the terms coined around the French revolution concerning the distinction of *pouvoir constituant* and *pouvoir constitué*.

As the *Bundesverfassungsgericht* specified in the Lisbon judgment, the respect due to the *Ewigkeitsklausel* is binding on 'the constitution-amending power' ('*der* verfassungsändernde *Gesetzgeber*', sometimes referred to as *verfassungsgesetzgebende Gewalt*) as constituted power under Article 79 of the Grundgesetz and as such, the principles and rights protected by that clause cannot be amended. The power to amend the Grundgesetz under Article 79 GG cannot give an amendment a specific content that would infringe the principles and rights protected by the eternity clause (as they are elaborated in the case law of the BVerfG).

The BVerfG explicitly left it an open question whether the values protected by the clause also bind the original constitutional power under Article 146, the *Verfassungsgebende Gewalt*, *pouvoir constituant originaire*, "i.e. for the case that the German people, in free self-determination, but in a continuity of legality to the Basic Law's system of rule, gives itself a new constitution". Such binding force of these principles could be argued on the basis of the universality of the principles of dignity, freedom and equality.[354]

The answer to the as yet open question – whether the constituent power is bound to the unchangeable principles protected by the eternity clause – is decisive for the possibility or impossibility to overcome the existing substantive limits to further European integration.

The interpretation of Article 146 GG plays an important role in this. The literature is divided over this issue, which has been one of the most contested ones in German constitutional law.[355]

[353] Lissabon *Urteil*, Rn 216.
[354] Lissabon Urteil, Rn 217.
[355] For an overview, see Haug 2013.

Article 146 GG in its present phrasing reads:

> This Basic Law [*Grundgesetz*], which is valid for the entire German people after the achievement of the unity and freedom of Germany, ceases to be valid on the day on which a Constitution [*Verfassung*] enters into force which has been adopted by a free decision of the German people.[356]

Assuming the provision can at all be applied in practice, which is a reasonable assumption giving the new phrasing it received after the unification of Eastern and Western Germany, two different scenarios can be thought of.

In the first scenario, the transition of the constitutional order under the *Grundgesetz* into that under the new *Verfassung* is considered a legal continuity, precisely because Article 146 GG provides for such a transition. So this scenario is one of legal continuity, although it is marked by the distinction of passing from on constitutional order, that of the *Grundgesetz*, to another constitutional order, that of the new *Verfassung*. Under such a scenario it is perhaps arguable that the constituent power – *Verfassungsgeber* – is bound also to the values protected by the eternity clause. Even then, however, one could argue that it is part of the nature of that power, as distinct from the derived and constituted power under Art. 79 GG, to decide freely (in the words of Art. 146 GG, 'by a free decision'[357]) – that is to say, free from the assumptions, even the fundamental assumptions, underlying the GG. This, of course, does not mean that such a free constituent power would as a matter of fact not decide to adhere to (all or some of) the principles protected under Art. 79(3) GG. They might very well be opted for under present day circumstances, since the core of those principles are part of essential values shared by democratic states under the rule of law throughout Europe, which might also exert its influence in the constitutional moment to which Article 146 GG refers.

Another scenario is one in which a constituent power would not think in terms of acting in compliance with Article 146 GG. Also in this scenario, the process of creating a new constitutional order could be regulated by a norm such as Article 79(3) GG. Article 146 GG is unable to govern a truly original constituent power, precisely because of its very constitutional nature and the very originality of the constituent power. Arguably, Article 146 GG can do no more than signal a possibility of an original constituent power arising and taking the shape adumbrated in 146 GG. But this is merely declaratory of a fact which may (or may not) arise. It cannot legally exert normative power over the truly revolutionary situation that would occur. Again, under such circumstances it would be up to the constituent power to decide whether it would consider itself bound to respect the values and principles which at present are protected by Article 79(3) GG.

It deserves mention that the BVerfG in the Lisbon judgment pointed out that under the provisions of the *Grundgesetz* – 'Article 23(1) of the Basic Law in conjunction with the Preamble, Article 20, Article 79(3) and Article 146 of the Basic Law' – the European Union cannot claim to be an independent subject of legitimacy that autonomously establishes itself independently and without being of external derivation.[358] It is not entirely sure how

[356] 'Dieses Grundgesetz, das nach Vollendung der Einheit und Freiheit Deutschlands für das gesamte deutsche Volk gilt, verliert seine Gültigkeit an dem Tage, an dem eine Verfassung in Kraft tritt, die von dem deutschen Volke in freier Entscheidung beschlossen worden ist.'

[357] One should remember that, the original Grundgesetz was drawn up under circumstances of post-war occupation by the allied powers which limited the free constitutional decision-making considerably. This did not answer the ideals of original constitution-making inherited from French revolutionary thought, as articulated in particular by Sieyès.

[358] Lissabon Urteil, Rn 232: 'Nach Maßgabe der Integrationsermächtigung des Art. 23 Abs. 1 GG in Verbindung mit der Präambel, Art. 20, Art. 79 Abs. 3 und Art. 146 GG kann es für die europäische Unionsgewalt kein eigenständiges Legitimationssubjekt geben, das sich unabgeleitet von fremdem Willen und damit aus eigenem Recht gleichsam auf höherer Ebene verfassen könnte.' This is translated in the English version provided by the BVerG: 'In accordance with the powers granted with a view to European integration under Article 23.1 of the Basic Law in conjunction with the Preamble, Article 20, Article 79.3 and Article 146 of the Basic Law, there can be no

the string of Grundgesetz provisions is to be understood. In one reading, the emphasis is on Article 23(1) and the other provisions, notably Article 146 GG, come by way of contrast. The alleged impossibility of constituting a European Union on an independent legitimating subject (presumably a European *demos*) is then premised on Article 23(1) GG. If the string is understood as a coherent set which together lead to the impossibility for the EU to have an independent legitimating subject, then even Article 146 GG cannot provide the EU with an independent legitimating subject. Put differently, Article 146 defines the subject of the constituent power in terms of 'the German people', not from the point of view of some more broadly conceived subject. However the BVerfG has intended its remark, this raises doubts as to the potential of this provision to provide an independent legitimacy basis for the EU.

A new constitutional order (Verfassung) legitimating further integration beyond the confines of the Grundgesetz: a referendum on the European Union?
The necessity of passing to a new constitutional order would exist if European integration would go beyond the 'unchangeable' principles of democratic statehood under the *Grundgesetz*. This would be the case if further European integration would transgress the boundaries of the essential state functions that should be left to Germany in order for it to be a democratic state in a meaningful sense. This would be the case if, for instance, the budgetary and fiscal power of parliament would be emptied out significantly, but also if in any of the other four or five areas mentioned by the BVerfG in the Lisbon judgment, the autonomous decision-making power of the German parliament to democratically shape state activity would be significantly reduced. That would precisely be the point where Germany would cease to be a sovereign state and would become a component state within a larger federal state – and where the EU would turn from a federation of sovereign states (*Staatenbund*) into a federal state (*Bundesstaat*).

It is precisely here that Article 146 GG steps in, and suggests that that a new constitutional order is established – and the *Grundgesetz* simultaneously comes to an end – through 'a free decision of the German people'. It is not absolutely clear what that is, or should be.

A general assumption concerning the way in which Article 146 GG might find expression is through the means of a nationwide referendum (presumably combined with or followed by a constitutional assembly or convention).

> Note: Such a referendum under Art. 146 GG should not be confused with a referendum (*Abstimmung*) under Art. 20(2) GG[359]; the first is a referendum expressing a *pouvoir constituant*, the second a referendum as *pouvoir constitué.* Recently, in Germany a debate has been on-going on the introduction of a referendum to legitimate the EU, but this idea was not taken up in the coalition agreement of the new Merkel government.

On the basis of a reading of Article 146 GG as providing legal continuity by bridging the old order of the *Grundgesetz* and the order of a new *Verfassung*, but nevertheless signalling the change of identity of the constitutional orders[360], it has been suggested that this referendum must live up to criteria that can guarantee the 'freedom' of that constitutional decision[361]. Thus, Article 146 concerns a right to vote on the passing to a new constitutional order.

---

independent subject of legitimisation for the authority of the European Union which constitutes itself, so to speak, on a higher level, without being derived from an alien will, and thus out of its own right.'

[359] 'Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.' / 'All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.'

[360] Cf. Lissabon Urteil, Rn 179.

[361] Cf. BVerfGE 5, 85, KPD-Verbotsurteil, Bundesverfassungsgericht Urteil 17. August 1956, at pp. 131-132.

Also, it has been argued that this vote should only concern the question *whether* to pass to a new constitutional order, and that this vote should be organized by the *pouvoirs constitués* under the Grundgesetz, as the *pouvoir constituant* is, at the breaking point from one order to another, not yet able to prepare itself to act, and is rather expressing itself through that vote. Subsequently, a constitutional assembly should be elected (by the *pouvoir constitué* under the GG, but acting under Article 146 GG only) which should be charged with deciding on the future constitutional order. Thus, as has recently been proposed in the literature, it should be up to this constituent assembly to decide on the modalities of further popular vote on the proposed constitution.[362]

The latter set of proposals is premised on the idea that Article 146 GG can master in a legally binding manner the transition from one constitutional order to the next. One might as well argue that even on the basis of Article 146 GG it is unclear what should happen.

Thus, beyond assertions that the 'German people' under Article 149 GG is not the Germans in the sense of Article 116 GG but rather the 'German nation', it is unclear who would be qualified to exercise the vote, and whether the same conditions to the right to vote would exist as for normal elections under the GG. Such doubt is not far-fetched within present-day Europe: for instance, in the Scottish referendum on independence the age limit is lower than in regular elections and a residence requirement is applied. It is not self-evident what definition and delimitation of the right to vote would apply in case of such a constituent referendum.

To put it in more fundamental terms, the very notion of 'German people' is a conceptual representation, but exactly what is represented is uncertain. From other 'revolutionary' constitutional moments in which a European country passed from one constitutional order to another, we know that this has also been done without a popular vote but by a few men who claimed to represent the people (even in America). It is not certain at what point such representational action is legitimated by 'the people', nor what that 'people' is exactly. While this applies in 'revolutionary' circumstances, it might also apply in somewhat less chaotic circumstances: it is hard to determine which factual power constellation or institution might act in a manner that is outside the *pouvoir constitué* and act representatively for the German people, however conceived, and still acquire popular legitimacy over time. This, after all, was also how the *Grundgesetz* came about and became one of the strongest constitutions of Europe with constitutional institutions which enjoy a very high degree of popular legitimacy: the factual acceptance of a constitutional order after it has come about – regularly or irregularly, based on evolution or revolution – is what is decisive.

6.4. REFERENCES

Volker M. Haug, Über Partizipation zu einer postgrundgesetzlichen Verfassung: Zum Potential des Art. 146 GG im Licht der europäischen Integration. (2013) 138 *Archiv des öffentlichen Rechts*, 435.

Von Heinegg, 'Art. 23' in Epping/Hillgruber (Hrsg), Beck'scher Online-Kommentar GG, (C.H. Beck ny), <beck-online.beck.de>.

Peter Huber, *Die EU als Herausforderung für das Bundesverfassungsgericht* [Vortrag an der Humboldt-Universität zu Berlin am 26. April 2012], *Forum Constitutionis Europae*, FCE 2/12.

Rupert Scholz, ‚Artikel 23'in: Maunz/Dürig (eds), *Grundgesetz-Kommentar*, 69. Ergänzungslieferung (C.H. Beck Verlag 2013).

[362] Haug 2013, who proposes to limit the first popular vote to the 'if'-question, followed by the election of a constituent assembly etc..

7. HUNGARY*

7.1. GENERAL CONSTITUTIONAL FEATURES

On 1 January 2012, Hungary's (until recently the 'Republic of Hungary') new Fundamental Law, replacing the 1989 Constitution, entered into force. It has been amended several times since. The process of constitutional reform and adaptation has not yet come to a halt. Various elements of the amendment package have been severely criticised both in Hungary and abroad, and have been challenged before the constitutional court, or are under scrutiny by the EU institutions and the Venice Commission.[363] This has on occasions led to additional constitutional legislation, either to re-adjust the amendment or to confirm an amendment that had been quashed by the constitutional court.[364]

The 2012 Fundamental Law is the first newly adopted post-communist Hungarian Constitution. Unlike the other Central and Eastern European countries, Hungary did not, after the events of 1989, replace the existing 1949 communist constitution with an entirely new Constitution. Nevertheless, the 1949 Constitution was so thoroughly amended, that 'it is not misleading to call it the 1989 Constitution'.[365] The 2012 Fundamental Law, and the amendment package accompanying it, does change the previous constitution fundamentally. Nevertheless, with respect to EU membership, the Fundamental Law does not at first sight appear to change significantly the prevailing constitutional settlement under the 1989 Constitution, even if the Fundamental Law seems to express a preference for national sovereignty against further federalisation of the EU.[366]

Hungary is a republic, and a parliamentary democracy. The government is responsible to the unicameral National Assembly and derives its powers from the majority of voters. Members of the National Assembly are elected for four years. Hungary has a constitutional court, which has played an important role in the transition process, and which can be seen as one of the most powerful among its brethren in Europe. Part of the 2012 reform package consists of reducing the competences of the constitutional court and limiting its influence over the political life of the country.

Article 7(1) of the 1989 Constitution reflected a dualist conception of the relationship with international treaties.[367] Treaties had to be transformed into domestic law before they had effect nationally. While the Constitution was silent on the hierarchical relationship between national and international law, and despite the dualist tradition, the Hungarian legal order has traditionally been friendly towards international treaties.[368] The Constitutional Court in effect provided primacy to international treaties promulgated by statute over conflicting national law. In fact, in case of a conflict between a treaty promulgated by statute and a domestic statute or lower ranking norm, the Constitutional Court was obliged under Section 45(I) of the Constitutional Court Act to declare the domestic law null and void. This generous approach only applied with regard to treaties that were in conformity to the Constitution. The constitutionality of treaties could be reviewed *ex ante*, that is before their conclusion, while legislation could be reviewed *ex post*, so after the entry into force of that law and the treaty.[369]

---

* Many thanks to Pál Sonnevend for his valuable comments.

[363] The European Commission for Democracy through Law, an advisory body of the Council of Europe.

[364] See among many others Dani (2013); Tóth, GA (2012); Vincze, A and Varju, M (2012); Müller (2013) and see the reports of the Venice Commission on the new Fundamental Law, available on http://www.venice.coe.int/webforms/documents/?country=17&year=all

[365] Kiss (2012), p. 5.

[366] So Tóth (2012), p. XIII, and Bragyova (2012), p.335.

[367] 'The legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law'.

[368] Sonnevend (2012), p. 255.

[369] Sonnevend (2010), p. 253-254.

The Constitutional Court has declared provisions of international treaties unconstitutional.[370] A petition seeking a determination of the unconstitutionality of the Act promulgating the NATO Treaty was dismissed, following a review on the merits.[371] In another decision, the Court established that the conflict of a domestic legal norm with an international treaty had created an unconstitutional situation and called upon the legislature to eliminate the unconstitutionality.[372]

Article Q of the 2011 Fundamental Law is much clearer:

> (1) In order to establish and maintain peace and security and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
> (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.
> (3) Hungary accepts the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in rules of law.

Hungary joined the EU in 2004. Accession was preceded by a constitutional amendment on the instigation of the Constitutional Court.[373] A Europe provision was included in Article 2/A (see below). In addition, Article 79 was added to the Constitution, saying that

> 'A peremptory national referendum shall be held concerning the accession of the Republic of Hungary to the European Union under the conditions laid down in the accession treaty. The date of this referendum will be 12 April 2003. The question of the referendum shall read as follows: "Do you agree that the Republic of Hungary should become a member of the European Union?"'

Over 83% of the voters who participated (turnout of 45%) voted in favour of accession.

7.2. THE SITUATION UNDER THE CURRENT SYSTEM

7.2.1. Enabling Clauses – allowing for membership

In 2003, the 1989 Constitution was amended in order to prepare for accession and a Europe clause was inserted. Article 2/A read:

> Article 2/A [European Union]
> (1) The Republic of Hungary may, in its capacity as a Member State of the European Union, based on an international treaty, exercise certain constitutional powers emanating from the Constitution 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 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union.
> (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament.

Article 2/A thus created a legal basis for a certain limitation of constitutional competences. Establishing such legal basis in the Constitution was necessary since the Hungarian Constitutional Court had stated in 1998 that, without express constitutional authorization,

[370] 30/1998 (n 9) and Decision 8/2005 (III. 31.), judgment of 31 March 2005, I ABH [2005] 102
[371] Decision 5/2001 (II. 28.), judgment of 28 February 2001, ABH [2001] 86.
[372] Decision 54/2004 (XII. 13.), judgment of 13 December 2004, I ABH [2004] 690
[373] Decision 30/1998

EU norms could not be applied in Hungary.[374] According to Article 2 para. (1) of the Constitution, the Republic of Hungary was an 'independent democratic state under the rule of law', while under Article 2 para. (2) 'in the Republic of Hungary all power belongs to the people, who exercise popular sovereignty through their elected representatives as well as directly'. The Court held that the requirement of democratic legitimacy based on popular sovereignty and on being a democratic state under the rule of law implied the requirement that the adoption of norms to be applied in Hungary could be traced back to the absolute source of sovereignty, and must be based on democratic legitimacy.

Hence, Article 2/A was inserted with the Act 2002:LXI.[375] According to the *travaux préparatoires*, there were two limitations to the authorisation: a joint exercise of competences (together with other EU Member States) was possible only as far as the fulfilment of rights and obligations deriving from the Founding Treaties demanded it; and the authorization regarded only specific (not all) state competences flowing from the Constitution. Consequently, the Hungarian Parliament could not transfer more powers to the EU than those necessary to reach the objectives of the Founding Treaties; and it was impossible to transfer the entirety of constitutional competences since this would lead to the disappearance of Hungarian state sovereignty. The provision was vague and ambiguous and avoided terms suggesting that the Republic could actually transfer ('surrender' or 'convey') its constitutional competencies. The final wording did not allow 'transfer' as such, and addressed only the forms of exercise of certain constitutional competencies.[376]

Article 2/A contained two limits to the effect of EU law. The first relates to the protection of fundamental rights as guaranteed by the Constitution: since the Constitution only allowed for the exercise in common of 'powers emanating from the Constitution', the Union was subject to the same conditions and constitutional limitations as the Hungarian authorities. Secondly, as regards the scope of competences transferred, Article 2/A stated that only 'certain' powers could be transferred, and exercised jointly, and this only 'to the extent necessary in connection with the rights and obligations conferred by the treaties'. This suggests that *ultra vires* acts were not covered by the integration clause. The clause was drafted in a manner that made it 'sufficiently ambiguous and foggy to make possible a constitutional interpretation reasonably acceptable to a wide circle of Hungarians and satisfy at the same time the Union'.[377]

In addition, Article 6(4) of the Constitution expressed the constitutional commitment to European integration:

> 'The Republic of Hungary contributes to achieve European unity in order to realize the liberty, the well-being and the security of the European people.'

The Constitutional Court has interpreted the provision as imposing an obligation on the Hungarian State, namely, that the Government should participate in the European Union and other regional organizations for the purpose of promoting human rights, prosperity and security in Europe. It added that Government and Parliament, when exercising their competences in European matters, must ensure that this paramount aim is fulfilled. However, no further use has been made of the statement.[378]

[374] HCC, decision 30/1998, where the Court essentially ruled that enabling the EU to make law with effect for Hungary before accession was unconstitutional. The argument used was democratic legitimacy, also referring to the Maastricht Judgment of the BVerfG.
[375] Act 2002:LXI also amended other constitutional norms: the electoral system (relating to the European elections and local elections under the EU Treaties), the measures on the relations between Parliament and Government on EU matters and the provisions on the Hungarian Central Bank relating to the EMU. The act stipulated a mandatory referendum on EU accession and defined its exact date (12 April 2003).
[376] Sajo (2004).
[377] So Brgyova (2012), p. 336.
[378] Varju and Fazekas, 2011

These provisions were crucial when a petitioner challenged the constitutionality of the Lisbon Treaty, arguing that it jeopardized the existence of the Republic of Hungary as an independent, sovereign State, governed by the rule of law. The Court held that the Europe clause could not be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance. The Constitutional Court emphasized that material and procedural rules were duly observed during the adoption of the Act of promulgation and the Parliament gave its consent to the content of the Lisbon Treaty on its free will. It came to the conclusion that even if the reforms of the Lisbon Treaty were of paramount importance, they did not change the situation that Hungary maintains and enjoys her independence, her rule of law character and her sovereignty. Consequently, the application was rejected in all its elements.

The decision suggests that there is a core of national sovereignty that cannot be affected by European integration without infringing the principles of the democratic state under the rule of law and popular sovereignty as proclaimed in Article 2 of the Constitution.[379] In other words, by enacting Article 2/A of the Constitution, the constitutional legislature has complied with the requirement derived from the principle of popular sovereignty that, in order to be applied to Hungarian subjects, all public law measures must be based on democratic legitimacy. At the same time, the effects of Article 2/A cannot compromise the principles of popular and State sovereignty and the democratic State under the rule of law as laid down in Article 2(1) and (2) of the Constitution.[380]

With respect to the independence of Hungary, the Court declared that the Lisbon Treaty does not bring about the creation of a European super-State that would replace the union of sovereign States established under the previous Treaties. Hence, there was no violation of the Constitution.

It is important to note that the Court called on the government and the president to use their powers under the Constitutional Court Act to apply for *ex ante* treaty review in future cases. Such procedure would not pose the court before the problem that a finding of unconstitutionality would be moot in practice, since it would not affect the binding nature of the Treaty under international law.

The new 2011 Fundamental Law contains a Europe clause in its Chapter entitled 'Foundation', which is essentially only slightly different from the provisions in the 1989 Constitution:

> Article E
>
> (1) In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity.
>
> (2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties.
>
> (3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2).
>
> (4) The 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.

The Fundamental Law hence contains a generous declaration of commitment of the Hungarian State to European unity (which presumably covers also the European Union).[381] This commitment can also be found in the preamble to the new Fundamental Law, the

[379] Tatham (2013), p. 202.
[380] Varju and Fazekas (2011), p. 1954.
[381] This is in essence the old Article 6(4) of the Constitution.

National Avowal of Faith.[382] The latter mentions Europe several times. Nevertheless, there seems to be a tension between the openness to Europe in these phrases, and the more national-State centred constitutional philosophy which is reflected in the Avowal.[383] Moreover, the references to the supra-national character of the European Union (exercising the competences transferred independently or separately from the Member States), which was originally included in Art. 2/A, has been omitted, though the essence of the construction has been maintained.[384]

It is not yet clear what is precisely the meaning of the third paragraph (The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2)), which may seem to subject EU law to national constitutional conditions, and can be construed as empowering Hungarian bodies, including the Constitutional Court, to review whether EU law is *intra vires* and complies with the Hungarian Fundamental Law.[385]

7.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions
In addition to the provision allowing for membership itself, the Constitution has also been adapted in order to solve concrete conflicts with EU law.

Article XXIII (2) of the Fundamental Law states that 'Every adult citizen of another Member State of the European Union who is a resident of Hungary shall have the right to vote and to stand as a candidate in elections of local government representatives and mayors, and of Members of the European Parliament'.[386] This brings the constitution in line with the requirements of EU law.

In 2007, at the occasion of the approval of the Treaty of Lisbon, the Constitution was amended to pave the way for the principle of mutual recognition in criminal matters. The adaptation was also taken over in the new Fundamental Law and now reads: 'Article XXVIII (4). No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union'.

A number of other provisions were also adapted to the realities of European integration, reflecting the division of powers and competences in the context of EU membership. They mainly concern the inclusion of European elections in the provisions on elections and electoral rights (Art. 8(3), c; Art. 9 (3), e). Additionally, several provisions regulate the relations between parliament, government and the president in European matters. They are included in the following section.

Adapting the constitutional framework and the functioning of the system
Under Article 19,

> 'Parliament may ask the Government for information on its position to be adopted in the decision-making process of the European Union's institutions operating with the Government's participation, and may express its position about the draft on the agenda in the procedure. In the European Union's decision-making process, the Government shall take Parliament's position into consideration'.

[382] 'We are proud that one thousand years ago our king, Saint Stephen, built the Hungarian State on solid foundations, and made our country a part of Christian Europe'; We are proud that our people have fought in defence of Europe over the centuries and, through their talent and industry, have enriched Europe's common values; 'We believe that our national culture is a rich contribution to the diversity of European unity'.
[383] So e.g. Bragyova (2012), at 350-351.
[384] Bragyova (2012), p. 337.
[385] Bragyova (2012), p. 353.
[386] This is taken over from Article 70 of the 1989 Constitution, as adapted to the conditions of accession.

Contrary to what has been accepted in other Member States, the implementation of EU law is not considered a constitutional obligation. In case 1053/E/2005, the petitioner had requested that the Court establish unconstitutionality by omission since – according to the petitioner – Parliament had failed to fulfil its obligation to legislate stemming from the EC Treaty; thus, it had violated Article 2/A of the Constitution, as well as the principle of legal certainty that may be derived from Article 2(1).[387] The petition was rejected by the Court, since in the absence of substantive unconstitutionality, a failure to legislate could not lead to an unconstitutional situation solely on the ground of Article 2(1); further, no concrete obligation to legislate flows from Article 2/A of the Constitution.

7.2.3. Status, effect and rank of EU law in the domestic legal order

The constitutional amendments adopted before accession deliberately avoided taking a position on the 'supremacy' or 'primacy' of EU law.[388] The government's original draft of the Europe clause did not address the question, but its official explanation did accept that national courts must give preference to EU law over domestic law. The opposition in the Hungarian Parliament, as well as a former Prime Minister (in various speeches outside Parliament), argued that a European supremacy clause in the Constitution would undermine the Hungarian Constitution and relevant laws. Given the need for a two-thirds majority to amend the Constitution, it was politically impossible to include primacy in the text of the Constitution.[389] The Constitution, hence, did not mention primacy nor did it not explicitly shield European law from constitutional review by the Hungarian constitutional court. The question of the effect and authority of EU law in the Hungarian legal order has hence been tackled by the courts.

The *Supreme Court* has accepted that, by virtue of Article 2/A of the Constitution (the Europe clause) and of the Treaty of Accession, EU law forms part of the Hungarian legal order. The Treaty established the obligation for Hungary to apply EU law, in harmony with the relevant case law of the CJEU and as required under former Article 10 EC. The general position of domestic courts was made clear in a judgment where the Supreme Court ruled that domestic courts are the ordinary courts of EU law.[390] The principles of direct effect and primacy, as a result of the efforts of the Supreme Court, now form part of Hungarian judicial practice.

The *Constitutional Court* has stated that Article 2/A 'defines the conditions and the framework of the membership of the Republic of Hungary in the European Union, and the status of Community law in the system of the sources of Hungarian law'.[391] As explained before, the core of the problem is that the Hungarian Constitution does not *expressis verbis* provide for EU law or its application; it only lays down procedural rules for the approval of EU Treaties. However, the hierarchy of EU law and domestic law cannot be derived from these procedural rules.

In Decision No. 61/B/2005, the Court further explained: *'The purpose of including this provision into the Constitution was to establish the conditions and the framework of the participation of the Republic of Hungary in the European Union. The cited provision of the Constitution authorizes the Republic of Hungary to conclude an international treaty under which certain of its competences deriving from the Constitution may be exercised jointly with the other Member States of the European Union and the joint exercise of competences be implemented through the institutions of the European Union.'* It indicated the limitations on the exercise of competences within the Union: *"(1) competences may be exercised jointly to the extent required for the exercise of rights and fulfillment of obligations stemming from the founding treaties of the European Union; (2) only the joint*

[387] Constitutional Court 1053/E/2005
[388] Sajo (2004).
[389] Sajo (2004).
[390] Varju and Fazekas (2011).
[391] Constitutional Court, Decision 1053/E/2005, judgment of 16 June 2006, II *ABH* [2006] 1824.

exercise of certain concrete competences deriving from the Constitution is authorized, in other words, the scope of competences exercised jointly is limited."

As regards the position of EU law within the Hungarian system of sources of law, the Constitutional Court widened the meaning of the authorizing provision by identifying it as the ground for the constitutional validity of EU (Community) law: *'Under Article 2/A of the Constitution community law applicable in Hungarian law is just as valid as is law adopted by Hungarian legislation.'*[392]

With respect to the question of the relationship between EU law and the Hungarian Constitution, the Constitutional Court has not made its position entirely clear. In the *Sugar surplus duty* case,[393] as well as in the *EUIN* case[394] the Court avoided the issue and focused on the constitutionality of the national implementing legislation.[395]

Subsection (3) of Article E of the new Fundamental Law is slightly more outspoken than the previous Constitution by stating that the law of the European Union 'may stipulate a generally binding rule of conduct', but again, there is no express mention of the principle of primacy of application of EU law *vis-à-vis* Hungarian law. Moreover, it is not yet clear whether the qualification 'subject to the conditions set out in paragraph 2' suggests that there are constitutional constraints to the applicability or validity of EU law in the Hungarian legal system.

As has been highlighted, scattered around in the text of the Fundamental Law are references to the independence of the State (e.g. Article B), the sovereignty of the Hungarian Nation, the commitment to Hungarian values, and the supremacy of the Fundamental Law (e.g. Avowal, Article R), which is to be interpreted in accordance with 'its purposes, with the Avowal of National Faith contained therein and with the achievements of our historical constitution' (which did not, of course, involve membership of the European Union). Whether this will change the existing position on the place of EU law in the domestic legal order is not yet entirely clear.

7.2.4. Conditioning participation in EU integration

Substantive Limits

Article E of the 2011 Fundamental Law (and before that, Article 2/A of the 1989 Constitution) may be interpreted as containing two reservations with regard to EU law: firstly, with regard to fundamental rights and principles as protected under the Fundamental Law and secondly, with respect to competences, in the sense that EU law cannot be *ultra vires*.

In its *Lisbon* decision, the Hungarian Constitutional Court has stated that in principle Hungary's membership in the EU is subject to meeting the constitutional requirements of democratic legitimacy, the rule of law, and limited transfer of competences. According to the petitioner, several provisions of the Treaty (e.g.: the legal personality of the EU and the regulation of competences) went beyond what was allowed by the Europe clause in article 2/A, and encroached upon the popular and State sovereignty under the Constitution to such an extent that they dissolved Hungary's existence as an independent State governed by the rule of law, as proclaimed in Art. 2 of the Constitution. The Court ruled that it did not. It stated that, by enacting Article 2/A of the Constitution, the *pouvoir constituant* had complied with the requirement derived from the principle of popular sovereignty that, in order to be applied to Hungarian subjects, all public law measures must be based on

[392] Constitutional Court, Decision 61/B/2005. AB, judgment of 29t September 2008, ABH [2008].
[393] Decision 17/2004, 24 May 2004.
[394] Decision 32/2008, 11 March 2008.
[395] Sajo (2004); Bragyova (2012); Varju and Fazekas (2011).

democratic legitimacy. However, the Court added that the effects of Article 2/A cannot compromise the principles of popular and State sovereignty and the democratic State under the rule of law laid down in Article 2(1) and (2) of the Constitution.

Regarding the question of independence (or statehood), the Constitutional Court declared that the Lisbon Treaty does not bring about the creation of a European super-State that would replace the union of sovereign States established under the previous Treaties. The Court then paid attention to four constitutional novelties introduced by Lisbon: the legal personality of the EU (leaving the governance and control of the EU to the Member States), the European citizens' initiative (which promotes European and national citizenship as a guarantee under the rule of law), the Protocol on Subsidiarity and Proportionality (creating a right for national Parliaments for a broader scope of control), and the EU Charter of Fundamental Rights (as 'a collection of rights provided by the EU which every European citizen shall possess'). Especially the subsidiarity control mechanism provided sufficient protection for Hungary's independence as a State as demanded by its Constitution.

The Court also indicated that the transfer of competences to the EU cannot exceed the extent necessary to exercise the rights and perform the obligations under EU law. Yet, the possibility of an *ultra vires* exercise of competences by the EU was not examined. The issue of competences was only dealt with in a general manner by referring to Parliament's consent to the reformed competences framework in the new Treaties and the reformed mechanism for subsidiarity control enabling the Hungarian Parliament to interfere with EU decision making.[396]

7.3. FURTHER TREATY REFORM

7.3.1. Substantive reservations

As has already been stated, the Constitutional Court held in its *Lisbon* decision that further transfers of competences should not violate the principles of popular and state sovereignty, democracy and the rule of law.

7.3.2. Procedural hurdles for further integrations

The ratification of international Treaties is subject to approval by Parliament. Under Article E(4) of the Fundamental Law,

> '4) The 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'.

No referendum may be held on 'any obligation arising from an international agreement' (Article 8 (3) d of the Fundamental Law).

7.3.3. Overcoming the hurdles

Can the Hungarian Fundamental Law be adapted so as to allow for further European integration?

The procedure for amendment of the Fundamental Law is laid down in its Article S:

> (1) A proposal for the adoption of a new Fundamental Law or any amendment of the present Fundamental Law may be submitted by the President of the Republic, the Government, any parliamentary committee or any Member of Parliament.
> (2) The adoption of a new Fundamental Law or any amendment of the present

[396] Varju and Fazekas (2011).

> Fundamental Law shall require a two-thirds majority of the votes of all Members of Parliament.
> (3) The Speaker of the House shall sign the Fundamental Law or the amended Fundamental Law and send it to the President of the Republic. The President of the Republic shall sign the Fundamental Law or the amended Fundamental Law and shall order its publication in the Official Gazette within five days of receipt.
> (4)The designation of the amendment of the Fundamental Law made during publication shall include the title, the serial number of the amendment and the date of publication.

Strikingly, no referendum may be held on any matter aimed at the amendment of the Fundamental Law (Article 8(3), a).

Until fairly recently, the Constitution-amending power of Parliament was considered legally unlimited.[397] In line with this principle, there would also be no constitutional limits to Union membership in Hungarian law, since any constitutional limits under the constitution could be overridden by constitutional amendment.[398]

Yet, more recently, in a decision concerning one of the (many) constitutional amendments recently introduced to the Constitution, adopted prior to the entry into force of the new Fundamental Law, the HCC considered whether it had jurisdiction to review the constitutionality of constitutional amendments.[399] The majority upheld the earlier view, with the qualification that the Court has the power to review the regularity of the amendment *procedure*, but it dismissed the possibility of substantive review of constitutional amendments. The Court however said that the consecutive amendments did raise concerns with respect to the requirements of democratic rule of law because they jeopardized the stability of the Constitution, and obviously failed to fully satisfy the requirements of democratic rule of law. But at the end of the day, the majority accepted that the procedure had not been unconstitutional.

With respect to the *substantive* review of the constitutionality of constitutional amendments, the Court began by saying that the Constitution does not contain an eternity clause, or immutable provisions. Accordingly, there are no absolute constitutional limits to the transfer of powers to the EU, as any constitutional obstacles can be removed by amendment.[400]

However, limits to constitutional amendment could be found in international law and *jus cogens*:

> 'Based on the principles enshrined in international agreements, the Hungarian Constitution has immutable parts whose immutability is not based on the will of the Constitutions' creators, but rather on *ius cogens* and those international agreements to which the Republic of Hungary is party. . . The norms, principles, and fundamental values of *ius cogens* together constitute a standard that all future constitutional amendments and constitutions need to satisfy.'[401]

The majority thus bound to these standards not only the constitutional amendments reviewed in the case, but even new constitutions, and presumably hence the new Fundamental Law. At the same time, it appears that the majority believed that it was not

[397] Bragyova (2012), 347.
[398] Bragyova (2012), 347.
[399] Hungarian Constitutional Court, Decision 61/2011. The decision concerned the question of the constitutionality of the constitutional amendment whereby the constitutional legislature intended to get round the constitutional court's annulment of the parliamentary act imposing a 98% retroactive tax. The very day of the decision, the constitutional legislature adopted an amendment allowing retroactive legislation in certain cases and limiting the Constitutional Court's jurisdiction to review laws pertaining to, among other things, budgetary and tax policy.
[400] Bragyova (2012), 347
[401] Hungarian Constitutional Court, Decision 61/2011.

within the jurisdiction of the Constitutional Court to ensure that the constitutional amendment (or the new constitution) satisfied these standards, meaning that there is effectively no way to enforce them.[402] The majority did however state that the attained level of constitutional protection of rights and its system of guarantees may not be diminished, and held that the Court had a signalling function.

7.4. REFERENCES

Blutmann, L and Chronowski, N (2011), 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', www.icl-journal.com, 2011/3, 329, available at http://ssrn.com/abstract=1961034.

Boulanger, C (2006), Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe", Spreading Democracy and the Rule of Law?, 2006, Part II:, 263-280.

Bragyova, A (2012), 'No New(s), Good News? The Fundamental Law and the European Law', in GA Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (CEU Press, 2012), 335-376.

Dani, M (2013), 'The 'Partisan Constitution' and the corrosion of European constitutional culture', LEQS Paper No. 68/2013.

Halmai, G (2012), 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' 19 *Constellations* 182.

Müller, J-W (2013), 'Safeguarding Democracy inside the EU. Brussels and the Future of Liberal Order' Transatlantic Academy Paper Series 2012-2013, 3.

Sajó A (2004), 'Accession's Impact on Constitutionalism in the New Member States', in GA Bermann and K Pistor (eds) *Law and Governance in an Enlarged European Union* (Hart, Oxford, 2004) 415-36.

Sonnevend, P (2010), 'Report on Hungary', in G Martinico and O Pollicino (eds), The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective, Groningen, Europa Law Publishing, p. 251.

Tóth, GA (2012), ed, *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, CEU Press.

Vincze, A and Varju, M (2012), 'Hungary. The New Fundamental Law' 18 *European Public Law* 437-454.

[402] Halmai, 2012.

8. IRELAND*

8.1. GENERAL CONSTITUTIONAL FEATURES

The Republic of Ireland (Eire) is a relatively young independent and sovereign State. It gained independence from the United Kingdom in 1922 as the Irish Free State, and declared itself a Republic in 1949.

The Irish Constitution (*Bunreacht na hÉireann*) was adopted in 1937 by referendum. Since the end of a short transitional period, it can only be amended by referendum (article 46 of the Constitution). In order to call a constitutional referendum, a proposal to amend the Constitution must be introduced in the House of Representatives (*Dáil*) as a Bill, setting out the proposed amendment to the Constitution. The Bill must be passed by both the *Dáil* and *Seanad* (upper house) with a simple majority vote. It is then submitted to the people, who can vote yes or no. If a majority of the votes cast is in favour of amendment, the President signs the Bill, and the Constitution is amended.

Thirty-six amending referendums have been called since 1937; nine of those directly concerned the process of European integration. The third amendment of 1972 allowed Ireland to join the European Communities. Further referendums concerned the Single European Act, the Treaties of Maastricht, Amsterdam, Nice (one negative, one positive) and Lisbon (one negative, one positive). Most recently, the people allowed the State to ratify the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (the 'Fiscal Compact').

Ireland is a parliamentary democracy. The Irish parliament (*Oireachtas*) consists of the President, the elected *Dáil Éireann* (the House of Representatives) and *Seanad Éireann* (the Senate). *Seanad Éireann* is composed of 60 Members, of whom 43 are elected by five panels representing vocational interests, namely, Culture and Education, Agriculture, Labour, Industry and Commerce and Public Administration; six are elected by the graduates of two universities (three each by the National University of Ireland and the University of Dublin - Trinity College); while 11 are nominated by the Taoiseach. *Seanad Éireann* is considered a safeguard against legislation being enacted too quickly. In addition to its legislative role, *Seanad Éireann* also debates important issues. It cannot indefinitely delay the adoption of legislation that has already been passed by *Dáil Éireann* and cannot initiate Bills to amend the Constitution.

The President is elected directly by the people. He or she does not have an executive or policy role, and exercises his or her functions on the advice of the Government. There are some specific instances where the President has an absolute discretion, such as in referring a Bill to the Supreme Court for a judgment on its constitutionality or in refusing to dissolve *Dáil Éireann* on the advice of a *Taoiseach* (Prime Minister) who has ceased to retain a majority. Additional functions can be conferred on the President by law.

Ireland has a dualist tradition when it comes to the effect of treaties in the domestic legal order. This is regulated in Article 29.6 of the Constitution, according to which 'no international agreement shall be part of the domestic law of the State save as may be determined by the *Oireachtas'*.

The Irish Constitution contains explicit measures for judicial review in Articles 26 and 34. Review of the constitutionality of primary legislation is allowed, but is confined to the superior courts (High Court and Supreme Court). There is no specific procedure to bring such cases (such as the *amparo* in Spain or *Verfassungsbeschwerde* in Germany), but the constitutionality of such legislation can be questioned in a normal procedure by a litigant who can show *locus standi*.

* Many thanks to Gavin Barrett for his valuable comments.

Article 26 Constitution also provides for the judicial review of bills before they are signed into law. The power to refer bills is personally exercised by the President after consulting the Council of State. When the Supreme Court upholds the constitutionality of a bill referred to it under Article 26, its constitutionality can never be questioned again in any court whatsoever (Article 34.3.3°). Supreme Court judges are normally free to deliver their own judgments, whether dissenting or concurring. However when considering the constitutionality of a Bill referred to the Court under Article 26 only a single judgment may be delivered by the Court (26.2.2°).

Ireland joined the EU in 1973, along with the UK and Denmark.

8.2. THE SITUATION UNDER THE CURRENT SYSTEM

8.2.1. Enabling Clauses – allowing for membership

Ireland was the first Member State to amend its Constitution specifically with a view to accession to the European Communities, in 1972. Accession to the European Communities was considered to cause tension with specific provisions of the Constitution, namely Articles 5,[403] 6.2,[404] 15.2,[405] 29.6 and 34.[406] Already in 1962, when accession was debated for the first time, an advisory Legal Committee on EEC problems, consisting of the Attorney General and officials from the Departments of Justice and External Affairs, signaled that it would be difficult to frame separate amendments to each of the relevant provisions of the Constitution.[407] It advised instead to have a single short amendment which would have the effect of enabling Ireland to be bound by the EEC Treaties notwithstanding these provisions of the Constitution. This path was chosen when Ireland did indeed join in 1973: the respective provisions of the Constitution were left unaltered. Instead, a Europe clause was inserted that facilitates membership and adjusts the constitution to the requirements of membership.

Accession to the European Communities was authorised by Article 29.4.3°, which was inserted in the Constitution by section 1 of the Third Amendment of the Constitution Act, 1972:

> 'The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957)'.

In addition to allowing for accession, the provision provided for constitutional immunity for European law and for Irish laws, acts and measures necessitated by the obligations of membership:

> 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State'.

[403] 'Ireland is a sovereign, independent, democratic state'. See e.g. J Henchy, 'The Irish Constitution and the EEC' (1977) DULJ 20; see also Fennelly J. in *Maher v Minister for Agriculture and Food* [2001] 2 IR 139 at 248, holding that the legislative capacity of the Council and increasingly the European parliament as co-legislator 'seriously encroaches on the legislative sovereignty of the State'.
[404] 'These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.'
[405] 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'
[406] 'Justice shall be administered in Courts established by law'.
[407] Gearty (2007).

Today, these 'European clauses' in the Irish Constitution are spread over eight separate subsections (now numbered Article 29.4.3° to Article 29.4.10°). The text reads as follows:

> 3° The State may become a member of the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957).
>
> 4° Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.
>
> 5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 ("Treaty of Lisbon"), and may be a member of the European Union established by virtue of that Treaty.
>
> 6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—
>
> > i the said European Union or the European Atomic Energy Community, or institutions thereof,
> >
> > ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
> >
> > iii bodies competent under the treaties referred to in this section, from having the force of law in the State.
>
> 7° The State may exercise the options or discretions—
>
> > i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
> >
> > ii under Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and
> >
> > iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.
>
> 8° The State may agree to the decisions, regulations or other acts—
>
> > i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,
> >
> > ii under those treaties authorising the adoption of the ordinary legislative procedure, and

iii under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice, but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas.

9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.

In addition, a new paragraph 10° was added by the Amendment of the Constitution in 2012 to authorize the ratification of so-called Fiscal Compact. Since that Treaty is not a Treaty amending the TEU, Article 29.4 did not apply, and accordingly neither did the essential scope and objectives test. An amendment was considered necessary to authorize ratification and to provide constitutional immunity. The *Taoiseach* indicated, on the advice of the Attorney General that, as the Stability Treaty was 'a unique instrument outside the EU Treaty Architecture', a referendum was required 'on balance'.

10° The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State.

It is not entirely clear why exactly it was thought that a constitutional amendment and hence a referendum was required for the ratification of the Fiscal Compact. Probably it was thought proper, as the immunity clause did not apply either to the Fiscal Compact itself or to any laws, acts or measures necessitated under it. Strikingly, while the Constitution was amended so as to specifically authorize the ratification of the Fiscal Compact and extend the constitutional immunity which applied to EU law and Irish law necessitated under it to the law adopted under the Fiscal Compact as well as Irish law necessitated by it, the Constitution was not amended so as to include a 'golden rule'. This, after all, was the original intent of the German Government, which ended up in a watered down version in the Fiscal Compact. While Ireland went through the trouble of organizing a referendum, it opted not to include the golden rule in the Constitution. The Fiscal Compact was implemented through the enactment of the Fiscal Responsibility Act 2012. On the other hand, the approval of the amendment of Article 136 TFEU and the ratification of the ESM Treaty were not submitted to the people in a referendum. They were approved by parliamentary approval alone.

The text of the current Europe clause thus constitutes the result of consecutive constitutional amendments, on the occasion of Treaty amendments. Each amending Treaty has so far been considered as requiring a new amendment under the so-called *Crotty* rule (see infra). The current Europe provision serves several purposes: firstly, it authorizes the ratification of the relevant Treaties and membership of the resultant organization, and grants constitutional immunity to EU law and Irish laws, acts and measures necessitated by the obligations of membership. A striking addition to the constitutional text on the occasion of the ratification of the Lisbon Treaty was Subsection 4°, added by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009. According to the *Taoiseach*, the addition was intended to confirm Ireland's commitment to the European Union and reflect Ireland's highly positive experience of membership going back to 1973. The legal effect of this provision is as yet unclear. Moreover, the Europe clause subjects certain decisions under the TEU to prior parliamentary approval and excludes one particular type of decision, in the context of defense.

Irish accession, as well as the ratification of amending Treaties (SEA, Maastricht, Amsterdam, Nice and Lisbon) and the Fiscal Compact (but not the ESM Treaty), have all required prior constitutional amendment, which in Ireland implies a referendum. So why is constitutional amendment considered necessary?

In the landmark case of *Crotty v an Taioseach*, concerning the Single European Act, the Supreme Court effectively held that not all amending Treaties require constitutional amendment, but only those that alter the essential scope or objectives of the Communities:

> 'it is the opinion of the Court that the first sentence in Article 29, s. 4, sub-s. 3 of the Constitution must be construed as an authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29, s. 4, sub-s. 3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad'.

And

> '[the provisions of the SEA do not] alter the essential character of the Communities. Nor has it been shown that they create a threat to fundamental constitutional rights.'

The implication therefore seemed to be that if they had, then the 1973 authorisation to join in Article 29.4.3° would not have extended to these provisions. The reason why a referendum must be held for Treaty amendments not covered by the existing constitutional provisions is that the powers vested in the Government do not belong to the Government, but rather, in the first instance, to the people. It is not possible, therefore, for the Government to relinquish the powers which the people have vested in them under the Constitution, without the approval of the people in accordance with the Constitution:

> 'It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people, the contemplated restrictions upon freedom of action. To acquire the power to do so would … require a recourse to the people "whose right it is … in final appeal, to decide all questions of national policy, according to the requirements of the common good" … In the last analysis it is the people themselves who are the guardians of the Constitution … the assent of the people is a necessary prerequisite to … ratification'.

The *Crotty* test used to decide whether or not a referendum is required (the essential scope or objectives test) is ambiguous, but since the decision, all major Treaty amendments (with the exception of accession treaties) have been preceded by a constitutional referendum. The decision to hold a referendum is made by the Government following the advice of the Attorney General (an advice that is not made public). Doubts have arisen as to whether *Crotty* did indeed render a referendum necessary in relation to the Nice Treaty, i.e. whether it did indeed alter 'the essential scope or objectives' of the Union, but no government has so far sought to ratify an amending Treaty by

parliamentary approval alone. If a government did decide to do so, the question whether a referendum was required could be raised before a court. The Irish President could refer to the Supreme Court a Bill purporting to incorporate the terms of the Treaty into Irish law for an opinion on its Constitutionality. Moreover, a private individual could challenge the constitutionality of incorporating legislation and/or the attempt by the Government to ratify the Treaty without a referendum. It should not come as a surprise that 'having a referendum on a European Treaty became the legally safe option in ratifying'.[408] In addition, from a political perspective, many in the Irish public now expect that every major European treaty will be accompanied by a referendum – and there is a strong political pressure to have one.

In July 2012, the Government has announced that it would consider a referendum on allowing the Government to refer to the Supreme Court international agreements - including those relating to EU treaties - for advice on their constitutionality. The matter, however, has since not been raised by the Government which has a rather full agenda in terms of constitutional amendments.

The *Crotty* test has recently been revisited in the Pringle case,[409] concerning the ratification of the ESM Treaty and the European Council Decision which provided for a revision of the TFEU through the simplified procedure. The Government though that authorization by the *Oireachtas* would be sufficient. Mr Thomas Pringle, an independent member of the *Dáil*, thought otherwise and brought a legal action before the High Court seeking an injunction preventing the Government from effecting approval and ratification of the two instruments without a referendum. In his view, the ESM Treaty entailed a transfer of sovereignty to a degree that made it incompatible with the Constitution when one applies the principles under *Crotty*, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland. The Supreme Court returned to *Crotty*, stating that the essential test was whether the State would, in the Treaty, relinquish powers which the people has given to the organs of the State under the Constitution. The powers that are given to the organs of State under the Constitution are for the common good of the people of Ireland. Thus, if a decision was required to be taken, to relinquish the powers of an organ of State, it must be taken by the people (*Pringle*, 17.ii). Yet, according to the Supreme Court, no such fundamental decision arose in relation to the ESM Treaty. The State had not ceded policy making for the future, nor had it ceded the power to increase the State's financial contributions. Consequently, there had been no transfer of sovereignty to any degree which was incompatible with the Constitution. There had not been any attempt at a fundamental transformation or diminution of sovereignty, such as arose in the *Crotty* case. The Government had not exceeded its powers under the Constitution by concluding the Treaty, hence, no referendum was required.

8.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions
Given the extensiveness of the Europe provisions, there has been no need to amend specific provisions in the Constitution in order to comply with the requirements of membership. This was the aim of the technique chosen: not to have to amend and adapt specific provisions of the Constitution.

Adapting the constitutional framework and the functioning of the system
Article 29.4 aims, among other things, to get around the friction between Irish membership of the EU and the provisions in the Constitution that regulate the powers of Irish institutions of government and divide powers between them. With one stroke, the provision thus deals with possible problems that could have arisen in the light of Article 6

[408] Barrett (2009), 44.
[409] Supreme Court of Ireland, Pringle -v- Government of Ireland & others [2012] IESC 47

(confining governmental powers to the organs of the Irish State); article 15.2.1° (granting exclusive power to legislate in the *Oireachtas*); Article 28.2 (vesting executive power in or on the authority of the government); and Article 34.1 (requiring justice to be administered in courts established by law by judges appointed in the manner provided by this Constitution).

The Constitution does not provide for a mandate system or scrutiny reserve system in the context of decision-making under the Treaties. The European Union (Scrutiny) Act 2002, which was adopted after the defeat of the referendum on the Nice Treaty, establishes the legislative basis for the EU scrutiny process in the Houses of the *Oireachtas*. The Act enables the Houses of the *Oireachtas* or *Oireachtas* Committees to make recommendations to Ministers on proposed EU measures which Ministers are legally obliged to take into consideration. The Act places a statutory obligation on Government Departments to inform the *Oireachtas* of draft EU measures. The Act states that Ministers must forward to the *Oireachtas* each draft EU legislative measure published by the European Commission; forward an *Oireachtas* Scrutiny Information Note (OSIN) with each draft EU legislative measure outlining the content, purpose and likely implications for Ireland of the proposed measure; submit reports to the *Oireachtas* every six months giving details of measures, proposed measures and other developments in relation to the European Communities and the European Union; and have regard to recommendations contained in reports of Committees. In addition to consideration of EU legislative proposals, the role of the Committees in relation to EU Affairs includes consideration of proposals for national primary legislation or Statutory Instruments (S.I.s) to implement EU Directives. The Programme for Government 2011 proposes that the Regulatory Impact Assessments prepared by Government Departments on all EU Directives and significant Regulations be forwarded automatically to the relevant sectorial *Oireachtas* Committees. The Joint Committee on European Union Affairs has a specific role for such S.I.s and may recommend to the Houses of the *Oireachtas* that a Regulation be annulled.

In addition, Section 5 of the EC Act 1972 (as amended in 2002) obliges the Government to make an annual report to each House of the *Oireachtas* on developments in the EU.

Articles 29.4.7° and 29.4.8° introduce a form of prior approval requirement for specific types of decisions, which are provided for in the TEU but are not necessitated by the obligations of membership and hence imply a discretion or option on the part of the State, such as in particular the decision to participate in enhanced cooperation, the opt-in to take part in some or all of the provisions of the Schengen acquis and the so-called opt-in decision to take part in some or all measures in the area of freedom, security and justice. These provisions are examined in detail below (see Section 8.2.4 B).

One type of decisions is entirely excluded, and cannot be adopted under the Constitution. According to Article 29.4.9°

> 9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.

The provision concerns the issue of Irish neutrality. It prevents the Government from adopting a decision under Article 42 TEU if that decision would commit Ireland to the common defence. If it does not, however, Ireland can take part in a unanimous decision. The provision was inserted through the second referendum on the Nice Treaty, in order to secure electoral approval.

Of special importance is Section 3 of the European Communities Act 1972 (as amended) which allows for implementation of EU law by way of ministerial regulations, which may

even repeal or amend primary legislation. In Meagher v Minister for Agriculture,[410] the Supreme Court viewed this mechanism as being part of the necessary machinery which became a duty of the State upon accession and was therefore necessitated by membership. Nevertheless, this does not mean that such regulations are necessitated in each case. The authorization to proceed by way of statutory instrument will need to be balanced against the exclusive legislative role of the *Oireachtas* under Article 15.2.1 of the Constitution.

Thus, in the mid-1990s, the Supreme Court declared the legitimacy of executive implementation of EU law by means of secondary or delegated legislation and, since then, the executive has continued to use secondary legislation frequently to implement important EU legislation. Also, the legislature has given itself extraordinary powers to implement EU law by way of delegated legislation in the European Communities Act 2007, extending the use of delegated legislation to the creation of indicted offenses while only adopting a minimalist role to its new far-reaching obligations in the Treaty of Lisbon.

8.2.3. Status, effect and rank of EU law in the domestic legal order

The direct effect and primacy of European law are not regulated by the Constitution, but rather by the EC Act, which incorporates European law into the Irish legal order.[411] Such statutory intervention was necessary given the dualist tradition of the Irish legal system. Article 29.6 of the Constitution states that 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.' The EC Act 1972 makes European law part of the domestic law of Ireland.

With respect to the relationship between the Irish Constitution and European law, the situation is more complex. Here, the immunity clause of 29.4.6° is relevant. Rather than resolve the issue of which legal order would prevail in the event of a collision between the national and the supranational, the provision ensures that, insofar as national constitutional norms are concerned, such collisions would not take place in the first place.

The provision shields EU law and Irish laws, acts and measures 'that are necessitated by the obligations of membership of the European Union'. The provision thus limits the reach of the Constitution, and prevents the courts from reviewing the constitutionality of EU law, and of Irish law necessitated by the obligations of membership.

It is thus crucial to establish what is 'necessitated by the obligations of membership'. This has been much debated in literature and by the courts.[412] The provision is generally considered to establish a *renvoi* from the Irish Constitution to the law of the European Union: anything required under EU law should also be considered as 'required by the obligations of membership' and is thus considered immune from constitutional review.[413] The issue is more problematic when EU law allows discretion to the State. The case law of the courts is inconsistent here. Even if legislation in such cases can be regarded as 'necessitated,' there is a point where the discretion is so broad that the acts of the Irish institutions can no longer be seen as necessitated by the obligations of membership. But there have been cases where Irish courts have accepted that where some discretion is allowed, these acts are still regarded as being necessitated.

The first decades of Irish membership, until 2003, were marked by low rates of preliminary references from the Irish courts, low participation rates as intervener in litigation before the Court of Justice by the Irish State and a relatively poor compliance

[410] *Meagher v Minister for Agriculture* [1994] 1 IR 329.
[411] Section 2 of the Act reads: 'from the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties'.
[412] Phelan (1997); Hogan and Whelan, X; Temple Lang (1992)
[413] Barrett (2012).

rate by the State with implementation of internal market legislation.[414] Yet, more recently, there has been specific engagement by the Supreme Court with the CJEU, including by making preliminary references relating to the financial crisis and the impact of the Charter of Fundamental Rights.

8.2.4. Conditioning participation in EU integration

It is generally agreed that participation in the process of European integration causes inroads in the sovereignty of the Irish people (see above), but these are agreed to each time in a referendum, which amends the Constitution and authorizes the ratification of the relevant Treaty, and hence also the inroad in sovereignty it entails.

Nevertheless, once these authorizations have been given, the Irish Constitution is particularly open to EU law, and provides both EU law and national acts necessitated by the obligations of membership with constitutional immunity. Yet, it is not fully accepted that this immunity would be absolute.

Substantive Limits

Article 29.4.6° seems to open up the Irish legal space completely to EU law, since it provides constitutional immunity for all EU law and Irish laws, measures and acts necessitated by membership. Nevertheless, in *SPUC v Grogan*, Walsh J stated that

> '…it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right'.

In the same vein, O'Higgins, a former ECJ judge wrote extrajudicially:

> 'Should a question arise as to whether a particular measure is so 'necessitated' [this is the test for immunity under the Third Amendment to the Constitution] it would seem to me to be one exclusively for the High Court under the provisions of Article 34.3.2° of the Constitution. I cannot see on what basis jurisdiction to decide what is, essentially, a question as to the validity of a law having regard to the Constitution can be conferred on or exercised by any other court…'

The concept of constitutional identity does not as such play an important role in the public debate. It can however be argued that some cases demonstrate a particular sensitivity on the part of Irish courts, such as the abortion cases (e.g. *SPUC v Grogan* and the *X case*) and Irish neutrality (see e.g. the *Crotty* case).

Procedural Limits

Articles 29.4.7° and 29.4.8° introduce a form of prior approval requirement for specified types of decisions, which are provided for in the TEU, but are not necessitated by the obligations of membership. These are decisions which imply a discretion or option on the part of the State, namely (1) the decision to participate in enhanced cooperation; (2) the opt-in decision to take part in some or all of the provisions of the Schengen acquis under Protocol 19 as well as (3) the so-called opt-in decision under Protocol 21 to take part in some or all measures in the area of freedom, security and justice, or to including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State. The State is permitted to reach these decisions in question only when permission to do so is granted by both houses of the *Oireachtas*.

[414] Fahey (2007).

The same requirement applies to the decision to agree to (1) the use of *passerelle* clauses under the TEU or the TFEU authorizing the switch to majority voting; (2) the decision authorising the adoption of the ordinary legislative procedure, as well as (3) the decision under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the TFEU relating to the area of freedom, security and Justice.

These decisions have in common that they are not necessitated by the obligations of membership and are thus not otherwise covered by article 29.4. Moreover, all involve a step towards further integration not yet effectuated by the Treaties as ratified under the constitutional authorization made possible by the Lisbon referendum. A specific constitutional authorization was hence considered necessary. In practice, the parliamentary approval has so far never been withheld.[415] It is regularly given in relation to justice and home affairs measures.

8.3. FURTHER TREATY REFORM

8.3.1. Substantive reservations

The Constitution contains no specific reservations, and it may be assumed that the same applies to the question of constitutional amendments: since both coincide and are in the hands of the people themselves, there seem to be no constitutional reservations to the type or the extent of the powers that can be transferred.

8.3.2. Procedural hurdles for further integrations

Transfers of sovereignty in the form of amending Treaties that 'change the scope and character of the Union' will require constitutional amendment, which can only take place through a referendum. This would, theoretically, not be the case if the new Treaty did not *alter the essential scope or objectives of the Union.* Yet, in practice, there is strong pressure on the Government to organize a referendum.

So far, the decision has always focused on whether or not a referendum was required, and not on the question whether a particular Treaty is considered constitutional or not. The reason is that since *Crotty*, ratification is authorized by a constitution-amending referendum. In other words, the Constitution is amended in order to authorize ratification. Constitutional impediments that may exist are lifted through the amendment. The constitutional amendments have thus solved frictions with the constitutional provisions concerning sovereignty, the attribution of exclusive legislative power of the *Oireachtas*, and the attribution of executive power to the government.

So far, no constitutional impediments have been identified which could not be lifted by constitutional amendment via referendum. Since the people themselves give permission to ratify Treaties, there seems to be no legal limits.

8.3.3. Overcoming the hurdles

As already clarified, amendment of the Irish Constitution requires a referendum (Article 46).

There does not seem to be a theory of 'core' or unamendable elements of the constitution that would be beyond the reach of the Irish people in a referendum. No constitutional provision is immune for amendment, and a constitutional amendment cannot itself be unconstitutional.[416]

[415] Barrett (2012).
[416] De Londras and Gwynn Morgan (2012)

In the 1995 *abortion* case, the Supreme Court stated that, based on the principle of the supremacy of popular sovereignty, no obstacle may be placed in the way of the people's privilege to amend the Constitution. Subsequently, the Court reaffirmed its commitment to popular sovereignty in several similar rulings: 'There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional.' Also, 'No organ of the State, including this Court, is competent to review or nullify a decision of the people... The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with.'[417] At the same time, the court's stance must be assessed jointly with the Preamble of the Irish Constitution, which begins with a reference to the Holy Trinity and then emphasizes the Irish people's commitment to Jesus Christ. Also the natural law tradition in Irish constitutional adjudication could play a role here: in fact, it has mostly had an impact on moral issues, and the concept has been abandoned over the past decades.[418]

There seems to be agreement today that these references in the Preamble do not in principle restrict the power of the people to amend the Constitution.

8.4. REFERENCES

Barrett, G, 'Why Does Ireland Have All Those European Referendums? A Look at Article 29.4 of the Irish Constitution', IIEA Economic Governance Paper 4.

Barrett, G, 'Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence' 5 (2009) EUConst 32-70.

Cahill, M, 'Ireland's Constitutional Amendability and Europe's Constitutional Ambition: the Lisbon Referendum in Context' 9 (2008) *German Law Journal* 1192-1218.

Geary, MJ, 'A historical analysis of the constitutional implications of Ireland's membership of the European Economic Community, 1961-73', unpublished paper, accessible via https://www.academia.edu.

De Londras, F and Gwynn Morgan, D (2012), 'Constitutional Amendment in Ireland', in X Contiades, Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA (Routledge, 2012) 179-202.

Fahey, E (2013), 'EU Law and Ireland: On the measurement of legal evolutions through judicial activity?' Paper presented to UACES, 40 Years of Accession of Ireland, UK, Denmark to the EU Woburn House, London (8 March, 2013), available on ssrn.

Phelan, W (2007), 'Can Ireland Legislate Contrary to European Community Law?', IIIS Discussion Paper No. 237.

Hogan, G, 'The Nice Treaty and the Irish Constitution' (2001) *EPL* 565.

[417] *Re Article 26 and the Information (Termination of Pregnacy) Bill 1995* (1995) 1 IR 1.
[418] Kavanagh (2013).

9. ITALY*

9.1. GENERAL CONSTITUTIONAL FEATURES

The Italian Republic is one of the six original founders of the European Communities.

Italy has a parliamentary system of government. Its parliament is bicameral, both chambers having identical powers. Their composition is based on proportional representation with a premium for the relatively largest party, although the elections for the Senate (*Senato*) are based on a district system with different electoral rules as compared to those for the House of Representatives (*Camera dei deputati*). The electoral system and its proportionally representative nature have been, and still are, the object of debate and political controversy.

The Constitution (*Costituzione*) is a single document, which was adopted by the constituent assembly on 22 December 1947 and came into force on 1 January 1948. It has since been amended several times, the last time in 2012 to introduce the balanced budget principle.

The court system is dual in the sense that ordinary courts and administrative courts are separate. Importantly, there is a system of centralized constitutional review by a specialized constitutional court, the *Corte costituzionale*, which holds the monopoly over issues of constitutionality. The constitutional court is competent to decide cases brought by political institutions (e.g. the President, the Regions) or referred by ordinary or administrative courts. There is *no* direct access to the constitutional court for individuals (such as the *Verfassungsbeschwerde* or the *amparo* procedure).

The constitutional system as regards the effect of international law in the national legal order belongs typically to the dualist tradition. In the dualist tradition, in order to have immediate effect within the national legal order, it is not sufficient that an international treaty (and international decisions based on it) becomes binding on Italy under international law, but international law requires transformation into national law by act of parliament. As a rule, the status of international law is that of the act that transforms it into national law, so in principle the relevant international norm has the status of an act of parliament. Some inroads have been made to these distinctive characteristics of dualism in case law as regards the European Convention of Human Rights and even more as regards Union law, as we shall see below, but traces of the dualist tradition survive.

9.2. THE SITUATION UNDER THE CURRENT SYSTEM

9.2.1. Enabling Clauses – allowing for membership

The constitutional basis for EU membership in Italy is firstly and primarily Article 11 of the *Costituzione della Repubblica*.[419] This provision allows Italy 'to agree to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations'; and provides that 'Italy shall promote and encourage international organisations furthering such ends'. Although this provision was drawn up, in the original constitution that entered into force in 1948, having in mind the United Nations, the *Corte costituzionale* already early on[420] declared this to be the basis also for membership of the European Communities, now European Union. The subsequent insertion of a reference to EU law[421] in Article 117 of the Constitution, as a restriction of the legislative power of the state and the

* Many thanks to Barbara Guastaferro for her valuable comments.

[419] Art. 11. L'Italia [...] consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.

[420] Sentenza 14/1964, 24 February 1964.

[421] Until the entry into force of the Treaty of Lisbon, Italian legislation (and constitutional law) referred – for good reasons – to 'Community law' also after the Union was established by the Treaty of Maastricht.

regions, has been taken to be a more concrete constitutional basis for the effect of EU law in the national legal order, giving it – at least as a matter of fact – a supra-legislative status (see further Section 9.2.3 below).[422]

The constitutional basis for the EU legal order in Article 11 of the Constitution means that EU membership has a constitutionally guaranteed status, which allows limitations on the constitutional powers otherwise at the sovereign disposal of the Italian public authorities. In this sense, certain divergences or deviations from the provisions of the Constitution to which EU law may lead in practice are allowed. As we shall see below, this limitation of constitutional powers is counterbalanced by certain constitutional counter-limits (below Section 9.2.4 A).

In line with the Italian dualist tradition, from a constitutional point of view the legal order of the Union has been viewed as an 'external' legal order, separate from the internal Italian legal order, which nevertheless has effects within the national legal order as a consequence of its basis in the Constitution (Art. 11 and 117 of the Constitution). In this regard, the position of EU law is in essence the same as the legal order of the Catholic Church pursuant to Article 7 of the Constitution.[423] Both entail certain constitutionally legitimated 'exceptions' from the purely autonomously determined Italian law, which courts have to apply.

The approval of the Treaties has been decided by act of parliament (Art. 80 of the Constitution[424]). Normal majorities suffice.[425]

9.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions

The conclusion and amendment of the European founding treaties has not directly necessitated any specific constitutional amendment.

The extension of certain citizens' rights to non-Italian citizens by act of parliament, as was the case for electoral rights of non-Italian EU citizens, has been considered unproblematic, not only (but certainly also) as a consequence of the application of EU law under Article 11 Constitution (see previous section); the same applied for the limitation of rights under the EAW.

There are, however, a number of constitutional and legislative provisions which in fact facilitate the effective functioning of EU law in the Italian legal order.

There are other provisions of the Constitution which explicitly mention EU law, apart from Articles 11 and 117, which we already mentioned. One is Article 97[426], which stipulates that

[422] Art. 117. La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali.
Lo Stato ha legislazione esclusiva nelle seguenti materie:
a) politica estera e rapporti internazionali dello Stato; rapporti dello Stato con l'Unione europea; diritto di asilo e condizione giuridica dei cittadini di Stati non appartenenti all'Unione europea; [...]
f) [...] elezione del Parlamento europeo;
Sono materie di legislazione concorrente quelle relative a: rapporti internazionali e con l'Unione europea delle Regioni; [...]
Le Regioni e le Province autonome di Trento e di Bolzano, nelle materie di loro competenza, partecipano alle decisioni dirette alla formazione degli atti normativi comunitari e provvedono all'attuazione e all'esecuzione degli accordi internazionali e degli atti dell'Unione europea, nel rispetto delle norme di procedura stabilite da legge dello Stato, che disciplina le modalità di esercizio del potere sostitutivo in caso di inadempienza.
[423] Cf. Cartabia, 176-220; Bin 2008, 326-327.
[424] Art. 80: The Houses authorise by law the ratification of international treaties which are of a political nature, or which call for arbitration or legal settlements, or which entail changes to the national territory or financial burdens or changes to legislation.
[425] Art. 72: The regular procedure for consideration and direct approval by the House is always followed in the case of bills on […]the ratification of international treaties […].

'general government entities, in accordance with European Union law, shall ensure balanced budgets and the sustainability of public debt'. The same is provided by Article 119[427] for municipalities, provinces, metropolitan cities and regions, whose budgetary autonomy is 'subject to the obligation to balance their budgets, and [who] shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law.' These explicit references to EU law were introduced in the latest constitutional amendment of 2012, which also introduced a provision on the balanced budget in Article 81 of the Constitution.[428] The constitutional act (*Legge costituzionale* 1/2012, 20 April 2012) also included more detailed provisions on the regulation of budgetary powers in light of the financial and economic situation; this constitutional act binds both the legislature that passes the yearly budget, as well as the legislature that is to determine by statute the rules and principles of budgetary discipline to which the legislature that passes the yearly budget is bound. All this has a close nexus with EU law, even though it was not strictly speaking EU law that was at the basis of the constitutional amendment; this is considered to be a provision that (also) implements the Fiscal Compact, and at any rate serves the objectives of the EU economic and monetary union.

Adapting the constitutional framework and the functioning of the system
More general provisions facilitating the functioning of EU law and adapting the national legal order to EU law, beyond the specific constitutional provisions already mentioned, are found in a piece of legislation that covers the ways in which the Italian legal order interacts with the EU legal order: the Act on General Norms on the participation of Italy in the forming and carrying out of the norms and policies of the European Union, of 24 December 2012, nr. 234 (hereinafter: European Union Act or EU Act).[429]

The EU Act replaces and considerably expands an earlier Act of a similar nature, the so-called *Legge Buttiglione* of 2005.[430] The Act now regulates the following matters:

- the functioning of the Italian council of ministers and its inter-ministerial committee for European affairs, as well as the coordination of policies concerning the EU;

- the participation of the national parliament in the definition of the Italian European policy and in the decision-making of the European Union;

- the (bureaucratic) coordination of the participation of Italy in the EU legislative process;

[426] Art. 97. Le pubbliche amministrazioni, in coerenza con l'ordinamento dell'Unione europea, assicurano l'equilibrio dei bilanci e la sostenibilità del debito pubblico.
[427] Art. 119. I Comuni, le Province, le Città metropolitane e le Regioni hanno autonomia finanziaria di entrata e di spesa, nel rispetto dell'equilibrio dei relativi bilanci, e concorrono ad assicurare l'osservanza dei vincoli economici e finanziari derivanti dall'ordinamento dell'Unione europea.
[428] Art. 81: "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle.
No recourse shall be made to borrowing except for the purpose of taking account of the effects of the economic cycle or, subject to authorisation by the two Houses approved by an absolute majority vote of their Members, in exceptional circumstances.
Any law involving new or increased expenditure shall provide for the resources to cover such expenditure.
Each year the Houses shall pass a law approving the budget and the accounts submitted by the Government.
Provisional implementation of the budget shall not be allowed except by specific legislation and only for periods not exceeding four months in total.
The content of the budget law, the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members of each House in compliance with the principles established with a constitutional law."
[429] Legge 24 dicembre 2012, n. 234, Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea, hereinafter 'EU Act'.
[430] Legge 11/2005.

- the participation of the Italian Regions, autonomous provinces and autonomous local authorities in EU decision-making;

- the participation of the social partners and trade and industry in the process of EU decision-making;

- the fulfilment of the obligations flowing from membership of the EU, especially through consolidated and delegated legislative measures to implement EU law, including judgments of the Courts of Justice of the EU;

- contentious proceedings at the CJEU (including the obligation for the government to bring a subsidiarity appeal on behalf of either chamber of parliament, Art. 42(4) EU Act);

- state aid;

- final provisions (including the prohibition of 'reverse discrimination'[431]).

9.2.3. Status, effect and rank of EU law in the domestic legal order

The basis of EU law in Article 11 of the Constitution grants EU law *in effect* a supra-legislative position, in the sense that Italian legislation that is contrary to directly effective EU law must be disapplied by courts and other public authorities: it is not invalidated, as would usually be the case within a strict hierarchy of purely national norms which conflict with superior norms; the duty to disapply (without invalidating the conflicting national norm) is in a sense a limited form of primacy. This power of disapplication is a power that ordinary courts and public authorities do not have as regards ordinary international treaties (including human rights treaties such as the ECHR), although these have supra-legislative status on the basis of Article 117 of the Constitution.[432]

The disapplication of any legislation that is incompatible with EU law is an obligation of all Italian courts when faced in a concrete case with a norm of Italian law and a norm of EU law. This, however, is an obligation that exists only as regards directly effective EU law; the disapplication of Italian legislation incompatible with non-directly effective EU law can only occur after the Constitutional Court has declared the unconstitutionality of the relevant Italian provision for infringement of Art. 11 of the Constitution. To complete the picture: the case of Italian norms of lower ranking than acts of parliament that conflict with EU law (whether directly effective or not) is different again, as it is considered a matter of incompatibility of these norms with the order to execute the EU Treaties contained in the act of parliament approving the Treaties;[433] hence this is a matter of the legality or illegality of these lower ranking norms, not a matter of their constitutionality or unconstitutionality.

The status and rank of EU law has been clarified in the case law of the *Corte costituzionale*, which has undergone various fundamental changes, affecting and concerning its grip over the constitutional adjudicatory control over EU law. The present constitutional situation

[431] Art. 53(1): "Nei confronti dei cittadini italiani non trovano applicazione norme dell'ordinamento giuridico italiano o prassi interne che producano effetti discriminatori rispetto alla condizione e al trattamento garantiti nell'ordinamento italiano ai cittadini dell'Unione europea."

[432] Although human rights treaties and in particular the ECHR have an important status precisely because they intend to protect fundamental rights also protected by the *Costituzione della Repubblica*, the *Corte costituzionale* has made clear that – unlike what is the case with EU law – a conflicting act of parliament can only be disapplied after a declaration of unconstitutionality by the *Corte costituzionale* itself (based on an infringement of Art. 117(1) *Cost*), but not by ordinary courts at their own motion (see the Constitutional Court judgments 348/2007 and 349/2007). On the matter Martinico and Pollicino 2012.

[433] Lastly Legge 2 agosto 2008, n. 130, on the ratification and execution of the Treaty of Lisbon, Art. 2: [Ordine di esecuzione] 1. Piena ed intera esecuzione e' data al Trattato di cui all'articolo 1, a decorrere dalla data della sua entrata in vigore, in conformita' a quanto disposto dall'articolo 6 del Trattato stesso.

concerning the status of EU law as we just described it, was in the main formulated in its judgment 170/1984, *Granital*: EU law emanates from a legal order that is distinct from the national legal order. Since the legislature has decided, on the basis of Article 11 *Cost*., to attribute a directly effective legislative power to the competent EU institutions, the decisions of these institutions, their meaning and effect is governed by EU law exclusively.

Dualism inspires this position, which avoids conceiving of EU law in hierarchical terms. A clear exception to this is the *Corte costituzionale*'s doctrine of *controlimiti*, which we discuss in the next section.

9.2.4. Conditioning participation in EU integration

Substantive Limits

Italian constitutional law, as enunciated in the case law of the *Corte costituzionale*, has always recognized cooperation in the framework of the European Communities and the European Union as a constitutional 'limit' to the sovereignty of the Italian Republic and as a limit to the exercise of sovereign powers by its organs. So much is already implied by the language of Article 11 of the Constitution. Nevertheless, in the course of time, the case law has also developed the doctrine of 'counter-limits', *controlimiti*, to European law. These exist because, in last instance, it remains to the Italian constitutional order to determine the constitutional framework of the operation of EU law in the national legal order. These counter-limits are constituted by the fundamental and supreme principles of the Italian constitutional order, which must be observed when EU law is applied in Italy.

As far as the counter-limits concern EU law, one of the standard texts is the *Fragd* judgment of the *Corte costituzionale*, in which the Court undertook a review of European law, in particular the possibility for the ECJ to limit the effects of a ruling of invalidity of EU legislation, against the 'supreme principle' of judicial protection of one's rights.[434] In the *Fragd* case, a European regulation that had been applied to Fragd was declared invalid by the ECJ; however, the money that Fragd lost could not be reclaimed because the effects of the declaration of invalidity were limited by the ECJ to damages occurring after the judgment of invalidity.

The *Corte costituzionale* held that European Community law provides an ample and effective system of judicial protection, including the preliminary reference procedure under (then) Art. 177 EC. It continued:

> "It is equally true that the fundamental rights guaranteed by the legal systems of the Member States constitute, according to the jurisprudence of the Court of Justice of the EEC, an essential and integral part of the Community legal order. But this does not mean that the Constitutional Court has no competence to verify whether or not a treaty norm, as interpreted and applied by the institutions and organs of the EEC, is in conflict with the fundamental principles [*i principi fondamentali*] of our constitutional order or violates the inalienable rights of the human person [*i diritti inalienabili della persona umana*]. The Constitutional Court is competent to verify the position in this regard by examining the constitutionality of the laws implementing such norms. Such a conflict, whilst being highly unlikely, could still happen. Moreover, it must be taken into account that, at least theoretically, it cannot be stated absolutely that all the fundamental principles of our constitutional order are to be found amongst the principles which are common to the legal orders of the other Member States and are therefore included in the Community legal order."[435]

[434] Judgment 232/1989.
[435] Sentenza 232/1989.

In this particular case it concluded that the principle was not violated.

What do the controlimiti consist of?
The question of the precise limits that EU law must observe is not easy to answer. The *Fragd* case cited, speaks of the 'fundamental principles of the constitutional order' and 'inalienable human rights'. But this category, though important enough in itself, may be too uncertain and broad properly to clarify the scope of the constitutional limits to which public authorities in Italy are bound and which function as *controlimiti* in the context of EU law.

First, it should be pointed out that a distinction is made between explicit and implicit constitutional limits.

One explicit limit concerns the republican form of the state, which is formulated as a limit on the power to amend the Constitution by its Art. 139, which we discuss further below. The scope of this provision is uncertain. Some authors maintain that it primarily refers to the republic as opposed to a monarchy (the latter having been rejected in the pre-constitutive institutional referendum of 1946 that bound the constitutive assembly that drafted the Constitution), but others read into the 'republican form' also further essential political principles, such as sovereignty of the people, democracy and the fundamental rights indispensable for democracy such as freedom of expression, assembly, association, etc.

In most of the literature, the guarantee of inviolable human rights, described in Article 2 of the Constitution, is also considered to be beyond constitutional amendment and therefore an absolute limit. This provision recognizes and guarantees in general terms "the inviolable rights of man, both as an individual and in the social context in which he develops his personality, and requires the fulfilment of the duties of political, economic and social solidarity."[436] In the literature, all the fundamental rights covered by Articles 13 to 29 of the Constitution are read into the general provision of Article 2; alternatively, or more specifically, Article 2 is considered to refer to those rights which the Constitution declares in so many words to be 'inviolable' (which includes personal liberty (Art. 13), the home (Art. 14), the freedom and confidentiality of correspondence and communication (Art. 15), the right to defence in legal proceedings (Art. 24)).

Apart from these fundamental *rights*, there are also inviolable '*principles*' of the constitutional order. These were originally, and still largely are, developed in the context not of the 'external' legal order of the EU, which is recognized in Italy on the basis of Article 11 of the Constitution, but of the other legal order that is external to the Italian one, that of the Catholic Church, which is recognized on the basis of Article 7.[437]

Looking at the case law of the *Corte costituzionale*, these 'inviolable principles' partly overlap with fundamental rights (particularly the 'inviolable' ones), as well as with the republican principle, broadly understood. The *Corte costituzionale* has never provided a catalogue of inviolable principles. The case law that we have been able to consult points to the following fundamental principles that need to be respected, and that underlie certain provisions of the Constitution (indicated in brackets):

- the unity of the state (Art. 5), as regards the unity of constitutional jurisdiction as an indispensable element of the Italian legal order (the effective and uniform

[436] Art. 2 Cost.: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.'
[437] In conjunction with the Lateran Pacts (originally concluded in 1929 and revised in 1984), an international agreement between Italy and the Holy See.

interpretation of the Italian Constitution);[438]
- the principle of judicial protection, including access to a court of law and the rights of the defence (Art. 2 jo 24(1));[439]
- the right to free and confidential communication (Art. 2 jo 15);[440]
- the right to equal treatment[441] (Art. 3(1), in itself and in relation to other provisions e.g. freedom of religion (Art.8)[442];
- the principle of representation based on pluralist democracy, as expressed in the right to non-discrimination in the electoral context (Art. 51);[443]
- the secular character of the state, comprising the protection of freedom of religion in a system of confessional and cultural pluralism (Art. 2 jo 3, 7, 8, 19 and 20).[444]

Principles and details

An important distinction in the case law (and literature) in Italy is made between the core of inviolable principles, which are considered not to be constitutionally amendable (except through a revolutionary act establishing a new political order), and the particular formulations in and applications of the law.[445] Although the boundary between principles and detailed rules may not be clear, and explicit case law relevant to the counter-limits doctrine is lacking, this distinction should leave scope for development also in terms of EU law which, even though touching on the field to which a principle may apply and thus possibly affecting particular detailed applications of the principle, does not affect the core of the principle itself. It goes without saying that the distinction will in practice have to be developed and applied by the *Corte costituzionale*.

Procedural Limits

Parliamentary procedures

Of particular significance are the provisions in the EU Act (see Section 9.2.2 above) on participation by parliament and regions and other authorities in EU decision-making. These include the government's duty to provide information not only to parliament, but also to the regions and local authorities through their organization in special 'assemblies'.[446]

The government must ensure that the position on draft EU acts taken by Italian representatives in the relevant EU institutions is consistent with the 'directives' that each of the chambers of parliament can issue, except in case of urgency (Art. 7 EU Act).

The EU Act also regulates parliament's participation in the subsidiarity review at EU level and in the political dialogue of the national parliaments with the Commission, the so-called 'Barroso initiative' (Artt. 8 and 9 EU Act). Additionally, each house can request the

[438] Sentenza 9 March 38/1957 and Sentenza 22 January 6/1970.
[439] Sentenza 18/1982; 232/1989 (*Fragd*); 29/2003.
[440] Sentenza 366/1991.
[441] Implicitly Sentenza 18/1982
[442] Cf. Art. 8 Cost.: Tutte le confessioni religiose sono egualmente libere davanti alla legge.' Cf. Sentenza 203/1989, 259/1990, 195/1993, 329/1997, 508/2000, 329/2001; Ordinanza 34/2002; Ordinanza 213/2002.
[443] Sentenza 422/1995, in which the Corte costituzionale stated *obiter*": 'C'è ancora da ricordare che misure quali quella in esame si pongono irrimediabilmente in contrasto con i principi che regolano la rappresentanza politica, quali si configurano in un sistema fondato sulla democrazia pluralistica, connotato essenziale e principio supremo della nostra Repubblica.' This judgment regarded a legislative provision prescribing a quota on the basis of gender for elections in smaller municipalities; it was overruled by constitutional amendment of Legge costituzionale 1/2003, amending Art. 51 Cost.; also, Art. 117(7) Cost..
[444] E.g. Sentenza 203/1989 ('principio supremo della laicità dello Stato'); 149/1995; 327/2002.
[445] E.g. Sentenza 18/1982, and also in Sentenza 366/1991.
[446] The *Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e di Bolzano*, the *Conferenza Stato-città ed autonomie locali*, and the *Consiglio nazionale dell'economia e del lavoro* (CNEL). The latter can be consulted and present its views to the government (Art. 28, Legge 24 dicembre 2012, n. 234, furthermore EU Act); the second can present observations in matters within their competence (Art. 26 EU Act; but if these are not presented in time, the government can go ahead nevertheless); the first can oblige the government to make a scrutiny reserve in matters within their legislative power, which lasts for a maximum of 30 days (Art. 24 EU Act).

government to make a scrutiny reserve of a maximum of 30 days in the Council; moreover, the government can make such a reservation of its own motion in order for parliament to consider the matter (Art. 10 EU Act).

The EU Act stipulates the procedures to be followed in cases of simplified treaty amendment under Articles 48(6) and (7), as well as 42(2) EU Treaty. The latter provision concerns the decision to establish a common defence, which under the Italian EU Act requires adoption by act of parliament (Art. 11(2) EU Act). Also a decision under Article 48(6) EU Treaty (amendment of part III of the TFEU) requires adoption by act of parliament (Art. 11(4) EU Act), as well as the decision on the system of own resources of the EU (Art. 311(2) TEU). The decisions under 48(7) TEU (to switch from unanimity to qualified majority), however, can be blocked by a 'negative deliberation' in both chambers only (Art. 11(5) EU Act) within six months after it was communicated to them by the EU.

Finally, the emergency brake procedures[447] also require decisions of both chambers to be adopted in order for an Italian representative in the Council to trigger the procedure at EU level; these decisions need to be taken within 30 days after the relevant draft decision under the EU Treaty is submitted to the chambers by the government (Art. 12 EU Act).

No referendums on EU treaties

In Italy, legislation authorizing the ratification of treaties cannot be subjected to an abrogative referendum (Art. 75 of the Constitution), which is the only type of referendum on legislation provided for by the Constitution. The *Corte costituzionale* has extended this prohibition to legislation which gives effect and strictly implements treaties (whenever no discretion is left by the international obligations), including the EU founding treaties.[448] This was, in essence, reconfirmed in later case law, in which the criterion was coined of 'norms necessitated by Community or EU law', i.e. all the legislation that, if repealed, would result in a breach of the international obligation of the State.[449]

9.3. FURTHER TREATY REFORM

9.3.1. Substantive reservations

In Italy, there are no specific substantive areas of state activity labelled as 'no go' areas for EU law. There is no indication in the case law or otherwise of specific powers that must be retained by the Italian state in the context of further European integration, because they are supposed to belong to the substance of state power qualitatively (i.e. inherent state powers without which the state could not exist) or quantitatively (i.e. an amount of certain state powers should remain with the state exclusively as otherwise state power is 'emptied out' and becomes so little as to be insignificant).

The counter-limits to EU law contained in the fundamental and supreme principles of the Constitution that need to be observed by any Italian public authority in the exercise of its powers, also when acting in the scope of EU law, are merely regulative norms, that is to say, they are norms that regulate the nature and manner of exercising the powers attributed to the relevant authority; they regard the democratic and republican nature of the state and core fundamental rights; they do not concern norms which attribute specific substantive powers to the state or any of its organs or parts that could not be attributed,

[447] Artt. 48 (2), 82(3) and 83(3), as well as Art. 31(2) TEU.
[448] Sentenza 31/1981, concerning Euratom; the Court held that this concerns "le leggi di esecuzione dei trattati internazionali e quelle produttive di effetti strettamente collegati all'ambito di operatività dei trattati medesimi". In sentenza 30/1981 (concerning international treaties regulating or prohibiting the use of cannabis products), it held that not all implementing legislation is excluded from the possibility of a referendum, but only laws that leave no margin of discretion as to their very existence and content save the alternative between fulfilling the obligation entered into internationally or violating it by not passing that legislation or abrogating it after having passed it. The choice for the latter is up to the political organs of the state, not for a popular referendum.
[449] See for example Sentenze no. 63 and 64 of 1990.

transferred, delegated or mandated to the EU, as is the case in Germany (see the chapter on Germany above).

Nevertheless, at some point in the future it can well turn out to be the case that some fundamental and inviolable rights and principles play a more prominent role in some areas than in others. This might for instance be the case with the right to free and confidential communication as an inviolable constitutional principle. This touches particularly the area of telecommunication and data protection, where the EU has begun manifesting itself more and more, also in the form of EU legislation of increasing intensity: this should in principle not overstep boundaries which are sensitive from the national constitutional point of view.

9.3.2. Procedural hurdles for further integrations

As to procedural obstacles to further integration, there is the requirement of positive approval by act of parliament for simplified treaty amendment (as well as for the decision to establish a EU common defence and a system of own resources for the EU).

As a general rule, further integration that takes the form of formal treaty amendment requires approval which must take the form of an act of parliament.[450] The act approving an amendment of the EU founding treaties cannot be subjected to an abrogative referendum, as this is explicitly excluded in the Constitution, as mentioned above.

An important hurdle to the approval of treaty amendments is posed by the Constitution (whose amendment is subject to the special procedure examined below), and even more so by the *controlimiti* which must be respected by the legislature. These are all the more problematic because it is not self-evident that the national constitution can be amended so as to remove all or any such *controlimiti* due to their particular status of 'supreme principles of the constitutional order'.

The ordinary procedure for constitutional amendment under Article 138 of the Constitution is as follows. The amendment act, *legge di revisione*, needs to be deliberated and adopted in two readings, separated by a period of no less than three months. In second reading, the amendment must be adopted by a majority of the members of each house of Parliament. After adoption, the amendment can be subjected to a referendum if one fifth of the members or either house requests so, or if 500.000 citizens or five regional assemblies request a constitutional referendum. The amendment act can only be promulgated if it is approved by a majority of the votes validly cast. No referendum can be held if the amendment was adopted with a majority of two thirds of the members in each house.

Article 138 thus makes it possible to revise the provisions of the constitution; however, Article 139 of the Constitution explicitly excludes the republican form of the state, which cannot be made object of constitutional amendment[451]. Most scholars hold that, apart from the republican principle, also other constitutional principles are excluded from constitutional amendment; they constitute implicit or tacit fundamental or supreme limits to constitutional revision.

The implicit *fundamental principles of the constitution* are recognized in the case law of the Constitutional Court not only as binding public authorities acting within the scope of European law, but also as an implicit limitation to the power of the constitutional legislature to amend the Constitution's provisions.

We discuss the issue of overcoming the constitutional limits to constitutional amendment below. Here we remark that the prevalent view in Italy is that principles that are not at the

[450] Art. 80 Cost.: "The Houses authorise by law the ratification of international treaties which are of a political nature, or which call for arbitration or legal settlements, or which entail changes to the national territory or financial burdens or changes to legislation."
[451] Art. 139. La forma repubblicana non può essere oggetto di revisione costituzionale.

disposal of the constituted powers under the *Costituzione*, cannot legally be placed at the disposal of other legal orders which have effect in the Italian order either. This applies both to the EU under Article 11 of the Constitution and to norms of the Concordate under Article 7 of the Constitution.

9.3.3. Overcoming the hurdles

Overcoming procedural limits in the Constitution

Procedural requirements can be overcome by constitutional amendment of Article 138 on the basis of the same Article. It is more uncertain whether the supreme principles of the Constitution can be amended. In line with the case law of the *Corte costituzionale*, scholarship predominantly holds that this is not possible by ordinary constitutional amendment.

Overcoming the substantive limit of the republican form of the state

Some authors have maintained that the explicit limitation of constitutional amendment of Article 139 of the Constitution (republican form of government) can itself be amended through a double procedure: first, Article 139 would need to be removed from the Constitution by constitutional amendment, on the basis of the procedure of Article 138 Cost; after entry into force of this amendment, a subsequent constitutional amendment which does not respect the republican principle could be adopted.[452] Most authors disagree with this view and consider this 'double amendment' prohibited.

A different question is whether this supreme principle could be overcome by an *original constituent power* (as distinct from the ordinary procedure of constitutional amendment based on the constitution amending power as a 'constituted power'). It is only by means of the original constituent power (constitutionally 'revolutionary' power) that limits such as those contained in Article 139 could be set aside. This could be achieved by a constitutional referendum similar to the referendum of 2 June 1946, on the abolition of the monarchy. Indeed, with this referendum the monarchy was abolished and the people, expressing its view by referendum, opted for the republican form of the Italian state. This referendum is considered to have preconditioned the Constitution in the sense that it bound the subsequent constituent assembly and *a fortiori* the powers constituted by the constituent assembly in the Constitution (including the subjects of the norms on constitutional amendment). Arguably, a similar act could lift this particular pre-condition of constitutionality.[453]

Overcoming the implicit limits of the fundamental principles of the Constitution

The scholarly literature has pointed out that the *Corte costituzionale* has considered the supreme principles of the constitutional order as implicit limits to constitutional amendment only in an *obiter dictum*.[454] This might be a reason to consider the question whether they could be overcome to be moot.

In principle, the view could be defended that these implicit limits are implied decisions of the original constituent power. Implicit fundamental principles are so intimately connected to the provisions of the Constitution that they could be overcome only by a new original constituent power.

There is no precise form which this constituent power could or should take. In this regard, one could think of referendums or of a combination of referendums with a constituent

[452] Cartabia 1995, 143-144.
[453] PM Cartabia 1995, 144, footnote 8 (cont'd) mentions one author, G. Contini, who holds that under Art. 138 *Cost* any constitutional amendment can be validly adopted.
[454] E.g. Bin/Pitruzzella 2008, 327.

assembly, for which the making of the present Constitution in the years 1946-1948 could serve as a precedent. The idea of a constitutional referendum as an expression of an original constituent power is discussed further below.

The question might, of course, be raised whether an original constituent power could be bound to equivalents of fundamental constitutional principles, so that these must be considered principles that are unchangeable even for the original constitutional power. In such a view, the principle of democracy, the related principle of the republican form of the state, the rule of law and certain inalienable fundamental rights and freedoms might also be incumbent on an original constituent power. Strictly speaking, however, it is in the nature of an original constituent power to be empowered to decide whether it would consider itself bound to such principles.

A constitutional referendum on the European Union

The Constitution explicitly regulates only the abrogative referendum (which cannot be applied to EU law, as we saw above) and the constitutional referendum. However, in 1989 a constitutional law (i.e. an act of parliament passed under the same procedure required to amend the Constitution) was passed which enabled a consultative referendum, held simultaneously with the direct election of the European Parliament, on the question whether the European Communities should be turned into a Union with a government responsible to the European Parliament, and the European Parliament should be given a constituent mandate to draw up a European Constitution to be submitted to the Member States.[455] The turnout was very high, as was the outcome in favour of doing so: 81% of the electorate cast a vote and 88.1 % voted in favour.

The general view has been that this was a referendum on a hypothetical event that never came about – a kind of phantom constitutional referendum. One could nevertheless also give a different interpretation: the plebiscite was extra-constitutional in the sense that a constitutional act of parliament created an entirely novel type of popular vote for the constitutionalization of Europe, not totally dissimilar to those one might associate with original constituent powers. Presumably, this was indeed the objective of the referendum: to facilitate the creation of a Constitution for Europe in line with the traditional continental European doctrine concerning the *pouvoir constituant* of the people. The referendum was then somewhat similar to the pre-constituent referendum on the republic in 1946, as it created the preconditions for a further constituent assembly to do its work (in this case the European Parliament) of further formal constitutionalization of an effective Union. The implications of such constitutionalization for the continued existence of Italy as a sovereign state remained, however, unarticulated. In this respect, the precise contours of the constitutional moment remained unclear. And probably Italy was too far ahead of times, so that that particular constitutional moment passed.

9.4. REFERENCES

Roberto Bin, Giovanni Pitruzzella, *Diritto costituzionale* (Giappichelli 2008).

Marta Cartabia, *Principi inviolabili e integrazione Europea* (Giuffrè 1995).

Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creatino of Supranational Laws* (Edward Elgar 2012).

[455] Art. 2 L. Cost 2/1989: «Ritenete voi che si debba procedere alla trasformazione delle Comunità europee in una effettiva Unione, dotata di un Governo responsabile di fronte al Parlamento, affidando allo stesso Parlamento europeo il mandato di redigere un progetto di Costituzione europea da sottoporre direttamente alla ratifica degli organi competenti degli Stati membri della Comunità?».

10. THE NETHERLANDS

10.1. GENERAL CONSTITUTIONAL FEATURES

The Kingdom of the Netherlands is one of the six original Member States founding the European Communities.

The Kingdom is comprised of four countries: the Netherlands (which since 10 October 2010 includes the Caribbean islands of Bonaire, St. Eustatius and Saba), and Aruba, Curaçao and St. Maarten in the Caribbean (all of these Caribbean islands previously formed the Netherlands Antilles). The relations between the four countries are governed by a constitutional instrument, called the Charter of the Kingdom (*Statuut voor het Koninkrijk*). The most important constitutional instrument for the country of the Netherlands is the *Grondwet* (Basic Law or Constitution, hereinafter 'Constitution' abbreviated as *Grw*).[456]

Except for Part Four of the TFEU (on 'the association of the overseas countries and territories'), the EU Treaties apply only the country of the Netherlands in Europe, not to the three Caribbean islands belonging to the Netherlands.

The Netherlands has a parliamentary system of government, based on an unwritten rule of confidence which requires the government (or any individual minister of state secretary) to resign when either house adopts a vote of no-confidence.

The parliament – the States General – is bicameral. The government is based on the principle of cabinet government: government's policies are the common political responsibility of all members of the cabinet (ministers and state secretaries).

The Netherlands is a decentralized unitary state. The most important local authorities are the municipalities.

The court system is divided into courts belonging to the ordinary judiciary and administrative courts. There is no constitutional court properly so-called. Although courts are not allowed to review acts of parliament against the provisions of the *Grondwet*, they are allowed to review acts of parliament against directly effective treaties. Human rights treaties are considered direct sources of Netherlands constitutional law and have overriding status which is enforced by all courts. Also, courts can indeed review all other legal instruments and decisions, as long as they do not take the form of an act of parliament, against the provisions of the *Grondwet* (and other superior norms). So as a matter of fact there is a diffuse form of 'constitutional' review, as long as the constitutional nature of this is properly understood.

The Netherlands system with regard to international law is monist. International legal norms binding on the Netherlands automatically form part of the national legal order. However, only provisions of treaties and decisions of international organizations under public international law which are directly effective have an overruling effect vis-à-vis conflicting national norms (which may include constitutional norms); international customary law does not.

10.2. THE SITUATION UNDER THE CURRENT SYSTEM

10.2.1. Enabling Clauses – allowing for membership

The Netherlands *Grondwet* makes no explicit reference to the European Union. There are, however, several provisions which were introduced with a view of enabling European integration in the 1950s. These have not been substantively changed since then. Articles 90

[456] The other countries of the Kingdom have their own constitutions.

(on the duty to promote the international legal order), 92 (on the conferral of legislative, executive and judicial powers on international organizations), 93 (on the direct effect of treaties and decisions of international organizations) and 94 (on the priority of directly effective international provisions on conflicting national legal provisions) of the *Grondwet* were introduced with a view also to European integration, and this intention was reiterated at the time of the general constitutional revision leading to the text of the Constitution of 1983.

Art. 90 Grw: the duty to promote the development of the European legal order

Article 90 Grw imposes the obligation to promote the development of the international legal order:

> 'The government shall promote the development of the international legal order.'[457]

This provision was originally introduced (as Article 57) in the Constitution of 1922 as a duty to pursue peaceful means for the settlement of international disputes,[458] and echoed views and principles that later gave rise to international provisions (Kellogg Briand Pact) and provisions in other European states on the repudiation of war as an instrument of international relations. It was part of a more general revision of the constitutional provisions concerning foreign relations, and was prompted by the new situation after the end of the Great War. The clause was revised in 1953[459] and transformed into an obligation to promote the development of the international legal order. This reformulation was part of a larger revision of the provisions on foreign relations, in light of the fast development of international cooperation as witnessed by the establishment of the United Nations and various forms of European integration. It was adopted in its present form thirty years later in the Constitution of 1983.

The obligation of Article 90 Grw includes the obligation to promote the development of the European legal order. This follows both from the text and from the historical background of Article 90 Grw.[460] There have been proposals to make this more transparent in the text of the provision by extending it so as to read: "The government promotes the development of the international *and European* legal order". This 'European legal order' was intended to reflect the importance of both the EU and ECHR.[461] So far, the suggestion has not been taken up.

Art. 92 Grw: the attribution of legislative, executive and judicial powers to international organizations

Article 92 Grw provides:

> Legislative, executive and judicial powers may be conferred on international organizations under public international law, by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

[457] On the provision Leonard F.M. Besselink, The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution. In: *Netherlands Yearbook of International Law*, Volume XXXIV, 2003, pp. 89-138.
[458] 'The King shall attempt to resolve conflicts with foreign powers through judicial and other peaceful means.'
[459] Article 58: 'The King shall have supreme authority over foreign affairs. He shall promote the development of the international legal order.'
[460] As regards international relations in a broader sense, Art. 90 Grw finds a parallel in Art. 3(5) TEU which, since the Lisbon Treaty, reads: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, *as well as to the strict observance and the development of international law*, including respect for the principles of the United Nations Charter.'
[461] Rapport Staatscommissie Grondwet [Report Royal Commission on the Constitution], 2011, pp. 108.

Article 91(3) Grw provides:

> If a treaty contains provisions which depart from the Constitution or which lead to such a departure, it shall be approved by the Houses only with at least a majority of two-thirds of the votes cast.

As was made clear at the time of adoption of this provision, the possibility of conferral of powers on international organizations is considered to be declaratory in nature: even if the provision would not exist, powers could be conferred on international organizations by treaty.[462]

It should be noted that the provision speaks of the *conferral* of powers, not of the *delegation* of powers. In most cases, the international organization involved takes decisions that regard one or more other member states of the organization – if this were based on 'delegation', this would wrongly suggest that the state 'delegating' the power was competent to take legislative, executive or judicial decisions binding on other member states. Even as regards the state itself, the language of conferral rather than delegation suggests that the exercise of power is not necessarily an exclusive sovereign state power. At any rate, the provision makes clear that the conferral of powers on an international organization is allowed as a matter of national constitutional law.

Although there is no certainty as to what exactly constitutes an 'international organization under public international law' in the sense of Article 92 *Grw*, it certainly includes organizations with legal personality under public international law. In itself, this does not pose problems in relation to Article 92 *Grw*, because – in line with its merely declaratory nature – it is not intended to be exclusive in allowing the conferral of powers only to international organizations under public international law. It is generally held that the state can also confer powers to other entities, such as States.[463]

The question whether the Union - prior to the entry into force of the Lisbon Treaty, which formally posited its international personality - was an organization within the scope of this constitutional provision (and if so, whether that was the case from the moment of its establishment by the Treaty of Maastricht) has not been answered. The Council of the Union, in a case concerning a Dutch person, has denied liability for damages which occurred during an EU international monitoring mission in Bosnia, relying on EU's lack of legal personality, but it is controversial whether that position was legally tenable, either at that moment or at all later stages.[464]

The issue might arise in the context of entities set up by treaties outside the EU framework, but related to the EU (cf. the Fiscal Compact and ESM Treaty). If these entities do not have legal personality under public international law, this implies that their acts, whether executive, legislative or judicial in nature, must as a rule be attributed to the member states of the entity, together or severally.

The conferral of powers by treaty is subject, where necessary, to Article 91 paragraph 3 of the Constitution, which requires approval by at least two thirds of the votes if the treaty deviates from the provisions of the *Grondwet*. From its wording it is apparent that the conferral of powers is not in itself and necessarily a deviation from the *Grondwet*. The conferral needs, in other words, to conflict with particular constitutional norms, other than Article 92 itself, for the procedural requirement of a qualified majority to be triggered.

---

[462] See Parliamentary documents of the Lower House, TK 1951-1952, 2374, nr 3, p. 8.

[463] This means that also the conferral of executive powers on the European Financial Stability Facility ("EFSF") established by international agreement between the Eurozone member states and governed by English law (Art. 16(1) EFSF Agreement, Paris, 7 June 2010) would not be problematic under Dutch constitutional law.

[464] Letter of the Council to the legal counsel of Mr Peter Schoonenwolf, a member of the EC Monitoring Mission in Bosnia sent by the responsible leader of the EC Mission into the area of Mladic when NATO had already decided to start bombings, and was subsequently taken hostage and (wrongly) declared dead by Mladic and his men.

Procedural arrangements: treaty approval

It is a constitutional rule that treaties to which the Kingdom of Netherlands wants to become a party require prior parliamentary approval (Article 91 paragraph 1 Grw). All the founding treaties of the European Communities and the subsequent amendment treaties have so far been adopted with an actual majority of more than two thirds of the votes cast. None of them have declared the applicability of Article 91 third paragraph (on treaties deviating from the *Grondwet*).

10.2.2. Adaptation of the constitutional framework to facilitate membership

Adaptation of specific provisions
Contrary to some other Member States, neither the issue of voting rights for non-Dutch EU citizens, nor the European Arrest Warrant have necessitated constitutional changes. Since 1983, the *Grondwet* has allowed non-nationals (including non-EU citizens) to vote and stand for election in municipal elections.[465] The electoral legislation has established a residence requirement of a minimum of five years for non-EU foreign citizens – for EU citizens, mere residence suffices.

Among piecemeal adaptations of constitutional significance, mention can be made of article 20 of Book 2 of the Civil Code, which affects the constitutionally guaranteed freedom of association and in particular the freedom to establish a political party. It prohibits *ipso iure* any legal person mentioned in the lists annexed to the EU sanctions regulations and common positions, adopted with a view to combatting terrorism, and declares them legally incompetent to act.[466] This is in contrast to the position under national law, which restricts the possibility to dissolve a legal person to a specific court decision at the request of the public prosecutor, and requires the court to establish concretely that the acts and existence of the legal person involved is against public order. These are requirements which are applied with the greatest possible restraint to political parties in autonomous national situations, but when it comes to political groups and parties on the EU sanction lists, they are automatically prohibited and there is no need for a decision by a court.

Adapting the constitutional framework and the functioning of the system
The establishment of the European Coal and Steel Community was a deliberate reason to introduce the provisions we now find in Artt. 93-94 Grw.. They provide that directly effective provisions of treaties and of decisions of international organizations have binding effect after they have been published in accordance with rules established by act of parliament (Art. 93); while in case of conflicting national legal provisions, such directly effective provisions of international law have overriding effect. We discuss the meaning and relevance of these provisions below.

> Article 93
>
> Provisions of treaties and of decisions by international organizations under public international law, which can bind everyone by virtue of their contents shall become binding after they have been published.

[465] Art. 130 Grw.
[466] Civil Code, Book 2, Art. 20 (3): 'A legal person mentioned in the list, meant in Article 2, third paragraph of Council Regulation (EC) No 2580/2001, OJ L 344, in Annex I of Council Regulation (EC) nr. 881/2002 of 27 May 2002 (OJ L 139) or is mentioned and marked with a star in the Annex to Common Position nr. 2001/931 of the Council of 27 December 2001 (OJ L 344) is prohibited by law and legally incapable to engage in legal acts.'

> Article 94
>
> Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of decisions by international organizations under public international law, which can bind everyone.

The Act of Parliament by which the Lisbon Treaty was approved, provides for the possibility for either house of parliament to request a scrutiny reserve (see further below), but for subsidiarity review only informal internal rules apply. The national legal basis for bringing a subsidiarity case to the Court of Justice under Article 8 of Protocol No 2 is to be found in informal correspondence between both houses of parliament and the government.[467] The same informality is the basis for the engagement of the States General in the 'political dialogue' with the Commission (the so-called 'Barroso initiative').

Partial adaptations of constitutional significance have also been the introduction of Articles 1:7 to 1:9 *Algemene wet bestuursrecht* (in 1993), which bypass the usual advisory bodies and notification duties, with the exception of the Raad van State (Council of State), when it comes to the implementation of EU law. The role of a multitude of advisory bodies in the process of legislation and policy formation was at the time a distinguishing feature of the Netherlands political and constitutional system, which has – under a reform act of 1996 popularly known as the 'Desert Act' [*Woestijnwet*] – been drastically reduced.

There have been various proposals to improve the speed of implementation of EU law in Dutch legislation in the course of the 1990s. Many 'Henry VIII'-like clauses in acts of parliament – which allowed lower legislation either to depart from acts of parliament or even to amend specific acts of parliament whenever this was necessitated by international treaties or decisions of international organizations (including the EU) – happened already to exist. These were highly unsystematic and at least some of them not without constitutional objections from the perspective of democratic decision-making.[468] Nowadays, the rules of instruction on legislation issued by the prime-minister to all ministerial departments no longer allow lower legislation to deviate from higher, except under circumstances of emergency (or temporarily for the purpose of experimental legislation).[469] As a rule, delegation of legislative power by act of parliament is allowed if it is delegation on specified points to an order in council (*algemene maatregel van bestuur*). Delegation to a minister is not allowed, unless it concerns purely administrative regulations which require frequent changes. For the purpose of implementation of international legislation (including EU law), however, delegation by act of parliament to a minister is allowed, if it does not leave room for policy choices except on minor points.[470]

In addition, legislation has been passed which creates the possibility for the competent minister to instruct any public entity that does not comply with an obligation incumbent on the Netherlands under EU law to fulfil the obligation within a time limit established in the instruction. Moreover, should the non-compliance of a public entity lead to EU fines or other payments by the Netherlands resulting from its liability under EU law, these sums of money can be recovered by the competent minister from the public entity whose non-compliance has engaged the liability of the Netherlands.[471]

[467] See on these matters Van Mourik 2012, 50-64.
[468] An overview on the state of affairs by 2002 in Besselink and others 2002, 95-155.
[469] Aanwijzingen voor de regelgeving, aanwijzing 33a.
[470] Aanwijzingen voor de regelgeving, aanwijzing 26.
[471] Wet Naleving Europese regelgeving publieke entiteiten, Staatsblad 245, 2012. Arguably, this act is partly in conflict with Art. 132(5) Grondwet as , in cases of autonomous powers of municipalities and provinces (as is the case e.g. in public procurement), the constitution only allows for measures in cases of gross neglect of duty, in which case measures must be taken by act of parliament.

10.2.3. Status, effect and rank of EU law in the domestic legal order

As a consequence of Article 94 *Grw*, directly effective EU law has constitutional or supra-constitutional rank. This rank implies EU law's (supra-) constitutional nature as entrenched rules. The (supra-) constitutional rank and nature is based on the *formal* criterion of being 'directly effective' only. This criterion does not distinguish either as to whether this regards primary or secondary EU law, or whether the *substance* of the relevant EU law is constitutional in nature. So, under Dutch law the Charter of Fundamental Rights (which is of typically constitutional substance) is of the same rank as the proverbial Regulation on quality standards for bananas[472] or any of the other most technical and administrative EU decisions.

Since the mid-1980s, a considerable number of Dutch constitutional lawyers have begun holding the view that Articles 93 and 94 Grw do not govern the effect of EU law in the national legal order; this is, so it is held, because the status and rank of EU law is governed only by EU law itself, as established in *Van Gend & Loos* and *Costa/ENEL*, which in their view entails the exclusion of any possible function of Articles 93 and 94 Grw.[473]

This view has been endorsed in an *obiter dictum* by the criminal division of the Hoge Raad (Supreme Court)[474] – but the issue was evaded by the civil chamber when the point was raised around the same time – and was also held by the Judicial Division of the Raad van State[475], although this stance has not been reconfirmed in subsequent case law.

The practical meaning of this view is that even EU acts and measures that are not duly published – which is normatively excluded since the entry into force of the Lisbon Treaty – can directly impose obligations on citizens in the Netherlands' legal order, and also non-directly effective EU law would have overriding effect with regard to national legal provisions.

10.2.4. Conditioning participation in EU integration

Substantive Limits

Substantive limits to EU law under the current treaty framework are the following, which we briefly discuss presently:

- the clause in the Charter of the Kingdom on protection of fundamental rights, legal certainty and good governance (Art. 43 Kingdom Charter);

- supra-constitutional norms of international origin, mainly consisting of international human rights provisions.

The Charter of the Kingdom provides in Article 43:

> 1. Each of the countries shall ensure the realization of fundamental human rights and freedoms, legal certainty and good governance.
>
> 2. The safeguarding of such rights and freedoms, legal certainty and good governance shall be an affair of the realm.

[472] Commission Regulation (EC) No 2257/94 of 16 September 1994 laying down quality standards for bananas, Official Journal L 245, 20/09/1994, p 6-10.
[473] For the sake of brevity we refer to Van der Pot 2006, pp. 719-722 for a discussion with full references to the literature.
[474] HR 2 November 2004, ECLI:NL:PHR:2004:AR1797.
[475][475] ABRvS 7 juli 1995, AB 1977,117.

The Charter has primacy over the Grondwet, which 'shall have regard to the provisions of the Charter' (Art. 5(2) Charter). Potentially, Article 43 Charter is a primary norm that must be respected also in the execution of EU law by the Netherlands. However, there is no significant case law that makes clear what securing 'the realization of fundamental human rights and freedoms, legal certainty and good governance' means precisely, and whether the provision has direct effect in the sense that citizens can rely on it in court. Possibly, respect for such rights and principles dissolves in the respect for the international human rights obligations the Kingdom and its countries have entered into, as well as respect for human rights and principles of good governance as contained in national constitutional provisions. It may also be considered as a legal obligation to respect rights, freedoms, legal certainty and good governance as primordial constitutional principles that bind the legislature and the makers or amenders of the *Grondwet*.[476]

There is no developed doctrine on supra-constitutional norms and values that would need to be respected when the *Grondwet* is amended (or when a treaty is approved that deviates from the provisions of the *Grondwet*). Nevertheless, it is generally agreed that directly effective treaty norms have in principle a status above the *Grondwet*, so that arguably they need always to be respected by the legislature, also in the process of approving treaties and amending the *Grondwet*. This is particularly cogent as regards international human rights treaties protecting classic fundamental rights.

The prevailing legal notion is that one cannot act contrary to binding international law, and as regards directly effective international provisions, the courts can uphold such international provisions against conflicting national law (in principle including provisions of the *Grondwet*). This is in practice done in particular with regard to directly effective provisions of human rights treaties, such as the ECHR, as well as relevant provisions of the International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child and some ILO conventions.

It is standing case law that in case of conflict between treaty obligations, Dutch courts can balance them in order to establish which of them should outweigh the other. So far, this has always resulted in international human rights provisions outweighing non-human rights obligations under international law. The relevant case law mostly concerns extradition cases. The obligation to observe general obligations deriving from international and European as well as EU law even in the implementation of UN Security Council sanctions (in the case law: those against Iran) has been enforced in recent case law.[477] The issue has not yet arisen explicitly in the context of EU law, and perhaps the primary law status of the EU Charter on Fundamental Rights diminishes the chances that a court will ever be in the position to solve a collision of international treaty obligations, and the chances may diminish further when the EU accedes to the ECHR.

Courts cannot review treaties against the provisions of the *Grondwet* (Art. 120 Grw), and this implies that they cannot review decisions of international organizations against the *Grondwet* either. It is up for parliament, when approving a treaty, to judge whether it is compatible with the *Grondwet*.

[476] The President of the District Court of The Hague held that Article 43 Charter can be invoked by citizens in court, and that he could even review an act of parliament against the principle of legal certainty mentioned in Art. 43 Charter (Pres Rb Den Haag, 11 August 1988, ECLI:NL:RBSGR:1988:AH2339), but this judgment was squashed by the Hoge Raad, which held that acts of parliament cannot be reviewed against provisions of the Charter, HR 14 April 1989, ECLI:NL:HR:1989:AD5725.
[477] HR 14 December 2012, ECLI:NL:HR:2012:BX835.

Procedural Limits

Apart from certain areas and matters reserved for national authorities (the legislature, in particular, as explained below), there are procedural requirements to which European integration is bound.

These concern:

- the requirement of parliamentary approval of treaty amendments and new treaties by ordinary *majority of the votes cast* in both houses of parliament, if the new obligations entered into do not entail divergences from the provisions of the *Grondwet*;
- the requirement of parliamentary approval of treaty amendments and new treaties by at least *two thirds of the votes cast* in both houses of parliament, if the new obligations entered into entail divergences from the provisions of the *Grondwet*;
- acts under Articles 77(3), Art. 81(3) (EU family law measures), 87(3), and 89 TFEU require the prior consent of both houses of parliament;[478] but the consent is deemed to have been granted tacitly if neither house has expressed the wish to submit the decision to an explicit vote within fifteen days;[479]
- acts specified by Art. 2 of Protocol No 1 on the Role of National Parliaments (Lisbon Treaty), can be made the object of a scrutiny reserve at the request of either house of parliament within two months after they were communicated to parliament; this reserve is temporary (four weeks as a rule though no legally binding maximum duration is provided for);
- Article 93 Grondwet requires prior publication of primary and secondary EU law before it can have direct effect in the national legal order.

There are at present no referendum requirements.

There are no express provisions on the approval of simplified amendments to the EU treaties; the understanding is that the simplified approval under Art. 48(6) TEU is subject to the normal rules for the approval of treaties.

No explicit provision is made for the procedure to be followed by the Netherlands Parliament (the States General) in the cases provided in Art. 48(7) TEU (introduction of qualified majority in areas or cases in which unanimity has so far been required): however, in these cases a draft decision is notified to the national parliaments, any of which can block the decision.

10.3. FURTHER TREATY REFORM

10.3.1. Substantive reservations

The Charter of the Kingdom

Article 43 of the Charter of the Kingdom imposes the constitutional duty for each of the countries of the Kingdom to 'promote the realization of fundamental human rights and freedoms, legal certainty and good governance'. This might be understood to be a duty to respect rights, freedoms, legal certainty and good governance as primordial constitutional principles.

It is textbook wisdom that the 'legal provisions' which according to Art. 94 Grw can be overruled by directly effective international norms include the provisions of the Charter of the Kingdom and legislation for the whole realm (which is passed on the basis of the

[478] Art. 3 Rijkswet of 10 July 2008, tot goedkeuring Verdrag van Lissabon, Staatsblad 2008, 301.
[479] The particular selection of EU acts that require prior parliamentary approval is based on the criterion that the EP has no decisive co-legislative power in these cases.

Charter). There is, however, at least uncertainty as to the question whether that is truly so. According to Article 49 of the Charter of the Kingdom, a special act shall determine the rules 'with regard to the binding force of legislative measures which are inconsistent with the Charter, an international instrument, an act of the realm or an order in council of the realm.'[480] Such an act has, however, never been passed. The *Hoge Raad* has established that the absence of that act leads to a prohibition of judicial review of the binding force of measures that are inconsistent with the Charter.[481] This might arguably be extended to review against international instruments. If this would hold, the Charter of the Kingdom might pose a substantive obstacle to further European integration.[482]

As far as the Charter of the Kingdom is concerned, all this means that treaty amendments or new treaties are in principle not allowed it they entail divergences from the *Statuut voor het Koninkrijk*. The issue is further examined below.

The Grondwet

The *Grondwet* reserves a number of tasks to the legislature. These comprise provisions on the creation of public entities, the regulation of public authorities and several aspects of their functioning, as well as provisions allowing for restrictions of the exercise of certain fundamental rights, and finally also provisions concerning certain areas of public concern which must be regulated by or pursuant to an act of parliament, such as (not exhaustively):

- Dutch citizenship (nationality), and admission and expulsion of aliens (Art. 2 Grw)
- Data protection (Art. 10(2) Grw)
- Labour law (Art. 19(2) Grw)
- Social security (Art. 20(2) and (3) Grw)
- Education (Art. 23 Grw)
- Military service (Art. 98(2) and 99 Grw)
- Emergency situations and derogation from the *Grondwet* under emergencies (Art. 103 Grw)
- Taxation (Art. 104 Grw)
- The monetary system (Art. 106 Grw)
- Codification of civil law, penal law, and civil and criminal procedure (Art. 107 Grw)
- Legal status of civil servants (Art. 109 Grw).

These constitutional provisions of an institutional nature have often been understood as aimed at the 'internal' organization of the state. But also the other provisions can be understood as a reservation of the matter to the national legislature as opposed to the executive or decentralized authorities, and in that sense a matter of 'internal' organization.

Two quite opposite conclusions have been drawn from this, which must be distinguished with a view to the possibilities for further European integration: the first one is that these provisions have no external relevance, the second one is that, notwithstanding their primary internal objective, they do have external effect. We briefly treat each of these views below.

[480] Article 49 Charter for the Kingdom: 'Rules may be established by act of the realm with regard to the binding force of legislative measures which are inconsistent with the Charter, an international instrument, an act of the realm or an order in council of the realm.'
[481] HR 14 april 1989, especially §§ 4.1 - 4.6.
[482] It is doubtful whether it is enough to take away the doubts by pointing to the fact that under Dutch constitutional law the immunity of review of acts of parliament applies only to national constitutional sources, not to review against international sources; the latter type of review is after all based on an explicit exception to such immunity (Art. 94 Grw is an explicit exception to Art 120 Grw), and it is precisely the absence of an explicit exception (see Art. 49 Kingdom Charter) that is the problem.

The view that constitutional reservations have no relevance in external relations

Many authors have concluded from the internal organizational nature of the relevant constitutional provisions that they cannot be invoked in the context of international or European cooperation.[483] As a consequence there are no constitutionally reserved areas which the EU (or any other form of international cooperation) could not regulate. These authors emphasize that Art. 92 Grw allows for the attribution of legislative, executive and judicial powers to international organizations, and that this is merely a declaratory statement: it only confirms that provisions of the *Grondwet* which attribute and regulate powers of Netherlands public authorities do not affect the powers attributed to international organizations.

This view was supported by parliament when the Maastricht Treaty was approved, when in the discussions and debates leading up to the approval of this Treaty,[484] the question was raised whether the introduction of a European currency would deviate from the provision of the *Grondwet* which stipulates that '[t]he monetary system shall be regulated by Act of Parliament' (Art. 106 Grondwet). This view was rejected, though without very thorough consideration of any alternative interpretations of this provision of the *Grondwet*.

The view that constitutional reservations have effect in external relations

Others have opposed this conclusion in as much as this would undermine the distribution of powers and the principle of legality;[485] it would create an international detour for avoiding constitutional restraints (imposed by the *Grondwet* particularly on the national government and its members) via treaties and international organizations; and it would obviate the rationale of a qualified majority for engaging in international obligations which deviate from the provisions of the *Grondwet* (Art. 91(3) Grw, to which reference is made in Art. 92 Grw).

At one point, the government took the view (outside the context of EU law) that the requirement of a basis in an act of parliament was fulfilled as the relevant treaty was approved by act of parliament.[486] This, however, fits in poorly with the monist system as regards treaty law in the Netherlands legal order: the approval does not determine the internal effect of international treaty law, but merely grants leave to the government to consent to being bound by the treaty in international relations. On the other hand, it is quite clear that in itself an explicit approval of a treaty by act of parliament provides it with a legitimacy which approaches to some extent that of an act of parliament which itself contains rules binding on citizens (it is not fully equivalent, since in cases of treaty approval parliament does not have any amendment power; it is a matter of 'take it or leave it').

A conclusion on reserved areas in the Grondwet

In the first view as expounded immediately above, the *Grondwet*'s reservation of certain areas of legislative action to the legislature does not apply in the context of EU law and cannot therefore pose a substantive obstacle to further European integration. In the alternative view, further integration substantively intervening in the relevant areas reserved for acts of Parliament is not hindered as long as the areas covered leave scope for implementing acts at national level, somewhat similarly to the nature of EU directives. Otherwise such further integration does infringe on the *Grondwet*.

[483] Duynstee 1953; Oud 1970, 330-332; Akkermans/ Koekkoek 1992; Fleuren 2002, which contains further references to the older literature.
[484] Heringa 1992 a and b; Burkens and others 1992.
[485] Among others Roos, 1986; Besselink 1987; Besselink, 1993.
[486] The government relied on this in the context of the agreement on the trial of two Libyan accused by a Scottish court in the Netherlands; this presumably is not a court in the sense of Art. 17 Grw ('No one may be withheld access to the court to which he is entitled by act of parliament [wet] against his will.'), but the government maintained that the act approving the agreement is here the relevant act; see Parliamentary documents (kamerstukken) 1998-1999, 26 221.

Constitutional review of treaties and criteria of unconstitutionality

Netherlands courts cannot review acts of parliament against the provisions of the *Grondwet*, nor can they review treaties against the provisions of the *Grondwet* (Art. 120 Grw). This implies that they cannot review decisions of international organizations against the *Grondwet* either, based as they are on treaties. It is therefore up to parliament, primarily when approving a treaty, to judge whether it is compatible with the *Grondwet*.

The 'constitution' of the Netherlands is, however, not merely contained in the *Grondwet*, but also in other sources. There is general consensus that directly effective treaty norms which concern substantive constitutional rules, in particular concerning human rights, belong to the sources of Netherlands constitutional law. In principle, any Dutch court can review any act of a public authority against such provisions.

As we already remarked, courts do indeed have the power to review a treaty to which the Netherlands is a party against other treaty obligations. This has been effectively done mostly in cases which involved a conflict of obligations under one treaty with an ECHR right. In all these cases the human right was judged to prevail in a balancing of the interests underlying obligations under the conflicting treaty provisions.[487]

It is here that it would theoretically be possible to review primary or secondary EU law against other treaties, under which conflicting obligations may arise in specific instances. No actual instances have, however, occurred, without the Dutch court referring the matter to the Court of Justice for a preliminary ruling on the point. Presumably, the entry into force of the EU Charter of fundamental rights under the Lisbon Treaty has lessened the chances of an autonomous form of constitutional review of EU law against fundamental rights standards of other treaties.

Supra-constitutional limits

There is no developed doctrine on supra-constitutional norms and values such as the 'eternity clause' of the German Basic Law, which would need to be respected when the *Grondwet* is amended.[488] In 2006, the then minister of justice caused a stir when he said that Sha'ria is in conflict with the *Grondwet* but that it could be amended by a two thirds vote so as to accommodate it if such a majority would be available. Nevertheless, objections were voiced from constitutional lawyers.

Some discussion has taken place, however, over the question whether it is always allowed to approve a treaty that deviates from the provisions of the *Grondwet*. The *Raad van State* thus presented two sets of norms from which it suggested one could or should not deviate when concluding a treaty and approving it by qualified majority (Art. 91(3) Grw). Firstly, it held that one cannot deviate from certain other treaty obligations, especially 'the treaties establishing the European Union and the European Convention of Human Rights'. Secondly it hypothesized: "In the opinion of this Council it can be sustained that the same holds for provision of the *Grondwet* that provide essential guarantees, especially the fundamental rights of the first chapter of the *Grondwet*. An infringement of fundamental rights can under certain circumstances be so fundamental that approval even under Article 91(3) Grw cannot be justified.'[489]

However this may be, it is generally agreed that directly effective treaty norms have in principle a status above the *Grondwet*, so that arguably they always need to be respected

[487] The locus classicus is HR 30 March 1990, NJ 1991, 249. Most of the case law concerns conflicts of obligations under extradition treaties and human rights treaties e.g. also HR 15 September 2006, C05/120HR, LJN: AV7387, and the advocate general's opinion in this case, paragraphs 4.1 ff..
[488] See, however, G.F.M. van der Tang, Artikel 137, in: Akkermans-Koekkoek, *De Grondwet*, 1992, p. 1188.
[489] Advies Raad van State d.d. 19 november 1999 inzake implementatiewetgeving buitenlandse jurisdicties, *Kamerstukken II* 1999-2000, 26 800 VI A, p. 6.

not only by the legislature but also in the process of approving treaties and amending the *Grondwet*. This is particularly cogent as regards international human rights treaties protecting classic fundamental rights.

10.3.2. Procedural hurdles for further integrations

The procedural hurdles for further European integration are the same we indicated above in Section 10.2.4 under B.

10.3.3. Overcoming the hurdles

Overcoming procedural limits

The procedural hurdles of parliamentary majorities, both the ordinary majority of the votes cast as well as the qualified majority in case of treaties diverging from the Grondwet, could be amended through amendment of the Grondwet. This is unlikely to happen, because the qualified majority of Article 91(3) Grw is already lighter than that for amendment of the Grondwet (which requires adoption of an amendment in two readings, with a simple majority of the vote in the first reading and a qualified majority of two thirds of the vote in second reading, with elections of the *Tweede Kamer* in between). Otherwise, they can only be neutralized by creating the required political support so that those majorities are actually attained.

Parliamentary scrutiny reserves are not absolute obstacles. The parliamentary consent requirements listed above (Section 10.2.4 under B) can be overcome by amendment of the act of parliament in which they are contained (the Act of Approval of the Lisbon Treaty).

Overcoming the substantive limits

The highest national source of constitutional law, the Charter for the Kingdom, can be amended prior to the entry into force of a treaty amendment that might be in conflict with the Charter, especially its Article 43, provided that the relevant provisions of the Charter are not beyond amendment on the basis of 'supra-constitutional' principles as indicated below.

Moreover, as under national constitutional law the Charter for the Kingdom arguably cannot be reviewed by courts against treaty norms and decisions of international law, including EU law, but will prevail, any further EU integration which leads to deviations from the Charter for the Kingdom must be preceded by an amendment of this Charter. This can be done by a special act of parliament to be adopted by the Netherlands parliament as well as each of the parliaments of Aruba, Curaçao and St. Maarten (the Caribbean countries of the Kingdom of the Netherlands).

Substantive issues raised by provisions of the *Grondwet* can in principle be overcome procedurally under 91(3) Grw.

The substantive areas which the *Grondwet* reserves for the *legislature* by act of parliament are no obstacle to further integration in the view of those scholars who consider these constitutional provisions without relevance for the conduct of external relations in the framework of the EU. For those who, to the contrary, do consider these provisions also relevant with regard to European integration, they can be overcome in a variety of ways, depending on the circumstances.

Firstly, to the extent that European law that requires implementation respects Member States' discretion in the choice of the national instruments of implementation, as is typically the case for EU directives, there is no problem at all. The instrument of the act of parliament can then be used to live up to the relevant requirement of the Grondwet.

Secondly, where EU law draws a matter essentially away from the reserved domain of the legislature, and to the extent this is considered to diverge from the provisions of the *Grondwet*, Article 91(3) Grw allows for the approval of treaties that diverge from the constitutional provisions with a majority of at least two thirds of the votes cast in both houses of parliament. This provision has not yet been applied explicitly on the occasion of any of the treaty approvals involving the EU, though they have all been adopted with a majority of more than two thirds of the votes cast. Should the EU treaties prove to lead to secondary EU law which is in conflict with the *Grondwet*, this latter fact (they have, after all, been approved with two thirds of the votes cast) would, according to one view, mean that the deviation from the *Grondwet* is covered. According to another view, however, the treaty would require a re-approval with the required majority of two thirds of the vote.[490] Here the political support would be decisive for the question whether the hurdle can be overcome, though there is no doubt that legally it can be done.

As regards supra-constitutional requirements: if there are no truly supra-constitutional limits to constitutional amendment, there would not be any problem with further European integration.

There is no strong notion either of sovereignty of the state, nor of popular sovereignty as a constitutional doctrine. This has made it possible to hold the view that as a matter of fact the Netherlands are already part, as a state, of a semi-federal European Union – a view which was quite common in the 1990s both in politics and constitutional law circles, but even before that. This does not exclude that the matter might arise in legal discourse if the question would formally arise whether the Netherlands were to give up its statehood and be no more than part of a European Union. At the moment, strong popular sentiment (though not necessarily representing a majority sentiment) might militate against this.

However, there are more and more signs of awareness that international human rights obligations are binding on all public authorities, which arguably also limits the power to amend the constitution (this could apply both to the Charter of the Kingdom and the *Grondwet*). The *Raad van State* has suggested that this is the case. It is not totally clear whether this view finds its basis in the principles of the *Grondwet* itself (notably as expressed in Article 93 and 94 Grondwet). If this were the case, prior amendment of these Articles would be a possibility to remove that obstacle to further constitutional amendment – perhaps combined with rescinding the ECHR and similar treaties. If, however, the principle of being absolutely bound to fundamental rights treaties is a principle which is based on norms truly beyond the *Grondwet* itself, this might provide an unsurmountable obstacle to further European integration, if it meant violating fundamental human rights as recognized by international treaties. There is no coherent and strongly developed set of views expressed either by the constitutional organs in the Netherlands nor by the constitutional scholarship.

All this suggests that there are few if any unsurmountable obstacles to further integration in the Netherlands constitution. They may, of course, very well exist in terms of the political feasibility of taking the required procedural steps in achieving further European integration in the framework of the EU - but these are beyond the scope of this study.

10.4. REFERENCES

Leonard F.M. Besselink, H.R.B.M. Kummeling, R. de Lange, P. Mendelts en S. Prechal, *De Nederlandse Grondwet en de Europese Unie*. Europa Law Publishing, Groningen 2002. xii + 279 pp.

[490] For a treatment, Fleuren 1998, p. 100.

Leonard F.M. Besselink, The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution. In: *Netherlands Yearbook of International Law*, Volume XXXIV, pp. 89-138.

Burkens, M.C. en Vermeulen, B.P., Kortmann, C.A.J.M., Sewandono, I., Besselink, L.F.M. Reacties op Heringa. In: NJB, 1992, aflevering 27, p. 861-865

Duynstee, F.J.M., *Grondwetsherziening 1953: De nieuwe bepalingen omtrent de buitenlandse betrekkingen in de Grondwet, in voce* 'artikel 63', Kluwer, Devener 1954.

Fleuren 1998, in: C.A.J.M. Kortmann, P.P.T. Bovend'Eert, J.C.E. Ackermans-Wijn, J.W.A. Fleuren, M.N.H. van der Nat, *Grondwet: Tekst en Commentaar*, Kluwer, Deventer 1998.

Fleuren, J.W.A. Verdragen die afwijken van de Nederlandse Grondwet. In: Breillat, D., Kortmann, C.A.J.M., Fleuren, J.W.A. , e.a. Van de constitutie afwijkende verdragen, publikaties van de Staatsrechtkring, Deventer, Kluwer, 2002, p. 52-70.

Heringa, A.W. De verdragen van Maastricht in strijd met de Grondwet. In: Nederlands Juristenblad, 1992, aflevering 24, p. 749-752 (Heringa 1992a).

Heringa, A.W. Naschrift. In: Nederlands Juristenblad, 1992, aflevering 27, p. 865-866 (Heringa 1992b).

Brecht van Mourik, Parlementaire controle op Europese besluitvorming: Een rechtsvergelijkend onderzoek naar mandaatsystemen en parlementaire behandelingsvoorbehouden/ Parliamentary scrutiny of EU decision-making: A comparative study on mandating systems and parliamentary scrutiny reserves (with a summary in English). Wolf Legal Publishers, Nijmegen, 2012.

Van der Pot, *Handboek van het Nederlandse Staatsrecht*, bewerkt door D.J. Elzinga, R. de Lange, H.G. Hoogers, Kluwer, Deventer 2006.

11. POLAND*

11.1. GENERAL CONSTITUTIONAL FEATURES

The Republic of Poland, a Member State of the EU since 1 May 2004, is a democratic state under the rule of law with a system of government based on the separation of and balance between legislative, executive and judicial powers.

Poland is a parliamentary democratic representative republic with a political system based on the Polish Constitution of 1997. The new Polish Constitution (accepted by the National Assembly by majority of votes in favour and subsequently confirmed by referendum) vests legislative power in the Parliament, executive power in the President and the Council of Ministers, and judicial power in courts and tribunals.

The current bicameral Parliament is divided into the Chamber of Deputies (the Sejm) and the Senate. The Chamber of Deputies has 460 members and the Senate 100 members, both being elected for a four-year terms. Parliamentary elections are conducted by secret ballot, and voting is universal, equal, and direct. The Sejm exercises control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and shares its legislative power with the Senate (Art. 95 of the Constitution). The President is elected by popular vote for a five-year term of office and may be re-elected only for one more term. The President of the Republic, in addition to many other competences, also ratifies and renounces international agreements (Art. 133 of the Constitution).

The judicial system in Poland comprises the 'ordinary' court system and the Constitutional Tribunal. The ordinary court system consists of the Supreme Court, the common courts, administrative courts and military courts. The Constitutional Tribunal, composed of fifteen judges who are chosen by the Sejm for a nine-year term, adjudicates, *inter alia*, on the constitutionality of laws passed by the other branches and on individual actions concerning the infringement of constitutionally guaranteed rights and freedoms. Another function of the Tribunal is to ensure the conformity of statutes and international agreements to the Constitution.[491]

The procedure for amending the new constitution is provided in Article 235 of the Constitution.[492] The 1997 Constitution has been amended only once so far: the amendment by the Sejm on 8th September 2006 concerning the necessary changes associated with the European Arrest Warrant Framework Decision.

Article 91 of the Constitution prescribes the monistic approach for the incorporation of international law into the Polish domestic legal system: a ratified international agreement shall constitute part of the domestic legal order, shall be applied directly and shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. The last paragraph grants primacy to laws established by the international organisation.

11.2. THE SITUATION UNDER THE CURRENT SYSTEM

11.2.1. Enabling Clauses – allowing for membership

Poland's accession to the European Union was a very complex process. It started in 1989 including a multi-dimensional transformation of the Polish state and society from a

* Many thanks to Adam Lazowski for his valuable comments.

[491] A list of competences can be found in Article 188 of the Constitution.

[492] It is not an easy task: it requires approval of two parliamentary chambers (two-thirds majority in the Sejm in the presence of at least half of the statutory number of Deputies, and absolute majority in the Senate in the presence of at least half of the statutory number of Senators), and it may involve a confirmatory referendum.

communist system to a new political and economic system of democratic capitalism. Already in September 1989, Poland signed the trade and commercial and economic cooperation agreement with the (then) European Community. This agreement laid down the basis for further negotiations on the subject of association of Poland with the EU. Two years later, in December 1991, the Europe Agreement was signed with the aim of promoting the expansion of trade and economic cooperation but also providing a framework for political dialogue and Poland's gradual integration into the Community.

The first important moment in Poland's way to the EU was during the Copenhagen summit in June 1993 where the EU decided to open EU membership to the Central and East European countries as soon as they would be 'able to assume the obligations of membership by satisfying the economic and political conditions required.'[493] These conditions became known as the Copenhagen criteria for membership.[494]

The negotiation process officially started in 1998 and the Accession Treaty was signed in Athens on 16 April 2003. The accession procedure was completed by a national referendum that took place in June 2003.

The basis for negotiations and ultimately for the accession of Poland to the EU can be found in Article 90 (1) of the Polish Constitution, which reads as follows:

> 'The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'.

International agreements envisaged in Article 90 (1) of the Constitution, concerning the transfer of competences of State authority organs to an international organisation or an international organ, constitute one of the categories of international agreements subject to ratification. Ratification of such an agreement requires two-thirds majority vote in the presence of at least half of the statutory number of Deputies, both in the Sejm and in the Senate (Article 90 (2) and (3) Constitution). This procedure was applied for the approval of the Lisbon Treaty.

Alternatively, the Sejm (by an absolute majority vote in the presence of at least half of the statutory number of Deputies) or the President of the Republic (with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators) can decide to call a referendum on the matter, which the Sejm in fact did when the ratification of the Accession Treaty was at stake. If a referendum takes place, the majority of those eligible to vote have to cast their vote in order for the referendum to have binding legal force.[495]

In the referendum on the Accession Treaty, the Polish citizens opted for Poland's accession to the European Union (77 % of electorate voted in favour of accession). The Supreme Court confirmed the result[496] and Poland (together with other 9 candidate countries) became a member of the European Union on 1 May 2004.

[493] European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993) 13.
[494] The Copenhagen criteria laid down the following EU membership requirements:
1. That candidate countries achieve stable institutions that guarantee democracy, legality, human rights and respect for and protection of minorities.
2. That candidate countries have a working market economy, capable of competing effectively on EU markets.
3. That candidate countries are capable of accepting all the membership responsibilities, political, economic and monetary.
[495] Article 125 (3) of the Constitution.
[496] In accordance with Article 125 (4) of the Constitution.

11.2.2. Adaptation of the constitutional framework to facilitate membership

The Polish Constitution represents the 'international organization'[497] approach towards EU integration: it includes only few general clauses on international organizations, with no specific reference to the EU. As already mentioned above, the legal basis for the transfer of competences to an international organisation as well as the procedure for granting consent to ratification of such an agreement can be found in Article 90 of the Constitution which permits delegation of competences to international organisations by means of an international agreement. It reads as follows:

1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

The relationship between national and international law is addressed in Article 91 of the Constitution. Article 91(1) provides that a ratified and promulgated international agreement 'shall constitute part of the domestic legal order and shall be applied directly', and Article 91(2) grants supremacy to such treaties. The third paragraph represents the constitutional accommodation of supremacy for the laws adopted by those international organizations for whom it is so provided in the ratified treaty.[498] The content of Article 91 is further reinforced in Article 9 of the Constitution, which provides that 'the Republic of Poland shall respect international law binding upon it'.

The Polish Constitution has been amended once since it was adopted in 1997, with the purpose of adjusting the Constitution to the obligations stemming from the participation in the EU. The amendment passed by the Sejm on 8th September 2006 concerned the European Arrest Warrant framework decision (EAW) and Article 55 of the Constitution which, in its original form, prohibited extradition of Polish nationals.

The Constitutional Tribunal, in its decision on the EAW, considered the conformity of a national statute implementing framework decision 2002/584/JHA of 13 June 2002 with Article 55 of the Constitution. Article 55, as stated earlier, prohibited extradition of Polish nationals and the challenged provision was in a clear breach. Thus, the Tribunal declared the provision at stake unconstitutional. Nevertheless, the Tribunal recognised that under obligations derived from Polish membership in the EU and stemming from Article 9 of the Constitution, implementation of the framework decision is a constitutional requirement[499] and therefore an amendment of the provision at stake was necessary. It preserved the unconstitutional provision for a period of eighteen months, leaving the legislature the maximum amount of time permitted by the Constitution to amend the act. During this period, all Polish courts were precluded from claiming inconsistency of the provision with Article 55 of the Constitution and were hence obliged to apply the unconstitutional provision in order to ensure fulfillment of EU obligations. Moreover, the Tribunal instructed the

[497] The term 'international organisation' approach has been used by Anneli Albi in her writings, see e.g. Albi (2005) A and Albi (2005) B.
[498] For more details on the relationship between national and international law in Poland see section II C.
[499] However, the Tribunal also made clear that this constitutional requirement does not imply that the secondary EU law and the corresponding implementing act is in compliance with the Constitution.

legislature to amend the national Constitution in order to have the European Arrest Warrant applied to Polish citizens.[500] The message was heard and the Polish legislature amended Article 55 of the Constitution.[501]

The Constitutional Tribunal thus had two choices in this case: to interpret Article 55 in a pro-European manner and hence go for a consistent interpretation, or to declare the challenged provision unconstitutional. It opted for the latter, and while this decision is often criticised as showing general unfriendliness towards EU law one should not disregard 'the sheer complexity of the legal issue at hand and the balancing act the Constitutional Tribunal had to do. […] This was an optimal way of marrying the supremacy of the Polish Constitution with the obligation to comply with EU law.'[502]

Other possible conflicts between the constitutional provisions and EU law are generally resolved by means of interpretation, e.g. constitutional guarantees on voting rights for Polish citizens are interpreted as also including EU citizens.

11.2.3. Status, effect and rank of EU law in the domestic legal order

Article 91 (1) provides that a ratified international agreement (after promulgation in the Journal of Laws of the Republic of Poland) will form part of the domestic legal order and will be applied directly, unless the application depends on the enactment of a statute. Article 91 (2) further provides that such an agreement takes 'precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes'. The third and last paragraph of Article 91 is somewhat different,[503] as it pertains to laws established by international organisations. The Polish legal literature stresses the fact that this provision mainly concerns secondary EU law.

The provisions of Article 91 (2) and (3) thus provide for constitutional accommodation of supremacy of (primary and secondary) EU law in cases of conflicts with acts of the Polish Parliament and secondary legislation. However, when it comes to the relationship between the Polish Constitution and European law, the situation is more complex. Here, Article 8 (1) of the Constitution is relevant:

> 'The Constitution shall be the supreme law of the Republic of Poland'.

This provision has been interpreted by the Constitutional Tribunal as granting the Constitution 'precedence of binding force and precedence of application within the territory of the Republic of Poland' while the precedence of application of international agreements 'in no way signifies an analogous precedence of these agreements over the Constitution'.[504]

At the same time, Article 9 of the Constitution states that the Republic of Poland will comply with international law by which it is bound and it is appropriate to assume that EU law would fall under this category. In fact, the Constitutional Tribunal confirmed that Article 9 applies *mutatis mutandis* to Community (now EU) law.[505]

It is thus not clear how these two provisions can simultaneously be upheld if there is a conflict between international law and the Polish Constitution. The situation is even more

[500] This suggestion was perceived by some as an indication that the Constitutional Tribunal in fact recognises the supremacy of EU law. See e.g. Kowalik-Banczyk (2005) p. 1360.
[501] Law of 8 September 2006 on the Amendment to the Constitution of the Republic of Poland, available on the website of the Sejm.
[502] Lazowski (2011), p. 514.
[503] 'If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.'
[504] K 18/05, para. 11.
[505] P 37/05, para. 4.2.

complicated when the principle of supremacy of EU law comes into play. This is one of the most important issues addressed by the Constitutional Tribunal in several decisions.[506]

In its decision on the Accession Treaty, the Tribunal tried to find a compromise between the principle of supremacy of EU law and Article 8 (1) of the Polish Constitution. The constitutional judges interpreted Article 8 (1) as granting the Constitution 'precedence of binding force and precedence of application within the territory of the Republic of Poland' while the precedence of application of international agreements 'in no way signifies an analogous precedence of these agreements over the Constitution'.[507] The Tribunal sought the solution in pluralist doctrines, developing a concept of multi-centric circles.[508] It stated that the concept and model of European law created a new situation in which a Member State's domestic legal order co-exists and is simultaneously functioning with the Community legal order, and both should respect the mutual autonomy of European law and national law.[509] However, in case of irreconcilable inconsistency between the Polish Constitution and Community law, the conflict may in no event be resolved by assuming the supremacy of the latter.[510]

Nevertheless, the Constitutional Tribunal acknowledged the CJEU's case law on the principle of supremacy. The constitutional judges argued that the CJEU's position is justified when the aims and goals of the EU are taken into account. To this end, the principle of supremacy serves as a guarantor of the effectiveness of EC law (now EU law). This factor, however, does not determine decisions of Member States' authorities taken in cases of conflicts between domestic constitutions and EU law.[511]

The Constitutional Tribunal addressed the doctrine of supremacy of the Polish Constitution again in the Lisbon judgment. It held that Poland's accession to the EU changed the perspective of the supremacy of the Constitution, but did not call it in question.[512] Consequently, in a conflict between EU law and the Polish Constitution there are, in principle, three ways to proceed: a modification of the Polish Constitution, an amendment of EU law, or, ultimately, withdrawal from the EU. For the time being, however, only the first option seems to be the realistic one.

11.2.4. Conditioning participation in EU integration

Substantive Limits

In the judgment on the Accession Treaty, the Constitutional Tribunal addressed, inter alia, the constitutionality of the transfer of competences to the European Union and its implications for the national legal system. Within the framework of Article 90, competences belonging to the legislative, executive and judicial power in the Republic of Poland may be transferred. However, the Member States decide which competences are transferred and the Union functions on the basis of and within the limits set by the Member States. Consequently, the EU and its institutions may only operate within the scope envisaged by the provisions of the Treaties and it is for the Member States to examine whether or not, in issuing particular legal provisions, the Community organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the

[506] See e.g. K 18/05, K 32/09, SK 45/09.
[507] K 18/05, para. 11.
[508] Lazowski (2007), p.156.
[509] K 18/04, para. 12.
[510] K 18/04, para. 13. Note here however that a distinction has to be made between the Polish Constitution and other sources of Polish Law. Article 91 (3) as well as its interpretation by the Constitutional Tribunal are clear concerning the supremacy principle when it comes to acts of Parliament and executive regulations: Polish courts should give primacy to Community law.
[511] Lazowski (2011).
[512] K 32/09, part III para. 1.3.

precedence of Community law would fail to apply with respect to such provisions.[513] Therefore, the Member States will control the exercise of transferred competences, and while the Court of Justice of the EU decides exclusively on the validity of Community law, it must at the same time respect the limits of the powers that are transferred to the EU and hence limits to its own functioning.

The Tribunal further held that neither Article 90 nor Article 91 of the Constitution could be used as a legal basis for the delegation of competences to the EU permitting adoption of legal acts contrary to the Polish Constitution (being 'the supreme law of the Republic of Poland') or to such an extent that it would signify the inability of Poland to continue functioning as a sovereign State, where an international organisation would in fact become the sovereign.[514] Such a situation would at the same time amount to an infringement of the principles expressed in Article 4[515] and Article 5[516] of the Constitution. These inalienable competences of the organs of the State constitute the constitutional identity[517] of the Republic of Poland.

In the Lisbon judgment, the constitutional judges were asked again – in light of the new developments - to interpret Articles 90 (1) and 8 (1) of the Constitution. In this decision, the constitutional judges further developed ideas already addressed in the 2005 judgment, concentrating specifically on the meaning and scope of state sovereignty. According to the Constitutional Tribunal, sovereignty is a fundamental characteristic of the state which differentiates it from other subjects of international law. The transfer of competences to an international organisation, including the European Union, cannot influence national sovereignty or undermine its scope, because the transfer is neither final nor irreversible.[518] As long as the states have the 'competence to determine [the EU's] competences' they remain sovereign subjects. The constitutional judges also recalled that the conclusion of an international agreement cannot be treated as limiting state sovereignty, but conversely, constitutes a manifestation of sovereignty. The Tribunal held that 'the EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the State's sovereignty, retain their significance'.[519] The Member States accepted only a joint exercise of certain State powers, retaining their constitutional identity and remaining therefore 'masters of the treaties'.[520]

Furthermore, in the same judgment the Tribunal listed powers which cannot be transferred to the Union, namely competences in determining the fundamental principles of the Constitution (principles of statehood, social justice, rule of law, democratic governance, subsidiarity) as well as the requirement of protection of human dignity and constitutional rights. Moreover, powers of amendment of the Constitution and 'the competence to determine competences' are also under prohibition of transfer.[521] In other words, only the Polish State has the competence to determine which competences can be transferred to the EU level, and which ones cannot.

Accordingly, the Constitution prevents the transfer of competences insofar as it would lead to the Republic's loss of its status as a sovereign State. After all, the entire European integration process is based on and 'authorised' by the national constitutions, and hence any transfer of competences has to be done according to those rules. In this respect,

[513] K 18/04, summary para. 15.
[514] K 18/04, para. 8.
[515] "Supreme power in the Republic of Poland shall be vested in the Nation".
[516] "The Republic of Poland shall safeguard its independence".
[517] The concept is equivalent to (or at least comprises) the concept of national identity as used in the Treaties, in particular in Article 4 (2) TEU.
[518] K 32/09, part III para. 2.1.
[519] *Ibid.*
[520] *Ibid*., part III para. 3.4. This part of the judgment was on the jurisprudence of European Courts on the Treaty of Lisbon. The Tribunal pointed out what was stated earlier by the German Federal Constitutional Court and the Czech Constitutional Court.
[521] *Ibid*., part III para. 2.1.

however, the Tribunal found full uniformity between values and principles as determined in the Treaty of Lisbon and in the Polish Constitution.

The Constitutional Tribunal also posed limits to the principle of interpreting domestic law in a manner 'sympathetic to European law', as formulated within the Constitutional Tribunal's jurisprudence. In no event should consistent interpretation of EU law and the Polish Constitution lead to results contradicting the explicit wording of constitutional provisions. In particular, the norms of the Constitution within the field of fundamental rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.[522]

Additionally, in the judgment on the European Arrest Warrant, the Tribunal addressed the issue of the applicability and the limits of the concept of the interpretation of national law in a way that is open and benevolent towards European law. It ruled that the duty to interpret national law in a way that is open and benevolent towards European law also applies to the third pillar of the EU. Conversely, this obligation has its limits in case the interpretation would have deteriorating effects on the position of an individual, especially the creation or aggravation of penal liability.[523]

In a very recent case on the relationship between EU law and national constitutional law[524], the Constitutional Tribunal has (for the first time) directly reviewed the conformity of EU secondary legislation with the Polish Constitution. The Tribunal first examined the admissibility of the constitutional complaint and then its substantive validity. In order to evaluate the former, the Tribunal restated the position of the Polish Constitution as the supreme law of the Republic of Poland. Article 91(3) of the Constitution gives primacy to EU secondary legislation in the event of their inconsistency with statutes. However, the Constitution retains its superiority and precedence over all legal acts which are in force in the Polish domestic legal system, including the acts of the EU law. Therefore, the Tribunal as a guarantor of the primacy of the Constitution and an organ of protection of constitutional rights and freedoms is competent to review the constitutionality of the norms of EU regulations.[525] The Constitutional Tribunal is obliged to perceive its position in such a way that - as regards fundamental matters concerning systemic issues - it is 'the court which will have the last word' with regard to the Polish Constitution. Thus, the Tribunal declared that an EU regulation may be the subject of review proceedings commenced by way of constitutional complaint. To support its position, the Tribunal also relied on Article 4 (2) of the TEU which holds that the Union shall respect the national identities of the Member States, inherent in their fundamental political and constitutional structures.[526] Nevertheless, the Tribunal also emphasised the need to employ due caution and restraint when reviewing acts of secondary EU legislation, referring to the principle of sincere cooperation.[527] As for the substantive issue raised by the case, the Tribunal found the relevant provision of the secondary EU law compatible with the relevant provisions of the Polish Constitution.

[522] K 18/04, para. 14.
[523] P 1/05, para. 3.4.
[524] SK 45/09, 16 November 2011. The case concerned the conformity of Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with Articles 8, 32, 45,78 and 176 of the Constitution of the Republic of Poland.
[525] SK 45/09, part II para. 2.2.
[526] *Ibid*., part III para. 2.5.
[527] The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Procedural Limits

The regulatory framework currently in force in Poland, which outlines the powers and responsibilities of the Sejm and the Senate or competent bodies in each chamber as regards the EU, is enshrined in the Act of 8 October 2010 on the cooperation of the Council of Ministers with the Sejm and the Senate in matters relating to the Republic of Poland's membership in the EU (hereinafter the Cooperation Act), which entered into force on 13 February 2011. The Cooperation Act incorporates all changes made by the Treaty of Lisbon and replaces the Act of 11 March 2004.

Article 7 (4) of the Cooperation Act outlines the first step in the scrutiny process: the competent body in the Sejm and in the Senate may express its opinions on the draft legislative acts of the European Union adopted under Article 352(1) TFEU within 49 days of their transmission to the Sejm or to the Senate, accordingly. Failure to express an opinion within the time limit will be considered as an absence of comments on the draft act. Article 8 of the Cooperation Act deals with draft EU legal acts other than those referred to in Article 7, and states that the competent bodies in the Sejm and the Senate may express an opinion on those acts within 21 days after the transmission.

The competent bodies of the Sejm and the Senate may express their opinion on the progress achieved in the process of making EU law and Poland's position taken in the European Council, within 21 days following the communication of such position.[528]

Prior to considering a draft legislative act in the EU Council, the Council of Ministers shall seek the opinion of the competent bodies in the Sejm and the Senate, presenting written information on the position that it proposes to take during the meeting in the EU Council.[529] The Council of Ministers' proposal provides the representative of Poland in the Council with a notice to either support the adoption of a draft legal act of the EU or to abstain. If the President of the Republic has not taken the decision, the representative shall support the rejection of a draft legal act of the EU.[530]

The Cooperation Act also imposes additional tasks on the Parliament concerning the simplified Treaty revision procedure under Art. 48 (7) TEU (passerelle clause) and other provisions listed in Articles 14 and 15 of the Act. Poland's position in the EU Council is decided by the President of the Republic on the basis of the proposal of the Council of Ministers and with consent granted by a Parliamentary statute.[531]

The competent body in the Sejm dealing with EU affairs is the European Union Affairs Committee, established in November 2011 and appointed for the duration of the term of office of the Sejm. In all the above-mentioned instances, the Committee is authorised to express opinions on behalf of the Sejm and these opinions should constitute a basis for the position of the Government. If the Government decides to deviate from the opinion of the committee, it is obliged to explain the reason for such discrepancy.[532] Next to this, the Committee also examines compliance with the principle of subsidiarity[533] of draft EU legislative acts and acts adopted under Article 352 (1) TFEU. If the Committee decides that the draft act breaches the principle of subsidiarity, it adopts an opinion. On the initiative of the Committee, the Sejm can adopt a resolution on non-compliance of the given EU draft legislative act with the principle of subsidiarity.

The competent body in the Senate dealing with EU affairs is also called the European Union Affairs Committee. It was established in May 2004 and it is authorised to express opinions

[528] Article 10 (2) of the Cooperation Act.
[529] Article 11 (1) and 12 (1) (2) of the Cooperation Act.
[530] Article 14 (2) (4) of the Cooperation Act.
[531] Article 14 (1) of the Cooperation Act.
[532] Article 13 (2) of the Cooperation Act.
[533] Article 148cc of the Standing Orders of the Sejm.

on behalf of the Senate in the pre-legislative process of EU acts. As stated earlier, the government is required to seek the opinion of the Committee and present its negotiation position before it starts negotiating in the EU Council of Ministers. If the government decides not to seek the opinion of the Committee, it must explain why. However, the government is not bound by the opinion of the Committee and consequently, it does not have to explain the reason why it failed to take it into consideration.

11.3. FURTHER TREATY REFORM

11.3.1. Substantive reservations

The Constitutional Tribunal has always recognised that the accession of Poland to the EU and the relevant transfer of competences involve surrendering sovereignty to the EU. However, the transfer is not without limits. The constitutional judges identified, as their German colleagues before, a specific 'constitutional identity' which determines the scope of the matters which are 'fundamental to the basis of the political system of a given state', the transfer of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting such a detailed catalogue of inalienable competences, the Constitutional Tribunal has been able to specify matters under the complete prohibition of transfer, namely decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.

11.3.2. Procedural hurdles for further integrations

International agreements envisaged in Article 90 (1) of the Constitution, concerning the transfer of competences of State authority organs to an international organisation or an international organ, constitute a category of international agreements subject to ratification. Ratification of such an agreement requires two-thirds majority vote in the presence of at least half of the statutory number of Deputies, both in the Sejm and in the Senate (Article 90 (2) and (3)). It is perhaps interesting to note here that this procedure is even more stringent than the procedure for amending the Constitution.[534]

Alternatively, the Sejm can decide by an absolute majority vote in the presence of at least half of the statutory number of Deputies to call a referendum on the matter, which it did when the ratification of the Accession Treaty was at stake. If a referendum takes place, the majority of those eligible to vote have to cast their vote in order for the referendum to have binding legal force. If this threshold is not reached, the matter is returned to the Parliament for the final decision.

There is however a clear difference between the Parliamentary approval of Article 90 type of treaties, such as the EU and EC, and Article 89 type of treaties, which deal with matters not including transfer of sovereign powers of the state to an international organization. The Article 89 treaties require simple majority, both in the Sejm and in the Senate, with half of the deputies and senators respectively constituting a quorum. If the Senate rejects the ratifying statute, the Sejm can still adopt it by an absolute majority vote in the presence of at least half of the statutory number of Deputies.[535] In order to approve Article 90 treaties,

[534] Both Articles 90 (2) and 235 (4) require a two-thirds majority vote in the chamber of deputies in the presence of at least half of the statutory number of Deputies. The difference is that Art. 90 (2) also requires a two-thirds majority vote in the Senate in the presence of at least half of the statutory number of Senators, while Art. 235 (4) only requires an absolute majority of votes in the presence of at least half of the statutory number of senators.
[535] Articles 120-121 of the Constitution.

the requirements are much higher: either a two-thirds majority of all the deputies present is needed, both in the Sejm and in the Senate, or a positive vote at a referendum. Interestingly, the Polish Constitution provides for a special ratification procedure in the case of treaties which transfer sovereign powers but no special legal status is awarded to such treaties. There is no difference between international law and EU law with regard to their position within the national legal order.[536] The EU treaties, like any other international treaty approved by a Parliamentary statute, have primacy over national secondary legislation, but cannot overrule the Constitution.[537]

11.3.3. Overcoming the hurdles

In its decision on the constitutionality of the Treaty of Lisbon, the Constitutional Tribunal ruled that the limits to further conferral of competences to the Union include specific factors which determine the constitutional identity of Poland, namely respect for the principles of Polish sovereign statehood, democracy, the principle of a state ruled by law, the principle of social justice, the principles determining the bases of the economic system, protection of human dignity and the constitutional rights and freedoms. In addition, and in contrast to the case law of the Court of Justice of the EU[538], the Tribunal held that Article 90 could not be used as a basis for the transfer of competences to an international organisation which would allow the adoption of legal acts contrary to the Constitution. In the Lisbon decision, the Tribunal went as far as to state:

> 'In the Polish legal system such a collision cannot be in any case resolved by recognising the supremacy of the Community norm over the constitutional one. Nor could it result in the constitutional norm losing its binding force and being replaced with the Community norm or the scope of application of such a norm being restricted to the area not regulated by Community law'.[539]

This is certainly problematic as it might lead to a collision - at least in theory - of the two primacies. It could lead to a situation in which Polish judges will have to disregard certain measures of EU law in order to comply with the Constitution (either if there is a judgment already by the Tribunal or if they find a violation themselves). This is clearly a challenge for further EU integration process in Poland because its continuation will depend on the courts' choice to refrain from decisions that might put in question the compatibility between national constitution and EU law.[540] Nevertheless, a potential conflict of EU law and national constitutional law is not irreparable: the Constitution can still be amended.

The constitutional amendment procedure is outlined in Article 235 of the Constitution. It can be initiated by at least one-fifth of the statutory number of Deputies, the Senate or the President of the Republic. Amendments are made by means of a statute adopted by the Sejm and subsequently by the Senate (within 60 days) in the same wording. The first reading of the bill adopting the Constitution takes place no sooner than 30 days after the submission of the bill to the Sejm. A constitutional amendment is adopted if there is a two-thirds majority of votes in favour in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. The adoption of a bill amending the provisions of Chapters I, II or XII of the Constitution (respectively on the Republic, fundamental rights, and amending the Constitution) takes place no sooner than 60 days after the first reading of the bill. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the President of the Republic, the Senate or at least one-fifth of the statutory number of Deputies may require, within 45 days of the adoption of the bill by the Senate, the

[536] Biernat (2001), p. 420.
[537] This has been stated and confirmed in a number of judgments of the Constitutional Tribunal, as illustrated throughout this chapter.
[538] *Costa v Enel* [1964] ECR 585 (6/64).
[539] K 18/04, para. 6.4
[540] The same argument is supported by e.g. Kowalik-Banczyk (2005) or Hobel (2007).

holding of a confirmatory referendum. They can make an application on the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

Alternatively, the Constitutional Tribunal could seek solutions by adopting a consistent interpretation of the Constitution or through dialogue with the Court of Justice of the EU. A declaration of non-conformity of an EU norm with the Constitution is perceived by the Tribunal as an *ultima ratio* solution, thus applied only in extraordinary situations.

However, amending the core provisions of the Constitution labelled as the constitutional identity of Poland or striving for consistent interpretation of those provisions and EU law when there is a clear conflict would be very difficult to achieve. While the consistent interpretation of the provisions would be solely in hands of the Polish judges, in particular the judges of the Constitutional Tribunal, a constitutional amendment of one of the core provisions is in the hands of the constitutional legislature. The Tribunal has listed competences which cannot be transferred under the Constitution as it stands now but none of the provisions of the current Constitution are (in principle) non-amendable provisions which means that the constitutional legislature could decide to change it (i.e. re-write the Constitution). While this theoretically seems to be possible, it is highly unlikely that anything like this will take place in the near future.

11.4. REFERENCES

Anneli Albi, '"Europe" Articles in the Constitutions of Central and Eastern European Countries', *Common Market Law Review* (2005) (A)

Anneli Albi, '*EU Enlargement and the Constitutions of Central and Eastern Europe*' (Cambridge University Press 2005) (B)

S. Biernat 'Constitutional Aspects of Poland's Future Membership in the European Union (1998) 36 Archiv des Volkerrechts 398.

S. Biernat 'Poland', in: A.E. Kellermann et al. (eds.), EU Enlargement, The Constitutional Impact at EU and National Level (TMC Asser Press 2001)

W. Czaplinski, 'Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court' ERA Forum (2011) 197-204.

C. Grabenwarter, 'National Constitutional Law Relating to the European Union', in A. v. Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law,* 2nd edn. (Hart Publishing 2009).

S. Höbel, Polish and German Constitutional Jurisprudence on matters of European Community Law: A Comparison of the Constitutional Courts' Approaches (2007) 3 *Croatian Yearbook of European Law and Policy* 515.

K. Kowalik-Banczyk, "Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", *German Law Journal* 6, (2005).

J. Komárek, 'European constitutionalism and the European Arrest Warrant – in Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007) 9-40.

A. Lazowski, 'Polish Constitutional Tribunal: Accession Treaty', *EuConst* 3 (2007)

A. Lazowski, 'Half full and half empty glass: The Application of EU Law in Poland', *Common Market Law Review* (2011) 503-553.

12. THE UNITED KINGDOM*

12.1. GENERAL CONSTITUTIONAL FEATURES

The United Kingdom of Great Britain and Northern Ireland, an EU Member State since 1 January 1973, is a constitutional monarchy with a system of parliamentary government. The bicameral Parliament consists of the House of Commons (650 directly elected members) and the House of Lords (circa 760 members, most of them life peers appointed by the Queen on the advice of the Prime Minister, and in addition 26 archbishops and bishops of the Church of England and 92 hereditary peers). Of the two houses, the House of Commons is politically and legislatively the most important. Ministers are accountable to either the House of Commons or the House of Lords (depending on which Chamber they are a member of), but a motion of no confidence against an individual minister or the cabinet as a whole can be adopted only in the House of Commons. Acts of Parliament in principle require the consent of both Houses of Parliament and the Queen, but since the Parliament Acts 1911 and 1949 the Lords' consent can be dispensed with.

The UK has three different court systems for respectively England and Wales, Scotland and Northern Ireland. The UK Supreme Court, the successor of the House of Lords in its judicial function, is the highest appeal court in almost all cases in England, Wales and Northern Ireland, and in civil and devolution cases in Scotland; the highest criminal court in Scotland is the High Court of the Justiciary.

The relationship between the UK legal order and the international legal order is dualistic: in principle, international law has no effect in the UK legal order unless incorporated in an Act of Parliament.

Several other general characteristics of the British Constitution are of relevance in the context of this report. The first is that the UK has no written constitution, which means no written document (or, as in Sweden and Austria, no series of formally related documents) in which all or at least an important amount of the state's constitutional rules are assembled and codified. British constitutional rules are drawn from different sources and are to be found in statutes (Acts of Parliament and subordinate legislation), the common law (judge-made law), constitutional conventions, prerogative powers, and constitutional custom. Of paramount importance is further the doctrine of the sovereignty of Parliament. In the traditional view, this doctrine essentially holds that there are no legal (as opposed to political, ethical or practical) boundaries to what an Act of Parliament may do. By consequence, no court shall declare an Act of Parliament invalid: in the UK Acts of Parliament are the highest law of the land. The doctrine has a democratic rationale to the extent that it gives the directly elected House of Commons a dominant position in the legislature: the consent of the House of Lords can be dispensed with and the Queen acts upon advice of her ministers, who in turn are accountable to the House of Commons. However, as will be clear, at least in theory the doctrine of parliamentary sovereignty is not easily reconciled with the principle of primacy of EU law.

12.2. THE SITUATION UNDER THE CURRENT SYSTEM

12.2.1. Enabling Clauses – allowing for membership

UK membership of the European Union has a dual constitutional foundation. The first consists of the ratification of the EC/EU (amendment) Treaties and their successors by the British government, the second of the European Communities Act 1972.

Before the European Union (Amendment) Act 2008, which introduced the obligation of approval of future EU treaties (i.e., treaties amending or replacing the TEU or TFEU) by Act

* Many thanks to Jo Murkens for his valuable comments.

of Parliament,[541] the ratification of EU treaties formally did not require parliamentary approval.[542] However, the EC and EU (amendment) Treaties were indirectly approved by the Houses of Parliament. A treaty signed and ratified by the UK government has no effect in the British legal order without its incorporation in British law by an Act of the Parliament. Politically and practically, the British government could not have ratified the Accession Treaty and the following EC/EU (amendment) Treaties without having ensured the willingness of the Houses to adopt an Act of Parliament incorporating directly effective EC/EU law in British law. The Act concerned was, and still is, the European Communities Act 1972, enacted at the occasion of the British entry into the EEC and amended on the occasion of the subsequent accession, amending and successor Treaties (most recently by the European Union (Amendment) Act 2008 making provision for the Treaty of Lisbon). The European Communities Act is therefore not only the Act which provides for the reception of directly effective EC/EU law in British law, but *de facto* also the Act by which the Houses of Parliament have approved the British Accession Treaty and the subsequent EC/EU Treaties.

On 5 June 1975 the UK held a referendum in which 67% of the voters voted in favour of continued EEC membership.[543] Although the referendum was not legally binding, it was constitutionally of the utmost importance. It would have been hard if not impossible for British politics to ignore it. The 1975 referendum may therefore be counted as one of the events not only legitimising, but also enabling (or allowing) EU membership in the period after 1975. However, the legitimising and enabling effects of the 1975 referendum may be said to have withered away over the years, certainly after the profound changes brought by the Maastricht and Lisbon Treaties, which were not subjected to a popular vote. The current (conservative) British government has pledged to renegotiate the agreements with the EU if it is re-elected in the general election of 2015 and to hold a referendum on continuance of EU membership.

12.2.2. Adaptation of the constitutional framework to facilitate membership

Treaties ratified and signed by the United Kingdom have no effect in the British legal order, unless incorporated in an Act of Parliament. This also counts for the EU Treaties and more generally EU law, as is explicitly affirmed by the European Union Act 2011.[544] Therefore, directly effective EU law had to be transformed into British law by an Act of Parliament. This is done by the European Communities Act 1972, as amended at the occasion of EU accession, amendment and successor Treaties.

Section 2(1) of 1972 Act is a gateway provision which makes all directly effective EU law, whether existing or arising in the future, with one stroke of the pen British law and thereby it makes it effective in the British legal order. See further *supra.*

The European Communities Act 1972 has also made provision for the implementation of not directly effective EU law. In principle, it may be implemented by the Queen in the form of Orders in Council, or by a Minister of the Crown or a ministerial department designated for that purpose by Order in Council, in the form of orders, rules, or other forms of subordinate legislation.[545] All these so-called statutory instruments may even amend Acts of Parliament

[541] The current legal basis for this obligation is Art. 2 of the European Union Act 2011, which to the very least demands approval of new EU treaties by act of parliament, see *infra*.
[542] Although the so called Ponsonby rule, a constitutional practice, had it that they, like all other treaties subject to ratification, were submitted to Parliament at least 21 sitting days before the date the government intended to ratify them; this rule is codified in (and strengthened by) Art. 20-23 of the Constitutional Reform and Governance Act 2010, according to which in principle a treaty against which the House of Commons objects may not be ratified.
[543] For a short background sketch, see Bogdanor (2009), p. 31-32.
[544] Section 18: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognized and available in law by virtue of any other Act.'
[545] Section 2(2) European Communities Act 1972.

('Henri VIII clause').[546] Any (draft) statutory instrument implementing EU law must be submitted to both Houses of Parliament. If the draft is not submitted to and approved by both Houses (in the so called 'affirmative resolution procedure'), it can be annulled by either House in pursuance of a resolution within 40 days after a copy of the instrument is laid before the Houses ('negative resolution procedure').[547] It practically never happens that the Houses refuse to approve a draft or annul an instrument implementing EU law.

Not all directives can be implemented by statutory instrument. Provisions imposing or increasing taxation, having retrospective effect, sub-delegating legislative powers, or creating new criminal offences punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than 3 months or fine of a certain amount, have to be made by Act of Parliament.[548] Additionally, implementation by Act of Parliament instead of by statutory instrument is sometimes preferred, for instance when the government wants to do more than the directive requires, when the issue is of great importance politically or reflects an important policy change, or when in the field concerned directives traditionally are implemented by Act of Parliament.[549]

Section 3(1) European Communities Act 1972 obliges the UK Courts to treat any question as to the meaning or effect of primary or secondary EU law as a question of law. If they do not refer the question to the Court of Justice of the European Union via the preliminary procedure, they have to answer the question in accordance with EU law and more in particular the case law of the Court of Justice. This gives decisions of the Court of Justice force of precedent in the UK.[550]

12.2.3. Status, effect and rank of EU law in the domestic legal order

The British Constitution is not only unwritten (see *supra*), but also flexible. This means that it can be changed by a common Act of Parliament, i.e. an Act of Parliament which is not subject to a specific procedure and qualified majority voting requirements, as on the European continent is invariably the case. Consequently the UK also lacks a formal criterion by which it can be established whether, for instance, an Act of Parliament is of a constitutional nature. However, nowadays there is no doubt that due to its fundamental legal and practical importance for the UK and its inhabitants, the European Communities Act 1972 is a 'constitutional statute', and indeed it is classified as such in legal literature and jurisprudence.[551] In contrast to 'ordinary' Acts of Parliament, the European Communities Act 1972 is protected against implied repeal, as will be explained below; thereby, directly effective EU law is also protected against implied repeal.

---

[546] Section 2(4)) ECA 1972: 'Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision —

a) for the purpose of implementing any obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the[F22objects of the EU] and to any such obligation or rights as aforesaid.'

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

[547] Schedule 2, par. 2(2) ECA 1972 jo. Section 5(1) Statutory Instruments Acts 1946.

[548] Schedule 2, par. 1(2) ECA 1972.

[549] Steunenberg & Voermans, p. 150-151, 153.

[550] Craig & De Búrca, p. 269.

[551] By Lord John Laws in the Court of Appeal decision in Thoburn v. Sunderdand City Council, [2002] EWHC 195 (admin), point 62.

Section 2(1) of the European Communities Act 1972 incorporates all directly effective EU law, whether already existing or arising in the future, with one stroke of the pen in British law and thereby makes it effective in the British legal order. The section currently reads:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies.[552]

Section 2(4) adds that any Act of Parliament 'passed or to be passed, shall be construed and have effect subject to the foregoing provisions of this section'. By that the section refers to the phrase in section 2(1) that directly effective EU law in the UK 'shall be recognised and available in law, and be enforced, allowed and followed accordingly'. Section 2(4) has puzzled British courts and scholarship for a long time. The question was, and in a way still is, whether or not it has changed the traditional view of the sovereignty of Parliament.

The traditional view of the sovereignty of Parliament holds that 'Parliament' (the Queen and both Houses of Parliament together adopting an act of Parliament) can make or unmake any law whatsoever. An element of the traditional view is also that Parliament cannot bind its successor. This entails that any Act of Parliament whose application is incompatible with that of a later Act of Parliament and which is not expressly repealed by the latter, will be deemed to be impliedly repealed by the courts (*lex posterior derogat legi priori*); the courts will not apply it and instead apply the later Act.[553]

Since the House of Lords in its (former) capacity as the UK's highest court of appeal decided in 1991 the *Factortame (II)* and in 1994 the *Equal Opportunities Commission* cases,[554] cases which have been and still are the object of immense scholarly debate, it has become clear that the European Communities Act 1972 and therewith directly effective EU law cannot be repealed impliedly by later Acts of Parliament: even if a post 1972 Act of Parliament is not compatible with a directly effective Treaty provision, as was the case in both judgments mentioned, or for instance an EU regulation, the Treaty provision or the regulation will be applied by the Courts, not the Act of Parliament. Thereby the primacy of application of directly effective EU law on Acts of Parliament is ensured until an Act of Parliament expressly states that it wishes to derogate from EU law on a specific point or issue, or states that it wishes to repeal the European Communities Act 1972 altogether. Some suggest that Parliament's freedom to legislate has been more severely restricted. They argue that on account of the European Communities Act 1972, alone or in conjunction with EU law and its primacy principle, 'Parliament' has lost the power to derogate from EU law on specific points or issues: even if an Act of Parliament would state with so many words that it has to be applied notwithstanding for instance 'this or that EU regulation', the courts would still apply EU law instead of the Act.[555] The only 'sovereignty' Parliament in this view still possesses is the 'sovereignty' to repeal the European Communities Act 1972 *in toto*, which would imply (or follow) a decision to withdraw from the EU.

---

[552] The full text reads: 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.'

[553] See on this Bradley, p. 35-69.

[554] Factortame Ltd v Secretary of State for Transport ex parte [1991] 1 AC 603; Equal Opportunities Commission v Secretary of State for Employment [1994] 1 WLR 409.

[555] Craig (2011a), p. 118; cp. Bogdanor (2009), p. 29.

There is no consensus not only on the scope of the protection the European Communities Act 1972 offers to directly effective EU law against later Acts of Parliament, but also on what actually has happened in terms of the sovereignty of Parliament. For instance, several explanations have been brought forward to explicate the 'no implied repeal restriction'. One account for this restriction is that the courts derive from the European Communities Act 1972 a rule of construction that Parliament does not intend to legislate against EU law, a rule which is so strong that it only withers in the face of Parliaments' express wish to do so. [556]

The 'no implied repeal' restriction is also explained in terms of the so called 'new view' of the sovereignty of Parliament. According to this view Parliament cannot substantively limit the powers of a future Parliament, but can place 'manner or form' restrictions on the way future Parliaments exercise their legislative powers; the courts would be allowed to consider whether the prescribed 'manner or form' has been complied with.[557] According to some, this is what the Parliament has done with the European Communities Act 1972: this Act can only be repealed in an explicit 'manner or form'.[558]

In yet another view the 'no implied repeal restriction' is the result of a common law development, in other words: the work of the courts. This is for instance the view of judge Sir John Laws in the Court of Appeal decision in the *Thoburn v. Sunderland City Council* case, also known as *the Metric Martyrs* case. According to Laws, the common law has come to recognise a category of constitutional (or fundamental) statutes which, in contrast to ordinary laws, cannot be repealed impliedly. The European Communities Act 1972 belongs to this category, alongside with for instance the Magna Charta, the Bill of Rights of 1688, the Act of Union of 1703, the Parliaments Act 1911 and 1949, and the Human Rights Act 1998.[559]

In all the above explanations, the sovereignty of Parliament more or less still stands bolt upright. The more far reaching position that Parliament has also lost the power to derogate from EU law on specific points or issues even if it would expressly state its wish to do so is not so easily reconciled with the sovereignty of Parliament. It implies a fundamental change of the scope of Parliament's sovereignty and raises the question who (or which institution) has the power to modify that sovereignty so substantially. There seem to be essentially two views in this respect.

In the first, the sovereignty of Parliament is a common law construct, judicially-recognised, and what courts can make, they can also unmake.[560] In this view, it is thus up to the courts to decide what to do when they are confronted with a later Act which derogates from EU law. A variation on this view is that the courts take their decisions to give effect to an Act of Parliament on the basis of 'normative arguments of legal principle the content of which can and will vary across time'.[561] According to this variation, the normative arguments supporting the position that the UK should be bound by EU law while it remains in the EU, will prevail in the courts as long as Parliament cannot provide sound arguments to the contrary.

In the second view, a fundamental change in the sovereignty of Parliament is not in the hands of the courts alone. It can only be the result of consensus among a larger group of people, for instance the senior officials of all branches of government, including the

[556] Hartley (1999), p. 168 ff; Hartley (2007), p. 261.
[557] Bradley, p. 45
[558] See Goldsworthy, p. 175 ff. + 298.
[559] Thoburn v. Sunderland City Council, [2002] EWHC 195 (admin), points 62–64 (64). In the H *v* Lord Advocate decision of the Supreme Court of 20 June 2012 Lord Hope in an *obiter dictum* stated the same regarding the Scotland Act: 'because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act, this in itself must be held to render it incapable of being altered otherwise than by an express enactment'; see Perry and Ahmed.
[560] Bogdanor (2009), p. 81-82*;* this is probably also the view of judge Laws in *Thoburn* v. *Sunderland*.
[561] Craig (2011a), p. 120.

ministers and members of parliament.[562] At least that consensus does not seem to have been reached yet.

12.2.4. Conditioning participation in EU integration

Substantive Limits

In British case law, issues such as respect for the UK's constitutional identity, for fundamental constitutional principles, for fundamental rights and for the division of competences between the Member States and the EU (*Kompetenz-Kompetenz* issue) are not very developed. There also seems to be very little need to develop them as long as Parliament's legislative omnipotence is only limited by the 'no implied repeal' restriction. Anyway, the *controlimiti* developed by constitutional courts in other Member States are at the utmost mentioned in passing in UK case law. Lord Bridge's remark in *Factortame* that the supremacy of EU law only operates in areas where EU law is applicable, might be read as a reference to the *Kompetenz-Komptenz* issue.[563] And in *Thoburn v. Sunderland City Council*, judge Laws stated that 'In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law'.[564] But he did not further develop the argument. However, in the Supreme Court's judgment of 22 January 2014 in the so called HS2 case, Lord Neuberger and Lord Mance, in their joint opinion which was endorsed by the other sitting justices, clearly envisaged substantive limits to the primacy of EU law:

> 206. Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law: *R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. That was a significant development, recognising the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment to give loyal effect to European law. But it is difficult to see how an English court could fully comply with the approach suggested by the two Advocates General without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights. Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone.
>
> 207. The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law,

[562] Goldsworthy, p 53–55.
[563] Craig (2011a), p. 118.
[564] Thoburn v. Sunderland City Council, [2002] EWHC 195 (admin), point 69.

of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[565]

Procedural Limits

The UK has a scrutiny reserve system. In addition, the European Union Act 2011 subjects a whole range of (draft) EU decisions to approval by motion of the Houses Parliament, by Act of Parliament or by Act of Parliament *and* referendum.

The scrutiny reserve

Ministers are not allowed to agree in the (European) Council with legislative proposals if the scrutiny of the document has not been finished by the Houses of Parliament; the same holds for agreements to a programme, plan or recommendation for EU legislation, political agreements, Council positions or joint texts in the ordinary or a special legislative procedure, or with proposals for CFSP decisions. In the House of Commons the scrutiny is finished when either the European Scrutiny Committee itself has cleared the document or, in case the document has been recommended for debate in the House, the House has adopted a resolution on the document, either directly or after one of the three European Committees[566] has debated the document.

The scrutiny reserve is not absolute. According to the scrutiny reserve resolution of the House of Commons of 17 November 1998, a minister in the (European) Council in principle may not agree to a proposal if it is still subject to scrutiny. However, the minister may override the reserve in three situations: 1) if he considers that the proposal is confidential, routine or trivial, or substantially the same as a proposal on which scrutiny has been completed, 2) if the European Scrutiny Committee has indicated that agreement need not be withheld pending consideration and 3) for special reasons which the minister should explain to the European Scrutiny Committee as soon as possible or, if the document is awaiting consideration by the House, to the House at the first opportunity after having given agreement to the proposal.[567] The House of Lords has a similar scrutiny reserve procedure.[568]

On the basis of the so called *Ashton-Lidington undertakings*, a special scrutiny procedure applies to the 'opting-in' on measures in the Area of Freedom, Security and Justice on the basis of Protocol 21 on the position of the UK and Ireland, and for the 'opting-out' of Schengen measures on the basis of Article 5(2) of Protocol 19 on the integration of the Schengen-acquis in the EU Framework. According to the undertakings, the ministers will not give notifications for 'opt-ins' or 'opt-outs' before 8 weeks have passed since the measures concerned have been presented to the Council. The House of Lords on 30 March 2010 codified the undertakings in a resolution, which formally is applicable only to Protocol 21 notifications. The resolution gives the minister the right to override the scrutiny reserve if 'for special reasons this is essential'. He should explain his reasons to the European Union

[565] UK Supreme Court, R (on the application of Buckinghamshire County Council and others) (Appellants) v The Secretary of State for Transport (Respondent), [2014] UKSC 3.
[566] The House of Commons has three European Committees: European Committee A (Energy and Climate Change, Environment, Food and Rural Affairs; Transport; Communities and Local Government; Forestry Commission; and analogous responsibilities of Scotland, Wales and Northern Ireland Offices); European Committee B (HM Treasury (including HM Revenue & Customs); Work and Pensions; Foreign and Commonwealth Office; International Development; Home Office; Ministry of Justice (excluding those responsibilities of the Scotland and Wales Offices which fall to European Committee A); together with any matters not otherwise allocated by this Order); European Committee C (Business, Enterprise and Regulatory Reform; Children, Schools and Families; Culture, Media and Sport; Health; Innovation, Universities and Skills); Standing Order 119.
[567] Resolution of the House of 17 November 1998 (The scrutiny reserve resolution).
[568] Scrutiny Reserve Resolution relating to the Work of The European Union Committee of 30 March 2010.

Committee as soon as possible and in addition to the House in case a proposal is awaiting debate there.[569]

Autonomous EU decisions

Autonomous EU decisions are defined here as those decisions which can be validly made and enter into force after adoption by the EU institutions themselves; in other words, they do not require any kind of national approval. The European Union Act 2011 forbids the British minister to vote in favour of or 'otherwise support' a whole series of autonomous (draft) decisions in the (European) Council until the draft has been approved nationally. There are several different approval requirements: approval by motion adopted by both Houses of Parliament, by Act of Parliament and by Act of Parliament *and* a referendum. The referendum is corrective, as is also the case in all the other instances where the European Union Act 2011 requires a referendum. The sequence of approvals is that the (draft) decision first has to be approved by Act of Parliament; the Act in turn should provide that it only enters into force if the referendum has been held and a majority of those voting are in favour of the decision.[570]

Approval by a *motion moved by a minister and adopted by both Houses of Parliament without amendment* is required for decisions under

- Article 56 TFEU which permit the extension of the provisions of Chapter 3 of Title IV of Part 3 of that Treaty (free movement of services) to nationals of a third country;

- under Article 129(3) of TFEU (amendment of provisions of the Statute of the European System of Central Banks or of the European Central Bank);

- Article 252 TFEU that permits an increase in the number of Advocates-General;

- Article 257 TFEU that permits the establishment of specialised courts attached to the General Court;

- Article 281 TFEU that permits the amendment of the Statute of the Court of Justice of the European Union;

- Article 308 of TFEU that permits the amendment of the Statute of the European Investment Bank; [571]

Approval by *Act of Parliament* is required for decisions under

- Article 17(5) of TEU that permits the alteration of the number of members of the European Commission;

- Article 64(3) TFEU that permits the adoption of measures which constitute a step backwards in European Union law as regards the liberalisation of the movement of capital to or from third countries;

- Article 126(14) TFEU that permits the adoption of provisions to replace the Protocol (No. 12) on the excessive deficit procedure annexed to TEU and TFEU;

[569] The European Scrutiny System in the House of Commons Issued by the Department of Chamber and Committee Services No 3 October 2012, p. 13.
[570] Section 2(2) EU Act 2011.
[571] Section 10(1) and (4) EU Act 2011.

- Article 333(1) and Article 333(2) TFEU of TFEU (enhanced co-operation) adopting QMV or the ordinary legislative procedure, if they do not require a referendum (see *infra)* in place of a special legislative procedure.

  The same applies in principle to decisions under Article 352 TFEU, which allows for the adoption of measures to attain one of the objectives set out in the EU Treaties in case the Treaties have not provided the therefore necessary powers; they have to be approved by Act of Parliament. However, if the government is of the opinion that a proposed measure under Article 352 is a matter of urgency, the adoption of a motion moved by a minister and adopted by both houses of Parliament is sufficient for approval. Moreover, in certain cases no approval is required at all, for instance if the proposed measure is equivalent to a measure previously adopted under Article 352 of TFEU or when it regards a measure prolonging or renewing a measure previously adopted under the Article.[572]

  Prior approval by Act of Parliament is also required for the government's notification on the basis of Article 4 of Protocol 21 that it wants to accept a measure previously adopted without the UK's participation under

  - Article 82(2)(d) TFEU (the identification of further specific aspects of criminal procedure to which directives adopted under the ordinary legislative procedure may relate); and
  - Article 83(1) TFEU (identification of further areas of crime to which directives adopted under the ordinary legislative procedure may relate).[573]

Approval by *Act of Parliament and referendum* is required for decisions under

- Article 31(3) TEU that permits the adoption of qualified majority voting;

- Article 86(1) TFEU involving participation by the UK in a European Public Prosecutor's Office and, where the UK has become a participant in a European Public Prosecutor's Office, under Article 86(4) TFEU to extend the powers of that Office;[574]

- Article 140(3) to adopt the euro;

- Article 153(2) TFEU (social policy) and Article 192(2) of TFEU (environment) which permit the application of the ordinary legislative procedure;

- Article 312(2) of TFEU (EU finance), which permits the adoption of qualified majority voting in the Council;

- Article 333(1) TFEU and Article 333(2) TFEU (enhanced co-operation) which permits the adoption of qualified majority voting or the ordinary legislative procedure under certain conditions;[575] and

- Article 4 of the Schengen Protocol that removes any border control of the United Kingdom.[576]

[572] Section 8 EU Act 2011.
[573] Section 9(5) and (6) EU Act 2011.
[574] This also counts for a notification under Art. 4 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU which relates to participation by the United Kingdom in a European Public Prosecutor's Office or an extension of the powers of that Office; Section 6(2) EU Act 2011.
[575] Among other things the conditions are that it regards a provision listed in Schedule 1 of the Act and that the United Kingdom is a participant in the enhanced co-operation to which the decision relates; see for that list note 44.

The general and particular passerelle clauses

The general passerelle clause of Article 48(7) TEU allows the European Council to change the voting procedure in the Council to qualified majority voting where Title V of the TEU[577] and the TFEU prescribe unanimity, or to make the ordinary legislative procedure applicable where the TFEU prescribes a special legislative procedure. A condition is that none of the national parliaments objects to the change within a period of six months. The conditions set by the European Union Act 2011 are much stricter. They generally require that the British minister does not vote in favour of an Article 48(7) European Council decision unless it has been approved by Act of Parliament *and* a national referendum.[578] The same applies as regards the specific passerelle clauses.

More specifically, approval by Act of Parliament and referendum is always required for Article 48(7) decisions which introduce qualified majority decision making in provisions of Title V TEU. When it comes to making the ordinary legislative procedure applicable in the TFEU provisions, an Article 48(7) decision avoids the referendum requirement only in a few instances;[579] in these cases the simplified revision decision merely has to be approved by Act of Parliament.[580]

The use of the special passerelle clause in Article 81(3), which allows for the identification of those aspects of family law with cross-border implications which may be the subject of decision making according to the ordinary legislative procedure, is not conditioned by approval by referendum. In this field, the UK has an 'opt in' on the basis of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. In this instance the European Union Act 2011 introduces another kind of two-step approval procedure. First, the government's intention under Article 3 of Protocol 21 to give notification expressing the government's wish to participate in the adoption of a decision which would make the ordinary legislative procedure applicable under Article 81(3) requires approval without amendment by both Houses of a motion moved by a minister. Second, the British minister is only allowed to vote in favour of the concerned decision in the Council after the draft has been approved by Act of Parliament.[581]

[576] Section 6 EU Act 2011.
[577] Decisions with military implications or those in the area of defence are exempted.
[578] Section 6(5)(b) EU Act 2011. The minister may also not 'otherwise support' the draft, which means that if a vote is demanded in the Council he may not abstain from voting, at least not in those instances where the Council has to decide with unanimity, because 'abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity'; Art. 235(1) and 238(4) TFEU.
[579] For instance, the change of the procedure in Art. 64(3) TFEU (permitting the adoption of measures which constitute a step backwards in EU law as regards the liberalisation of the movement of capital to or from third countries) and Art. 262 TFEU (jurisdiction of the CJEU intellectual property cases) requires only approval by Act of Parliament (respectively section 7(4)(c) EU Act 2011 and section 7(2)(c) EU Act 2011). Regarding Art. 308 TFEU (Statute of the European Investment Bank) the adoption by both Houses without amendment of a motion moved by minister is sufficient (Section 10(1)(f) EU Act 2011). This also counts for those provisions which do call for the use of a special legislative procedure, but one in which the Council already may decide with qualified majority (Section 10(3) EU Act 2011). This concerns:
- Art. 23(2) TFEU (protection by the diplomatic or consular authorities),
- Art. 182 (4) TFEU (specific programmes concerning research and technological development);
- Art. 311(4) TFEU (implementing measures for the Union's own resources system);
- Art. 314 TFEU (budget);
- Art. 349 TFEU (specific measures ultra-peripheral regions).
The EU Act 2011 holds no specific arrangement for a change of the procedure in Art. 118 (2) TFEU (languages arrangements for the European intellectual property rights).
[580] Section 7(4)(b) EU Act 2011.
[581] Section 9(1)-(4) EU Act 2011.

12.3. FURTHER TREATY REFORM

12.3.1. Substantive reservations

In UK law, there are formally no substantive areas that are considered as reserved for national institutions, neither in Acts of Parliament nor in case law. However, if one looks below the surface the areas in which the European Union Act 2011 subjects potential (ordinary of simplified) Treaty provisions to approval by Act of Parliament *and* referendum (see under II.d.2) might be considered as 'reserved'. They apparently are deemed to be so important and sensitive that a Treaty amendment modifying the rules concerned requires the approval of the British people. Moreover, in a comparative law perspective the areas covered by the referendum requirement partially cover the same ground as the 'essential conditions for the exercise of national sovereignty' in the case law of the French Constitutional Council (justice and home affairs, the currency, taxation, foreign affairs and security policy). In addition, the areas overlap to a certain extent with the areas which according to the German Constitutional Court are very sensitive for the ability of a constitutional state to democratically shape itself and which, consequently, are easily prone to infringements of German constitutional identity (substantive and procedural criminal law; monopoly on the use of force by the police within the state and by the military towards the exterior; fundamental fiscal decisions on public revenue and public expenditure; living conditions in a social state; and decisions of particular cultural importance, such as those regarding family law and the education system).

12.3.2. Procedural hurdles for further integrations

Ordinary treaty revisions and simplified Treaty revisions under Article 48(6) TEU

Ordinary Treaty revisions under Article 48(2-4) TEU and simplified Treaty revisions under Article 48(6) TEU at a minimum have to be approved by Act of Parliament on the basis of the European Union Act 2011.[582] The European Council decision of 25 March 2011, amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, is the first (simplified) Treaty revision which has been approved in this way. In addition to approval by Act of Parliament, most ordinary or simplified Treaty revisions need to be approved by referendum. This is especially the case where new competences are conferred on the EU.[583]

A referendum is required for ordinary Treaty revisions and Article 48(6) simplified Treaty revisions in case the revision

- extends the objectives of the EU as set out in Art. 3 EU;
- transfers a new or extends an existing exclusive or shared competence, or transfers a new or extends an existing competence to carry out actions to support, co-ordinate or supplement the actions of Member States;
- extends the competence of the EU in relation to the co-ordination of economic and employment policies and common foreign and security policy;
- confers on a EU institution the power to impose a requirement, an obligation or a sanction on the United Kingdom;

[582] Section 2(1) EU Act 2011; a Treaty amending the Euratom Treaty requires approval by Act of Parliament on the basis of Art. 5 of the European Union (Amendment) Act 2005, as amended by the EU Act 2011.

[583] Section 2 and 3 jo. section 4 EU Act 2011. In this respect, section 3 jo. 4 EU Act 2011 seems to be phrased overly broad, as a condition for the application of Art. 48(6) TEU is that it does not lead to extension of the competences of the EU. This is in itself not necessarily problematic: if the Art. 48(6) decision is not for other reasons subject to the referendum requirement, the referendum simply is dispensed with; see however Craig (2011b), p. 1926-7. It might be added that the meaning of the term 'competence' in Article 48(6) is clear; it is not evident for instance whether an Art. 48(6) decision which would give a EU institution the power to impose a new sanction on the UK in a field in which the EU is already competent, is increasing the competences of the EU in the sense of Article 48(6).

- introduces (qualified) majority voting in a series of provisions of the TEU and the TFEU where decision making currently is done unanimously, by consensus or by common accord; these provisions are listed in Schedule 1 of the European Union Act 2011;[584]
- removes or amends the competence of a Member State to oppose qualified majority decisions relating to foreign and security policy according to Article 31(2) TEU;
- removes the competence of a Council member to ensure the suspension of the ordinary legislative procedure in Articles 48 (social security), 82(3) (judicial co-operation in criminal matters) and 83(3) TFEU (particularly serious crime with a cross-border dimension).

In case an ordinary or a simplified Treaty revision in principle would require a referendum, the referendum requirement can be dispensed with where the revision merely concerns the codification of a practice relating to the previous exercise of the involved competences and where the provision does not apply to the United Kingdom. Accession treaties are also exempted from approval by referendum;[585] this latter exception emphasises the importance British politics attaches to further enlargement. Exempted from the referendum requirement are furthermore simplified revisions under Article 48(6) (but not ordinary Treaty revisions) conferring on an EU institution the power to impose a requirement/obligation/sanction on the UK which is not significant in relation to the UK.[586]

Other EU decisions requiring approval of the Member States according to their national constitutional requirements

Most of the EU decisions which require approval of the Member States according to their respective national constitutional requirements (only) require approval by Act of Parliament.[587] In contrast, the European Council decision under Article 42(2) TEU in relation

[584] They concern:

TEU: Art. 7(2) (determination by European Council of existence of serious and persistent breach by member State of values referred to in Article 2); Art. 14(2) (composition of European Parliament); Article 15(4) (decisions of European Council require consensus); Art. 17(5) (number of, and system for appointing, Commissioners); Art. 19(2) (appointment of Judges and A's-G of ECJ); Art. 22(1) (identification of strategic interests and objectives of the EU); Chapter 2 of Title V (specific provisions on the CFSP); Art. 48(3), (4), (6) and (7) (treaty revision procedures); Art. 49 (application for EU membership); Art. 50(3) (decision of European Council extending time during which treaties apply to state withdrawing from EU).

TFEU: Art. 19(1) (measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, age or sexual orientation); Art. 21(3) (measures concerning social security or social protection); Art. 22(1) (arrangements to enable EU citizens living in another member State to stand and vote in local elections in the State in which they reside); Art. 22(2) (arrangements to enable such persons to stand and vote in elections to the EP in the State in which they reside); Art. 25 (provisions to strengthen or add to the rights of EU citizens listed in Article20(2) of TFEU); Art. 77(3) (provisions concerning passports, identity cards, residence permits etc.); Art. 82(2)(d) (minimum rules on criminal procedure); Art. 83(1) (decision identifying other areas of crime to which provision is to apply); Art. 86(1) and (4) (European Public Prosecutor's Office); Article 87(3) (police co-operation); Art. 89 (cross-border operation by competent authorities); Art. 113 (harmonisation of indirect taxes); Art. 115 (approximation of national laws affecting internal market); Art. 121(2) (broad guidelines of economic policies), so far as relating to a conclusion of the European Council); Art. 126(14) (adoption of provisions replacing the protocol on the excessive deficit procedure); Art. 127(6) (conferral on ECB of specific tasks relating to prudential supervision); Art. 153(2)(b) (measures on working conditions, social security etc.); Art. 155(2) (agreements at EU level between management and labour); Art. 192(2) (adoption of certain environmental measures); Art. 194(3) (energy measures that are primarily of a fiscal nature); Art. 203 (decisions establishing procedure for association of countries and territories with the EU); Article 218(8) (certain international agreements); Art. 222(3) (decisions on implementation of solidarity clause having defence implications); Art. 223(1) (uniform procedures for elections to EP); Art. 311 (own resources decisions); Art. 312(2) (laying down of multi-annual financial framework); Art. 332 (decisions to allow expenditure on enhanced co-operation to be borne by member states other than those participating); Art. 333(1) and (2) (enhanced co-operation); Art. 346(2) (changes to list of military products exempt from internal market provisions); Art. 352(1) (measures to attain EU objectives in cases where treaties have not provided the necessary powers).

[585] Section 4(4)(c) EU Act 2011.

[586] Section 3(4) EU Act 2011.

[587] Section 7(2) EU Act 2011. It concerns

- Art. 25 TFEU (provisions to strengthen or add to rights of citizens of the European Union);
- Art. 223(1) TFEU (provisions for the election of the members of the European Parliament);

to a common EU defense also requires approval by referendum, while the decision under Article 218(8) TFEU regarding the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms merely requires approval by both Houses in the form of the adoption of motion without amendment moved by a minister.[588]

12.3.3. Overcoming the hurdles

Here, the sovereignty of Parliament comes into play again. According to the traditional view of the sovereignty of Parliament, there are two ways for overcoming the procedural hurdles in the European Union Act 2011 and more specifically the referendum requirements. First, Parliament could repeal part of the Act impliedly, by approving an (ordinary or simplified) Treaty revision which according to the European Union Act 2011 requires approval by referendum without organising the referendum. The second manner is that Parliament repeals or partially repeals (amends) the European Union Act 2011 expressly. Implied or partial express repeal might be politically conceivable for instance when the Treaty amendment is politically uncontroversial and legally insignificant, or when it not only confers new competences on the EU but at the same time transfers competences back from the EU to the UK.[589]

Generally, the opinion is that the referendum requirements in the European Union Act 2011 can indeed be repealed or amended, at least expressly: although the Act subjects most EU Treaty revisions to a referendum, the amendment or repeal of the Act itself is not conditioned by approval by referendum and would therefore be accepted by the courts. However, implied repeal might be considered without legal effect by the courts on two accounts. First, the courts might consider the European Union Act 2011 a constitutional statute in the line of reasoning of judge Laws in *Thoburn* v. *Sunderland* (see *supra*). This is far from being certain, as the Act has been depicted as a failed statute with which actually no one is really satisfied.[590] Secondly, several authors have pointed to the possibility that the courts might consider implied repeal without effect on the basis of the reasoning that the Act has set 'manner and form' requirements on the approval of certain Treaty amendments (see *supra*) for approving certain EU Treaty amendments. In practice, Parliament would have reconstituted itself as not consisting of three but of four institutions: the Queen, the Houses of Parliament and the electorate. In this view, this reconstitution cannot be undone impliedly and Parliament would act *ultra vires* if it would approve a Treaty amendment which according to the European Union Act 2011 requires a referendum without organising the referendum.

The *Jackson* case gives some food for this thought. In that case, the Parliament Acts 1911 and 1949 were central. The Parliament Act 1911 abolished the absolute veto power of the House of Lords in the legislative process, replacing it with a suspensory veto for a period of two years. The 1911 Act expressly exempts Acts extending the maximum duration of Parliament beyond five years from being modified according to this new 'manner or form' for legislating. The Parliament Act 1949, which was adopted under the Parliamentary 1911 and thus without the consent of the Lords, reduced the Lords' suspensory veto to period of one year. The Hunting Act 2004 was adopted under the Parliament Act 1949 and subsequently challenged in the courts: Parliament under the 1911 Act, i.e. without the House of Lords, would not have had the power to adopt the 1949 Act; therefore, not only the 1949 Act, but also the Hunting Act would be *ultra vires* and without legal effect. The House of Lords in its (former) capacity as the UK's highest court of appeal, rejected the appeal. However, a majority of the Law Lords made statements to the effect that if the Parliament Act 1949 had been used to modify the maximum duration of Parliament, it

-Art. 262 TFEU (conferring of jurisdiction on the CJEU in disputes relating to the application of acts adopted on the basis of the EU Treaties which create European intellectual property rights);
-Art. 311 (3) TFEU (provisions relating to the EU's system of own resources).

[588] Section 10(4) EU Act 2011.
[589] Peers, p. 133; Gordon & Dougan, p. 23 ff.
[590] Murkens, p. 405-407.

would have been invalid.[591] On the basis of this reasoning, it is perhaps possible to argue that any Act impliedly repealing a referendum requirement in the European Union Act 2011 would similarly be without legal effect.[592] Anyway, *Jackson* makes clear that the courts consider themselves competent to hear claims that Parliament has acted *ultra vires* because it has neglected 'manner or form' requirements set by an earlier Parliament. In view of this fact, and the legal uncertainty which would arise on both the national and the European level if Parliament would approve and the government would ratify a Treaty amendment without the required referendum and these acts would be challenged in the courts, it is suggested that it would not be wise to repeal the referendum requirements in the European Union Act 2011 impliedly.[593]

12.4. REFERENCES

Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009).

Vernon Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty', Oxford Journal of Legal Studies (2011), p. 179-195.

Anthony Bradley, 'The sovereignty of Parliament – Form or Substance?' in Jeffrey Jowell and Dawn Oliver, *The Changing Constitution*, Seventh Edition (Oxford University Press 2011), p. 35-69.

Paul Craig, 'Britain in the European Union', in Jeffrey Jowell and Dawn Oliver, *The Changing Constitution*, Seventh Edition (Oxford University Press 2011), p. 102- 130, p. 118.

Paul Craig 'The European Union Act 2011: Locks, Limits and Legality', CML Rev. (2011) p. 1915.

Paul Craig and Gráinne de Búrca, *EC Law. Txet, Cases, & Materials* (Clarendon Press 1997).

Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Cambridge University Press 2010)

Michael Gordon and Michael Dougan, 'The United Kingdom's European Union Act 2011: "Who Won the Bloody War Anyway?"', European Law Review (2012) p. 3-30.

Trevor C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing 1999).

T.C. Hartley, *The Foundations of European Community Law* (OUP 2007).

J.E.K Murkens, 'The European Union Act 2011: a failed statute', *Tijdschrift voor constitutioneel recht* (2012) p. 396.

Steve Peers, 'European integration and the European Union Act 2011: an irresistible force meets an immovable object? ', *Public Law* (2013), p. 119.

A. Perry and F. Ahmed, 'Are Constitutional Statutes 'Quasi-Entrenched'?' UK Const. L. Blog (25th November 2013) (available at http://ukconstitutionallaw.org).

Bernard Steunenberg & Wim Voermans, *The transposition of EC directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1215542.

[591] House of Lords, *Jackson and others (Appellants)* v. *Her Majesty's Attorney General (Respondent)*, [2005] UKHL 56.
[592] Gordon & Dougan, p. 26; see also Bogdanor (2011), p. 187; Craig (2011b), p. 1936.
[593] Gordon & Dougan, p. 26 ff.

ANNEX II: BIRD'S EYE VIEW

1. AUSTRIA

1.1. Facilitating constitutional provisions and principles

Austrian constitutional norms are contained in the main constitution document, the *Bundes-Verfassungsgesetz* [Federal Constitutional Law, hereinafter B-VerfG], but also in separate *Verfassungsgesetze* ['constitutional laws'] and ordinary legislation as *Verfassungsbestimmungen* ['constitutional provisions'].

A general constitutional provision facilitating cooperation in the context of the EU is Article 9(2) *B-VerfG*. It provides that 'specific sovereign powers' can be transferred to inter-governmental organizations and other states by act of parliament or by an approved treaty. Moreover, it allows for the regulation of powers exercised by organs of international organizations or foreign states in Austria as well as the transfer of specific powers of other states and international organizations to Austrian organs; it also allows that Austrian organs are subject to the authority of agents of other states or intergovernmental organizations or that such agents be subject to the authority of Austrian agents.[594]

As we discuss below, the constitutional act on the accession to the EU amounted to a '*total* revision of the constitution', and provides the constitutional basis and legitimacy of Austria's membership of the EU. It provides in its Article I:

> 'Based on the acceptance of this Federal Constitutional Act on the part of the people of the Federation, the authorities competent pursuant to the Federal Constitution shall be authorized to enter into the Treaty regarding the accession of Austria to the European Union in accordance with the result of the negotiations as set forth by the accession conference on 12th April 1994.'[595]

Subsequently, this Act provided that the Accession Treaty needed approval in accordance with the requirements of a *Verfassungsgesetz*.

The approval of the amendments to the EU treaties in the form of *Verfassungsgesetze* grants these treaties constitutional rank in Austria. This guarantees the effective primacy of EU law over national law in terms of national constitutional law. The primacy of EU law over conflicting national law has been accepted in the case law of all courts, including the constitutional court.

In general, amendments of the constitutional legal order do not necessarily need to be incorporated into the core constitutional act, the *Bundes-Verfassungsgesetz* (Federal Constitutional Act), but can be adopted by separate constitutional act, *Verfassungsgesetz* and even as 'constitutional provisions', *Verfassungsbestimmungen*, in ordinary legislation. In this case, however, the procedure for constitutional amendment must be observed – i.e. a two thirds majority in the *Nationalrat* (the Chamber of Deputies of the Austrian Parliament) in the presence of at least half of the members (and if the matter restricts the

[594] Art. 9(2) B-VG: ‚Durch Gesetz oder durch einen gemäß Art. 50 Abs. 1 genehmigten Staatsvertrag können einzelne Hoheitsrechte auf andere Staaten oder zwischen-staatliche Einrichtungen übertragen werden. In gleicher Weise können die Tätig-keit von Organen anderer Staaten oder zwischenstaatlicher Einrichtungen im In-land und die Tätigkeit österreichischer Organe im Ausland geregelt sowie die Übertragung einzelner Hoheitsrechte anderer Staaten oder zwischenstaatlicher Einrichtungen auf österreichische Organe vorgesehen werden. Dabei kann auch vorgesehen werden, dass österreichische Organe der Weisungsbefugnis der Organe anderer Staaten oder zwischenstaatlicher Einrichtungen oder diese der Wei-sungsbefugnis österreichischer Organe unterstellt werden.'

[595] EU-Beitritts BVG, Art. I [http://www.ris.bka.gv.at/Dokumente/BgblPdf/1994_744_0/1994_744_0.pdf]: 'Mit der Zustimmung des Bundesvolkes zu diesem Bundesverfassungsgesetz wer-den die bundesverfassungsgesetzlich zuständigen Organe ermächtigt, den Staatsvertrag über den Beitritt Österreichs zur Europäischen Union entsprechend dem am 12. April 1994 von der Beitrittskonferenz festgelegten Verhandlungsergebnis abzuschließen.'

competence of the *Länder*, also with the same requirements in the *Bundesrat*, the Chamber of the Austrian Parliament in which the component states of the federation are represented) - and the act or provisions must explicitly be specified as 'constitutional law' or 'constitutional provision'.

Articles 23a to 23k *B-VerfG* contain a range of provisions on the consequences of EU integration, among other things in terms of duties of the government to inform parliament, powers of parliament to issue guidelines binding the government in EU decision-making fora, the proposals of Austrian candidates to the various EU institutions, organs and bodies, consent requirements in the context of the ESM etc. These provide democratic legitimacy to EU decision-making, but at the same time also entail restrictions on decision-making.

1.2. Limiting constitutional provisions and principles

Substantive

The Austrian constitutional norms do not include any explicit "eternity clause". Most authors agree that EU law cannot be allowed to infringe the fundamental principles of the constitution; should this nevertheless arise, the procedure for a 'total constitutional revision' must be followed before that EU law can sort effect in the Austrian legal order.
A 'total constitutional revision', requiring a two thirds majority in the presence of half of the members and a compulsory referendum, is understood as a change of the foundations of the constitutional order. That is considered to be the case if one or more of the following fundamental constitutional principles are substantially affected:

- the principle of democracy (*das demokratische Prinzip*);
- the republican principle (*das republikanische Prinzip*);
- the principle of federalism (*das bundesstaatliche Prinzip*);
- the principle of the rule of law (*das rechtsstaatliche Prinzip*);
- the principle of separation of powers (*das gewaltenteilende Prinzip*);
- the principle of liberty (*das liberale Prinzip*).

The lists of principles mentioned in the literature varies somewhat as some of the principles are considered by some authors to be part of another principle, e.g. separation of powers or the 'liberal' principle as part of the 'rule of law' principle. Some scholars, e.g. Griller, have defended the view that the Fiscal Compact's limitation of the powers of the purse of Parliament amounted to a 'total revision', but this view was not followed by government and parliament.

The accession to the EU was considered to constitute a '*total* revision of the constitution' and it was decided upon in accordance with the relevant procedure. The relevant constitutional act is the constitutional basis and legitimacy of Austria's membership of the EU.

The approval of the founding treaties themselves and their amendments were adopted by acts for a *partial* amendment of the constitution, *Verfassungsgesetze* (the procedure being the same as for 'total revision', but without compulsory referendum). Treaties on accession of new Member States were also adopted by *Verfassungsgesetz*. Since a constitutional amendment of 2008, however, the amendments to the founding treaties are approved by a resolution of both the *Nationalrat* and *Bundesrat* of at least two thirds of the vote in the presence of half the members (i.e. the same as for partial constitutional amendment). Should the treaty be understood to amount to an explicit total revision of the constitution, it should, according to some scholars, be accompanied by a *Verfassungsgesetz* (Art. 50(4) B-VerfG), while according to another view it should at any rate be accompanied by a constitutional referendum.[596] The Lisbon Treaty was considered not to constitute a total

[596] Art. 50(4) B-VG: 'Notwithstanding Art. 44 para 3, state treaties according to para 1 subpara 2 ['State treaties by which the contractual bases of the European Union are modified'] may only be concluded with the approval of

revision of the constitution, and was adopted under the new procedure, but was accompanied by a separate *Verfassungsgesetz* amending the *B-VerfG* mainly by ways of supplementing it with a series of new provisions.

EU acts must, in order to be legitimate, remain within the powers conferred on the EU as agreed to by Austria. An apparent and severe EU *ultra vires* act would not be acceptable, although this tends to be viewed as a matter of legality (distinct from a review against fundamental constitutional principles).

Procedural

The voting requirements for the approval of amendments to the founding treaties under Article 50(4) B-VerfG are the same as those for a partial revision of the Constitution. Should the treaty necessitate a constitutional amendment, it should be accompanied by a Verfassungsgesetz.

Partial revisions of the constitution require a two thirds majority vote in the *Nationalrat*, with half of the members present; if the subject matter restricts the competence of the *Länder*, the same vote is also required in the *Bundesrat*; moreover, the act or provisions need to be explicitly specified as 'constitutional law' or 'constitutional provision' (Art. 44 B-VerG). A referendum has to take place if one third of the members of parliament so wishes. In cases of a *total* revision a referendum is mandatory; this mandatory referendum is distinctive for total revisions.

The procedure of Article 50(4) B-VerfG has also been applied to the 'simplified' amendment procedure under Art. 48(6) EU when Article 136 TFEU was amended. The ESM Treaty and the Fiscal Compact, to the contrary, were adopted by ordinary treaty approval procedure (by resolution requiring a simple majority), but the ESM Treaty was accompanied with a constitutional act amending the B-VerfG (introducing Articles 50a to 50d into the B-VerfG) while the Fiscal Compact has been implemented by a *Verfassungsgesetz*.[597]

The simplified EU amendment procedures (Art. 48(6) EU) require the majorities of Article 50(4) B-VerfG, and the same applies to the *passerelles* provisions, the emergency brake procedure and the creation of new own resources under Art. 311, third paragraph TFEU.[598]

1.3. Possibilities and impossibilities in overcoming limitations

The possibility of *ultra vires* review means that measures of primary or secondary EU law amounting to further European integration can run into obstacles. The Austrian literature is divided over the standards for the *ultra vires* review and whether there is room for other criteria than EU law itself, notably Austrian constitutional law and its core founding principles. Should an obstacle be met, this could be remedied by appropriate constitutional amendments.

There are no unchangeable constitutional provisions, so in principle any constitutional amendment can be made, provided that the procedure for constitutional amendments is observed. In principle, the Austrian constitution can always be adapted to new developments of further European integration beyond the present framework. In this context it is important to be aware of the fact that the accession to the EU was considered to be a total revision of the constitutional order, which was legitimated by a referendum, i.e. a decision of the people from whom all power emanates in the sense of Article 1 of the

the National Council and the ap-proval of the Federal Council. These resolutions each require the presence of at least half of its members and the majority of two thirds of the votes cast.

[597] The Bundeshaushaltsgesetz [Federal Budget Act], especially in Section 2(4).

[598] See also Art. 23 i (2) B-VG.

Austrian Constitution.[599] Any further European integration that would affect the foundations of the Austrian constitutional order can be legitimated by a similar act of the people through referendum. Whether this could also extend to an abolition of Austria as a sovereign state under international law is, however, an open question.

* * *

2. BELGIUM

2.1. Facilitating constitutional provisions and principles

The Belgian Constitution contains a few provisions directly mentioning the European Union (or rather, the European Community). Article 117 and Article 195 (transitional provisions 5 and 14) of the Constitution refer to the European Union merely to ensure the coincidence of the Belgian elections with the European elections, while Article 168bis sets out that 'with respect to the election of the European Parliament, the law determines special rules with a view to protecting the legitimate interests of French and Dutch-speaking people in the former province of Brabant'. Article 168 guarantees the involving of the Houses in the 'revision of the treaties establishing the European Community and the treaties and acts which have modified or complemented them'. Finally, Article 8 of the Constitution provides that a law can organise the right to vote of citizens of the European Union who do not have Belgian citizenship, in accordance with the international and supranational obligations of Belgium. The allusions to the European Union are not lacking in the Constitution, but the Constitution mentions it in less obvious places, apparently presuming membership.

The Belgian Constitution allows for the attribution of the exercise of power to public international institutions. While under Art. 33 of the Constitution all power emanates from the Nation and is exercised in the manner established by the Constitution (a reference to national sovereignty), Art. 34 states that:

'The exercise of determined power can be attributed by a treaty or by a law to international public institutions'.

Sovereignty is theoretically preserved, since it is only the exercise of specific powers that can be assigned. The provision was inserted in the Constitution at the occasion of the constitutional reform process of 1970, so well into Belgian membership of the EU. The Treaties in which the exercise of competences is transferred are concluded in accordance with the normal procedure for entering into international treaties, and require the approval by the competent (federal or federated) chambers with a simple majority. Specifically with respect to the EU treaties, however, Art. 168 of the Constitution provides that

'The Chambers are informed from the beginning of negotiations concerning any revision of the treaties establishing the European Community in addition to treaties and acts which may have modified or completed the latter. They are aware of the planned treaty prior to signature'.

The most difficult issue has been to organise Belgian federalism in accordance with the requirements of EU law.

Belgian law is quite receptive to the application of EU law, sometimes even with precedence over the Belgian Constitution. The Cour de cassation (Hof van Cassatie, the highest court in civil and criminal matters) accepts the primacy of EU law (as well as the bulk of

[599] Artikel 1. Österreich ist eine demokratische Republik. Ihr Recht geht vom Volk aus. [Austria is a democratic republic. Its law emanates from the people.]

international law) over national law, including also over the Constitution.600 The Council of State (Raad van State, Conseil d'État, the highest court in administrative cases) equally accepts the primacy of EU law over the Constitution, but in contrast to the Cour de cassation, it bases this primacy on Art. 34 of the Constitution, rather than on the nature of international treaties.

Finally, the Constitutional Court (Grondwettelijk Hof, Cour constitutionnelle) takes a more balanced view. It considers international treaties as being inferior in rank to the Constitution, since under Art. 167 of the Constitution, they require legislative approval, and this approval is subject to constitutional review, possibly also by the Constitutional Court.[601]

The Council of State, in its advisory capacity, follows this position, and has stated that the State should not ratify treaties until the Constitution has been adapted.[602] Nevertheless, there have been instances in which Belgium has ratified Treaties before the Constitution had been amended, notably the founding Treaties of Rome (1957) and the Treaty of Maastricht (1993).

In order to avoid cases where the Act approving international treaties is found unconstitutional, Article 26, §1bis of the Special Act of 6 January 1989 on the Constitutional Court as amended by the Special Act of 9 March 2003 excludes from its jurisdiction by way of preliminary ruling, 'the statutes, decrees and rules referred to in Article 134 of the Constitution which ratify a treaty establishing the European Union or the Convention of 4 November 1950 for the protection of human rights and fundamental freedoms or an Additional Protocol to this Convention'. Thus, the Treaties establishing the European Union and the European Convention on Human Rights are excluded from the control of the court by way of preliminary reference.

Moreover, the time limit for direct actions challenging Acts of approval is limited to 60 days instead of the normal 6 months. The underlying intention is that the Executive should not ratify before that period of 60 days has expired, but in practice, the Executive tends not to await the expiry. Finally, to avoid the finding of unconstitutionality of Acts approving treaties, the Constitutional Court is restrictive in its review.

When it comes to secondary EU law, the primacy of EU law over the Constitution seems to be accepted on the basis of Art. 34 of the Constitution, which allows for the attribution of competences to international institutions.[603] Accordingly, it could be said that while the Treaties must be constitutional (and if not, the Constitution should be adapted), secondary EU law may be unconstitutional.

2.2. Limiting constitutional provisions and principles

Substantive

The Constitution does not explicitly set substantive limits to integration. While the Constitution states that only the exercise of 'specific' powers can be attributed to international organisations, it does not identify or indicate a core which cannot be transferred, nor does it impose conditions on the exercise of the competences transferred.

600 Cass, 27 May 1971, Pas., 1971, I, 886 (*Fromagerie Franco-suisse le Ski*); Cass. 9 november 2004, P.04.0849.N/20, *Rev. Dr. Pén.* 2005, 789; Cass. 16 november 2004, P.04.0644.N/3 en Cass. 16 november 2004, P.04.1127.N/3, *RW* 2005-06, 387.

601 GwH nr. 26/91, 16 oktober 1991; GwH nr. 12/94, 3 februari 1994; GwH nr. 20/2004, 4 februari 2004; GwH nr. 84/2005, 4 mei 2005; GwH nr. 96/2009, 4 juni 2009; GwH nr. 87/2010, 8 juli 2010; GwH nr. 117/2011, 30 juni 2011; GwH nr. 120/2011, 30 juni 2011; GwH nr. 32/2013, 7 maart 2013.

602 Opinion 21.540/AV, 6 mei 1992 (*European citizenship), Parl. St.* Kamer 1991-1992, nr. 482/1, pp. 69-72; Opinion 28.936/2, 21 april 1999 (*International Criminal Court*), *Parl. St.* Senaat 1999-2000, nr. 329/1, pp. 94-101.

603 Gwh, nr. 130/2010, 9 december 2010 (*CREG*).

As explained before, the primacy of EU law over national law is broadly accepted, including also, to a large extent, over the Constitution.

Procedural

The Constitution does not distinguish between 'smaller' and 'more important' Treaties attributing competences to international organisations. All European Treaties are to be approved by an ordinary Act of Parliament, adopted by simple majority by the competent legislative body at the federal or federated level. Usually, the European Treaties thus require approval by all nine legislative bodies, federal and federated. No special procedural conditions are imposed.

If a tension between the proposed Treaty and the Constitution is detected, the Constitution should be amended prior to approval, but on two occasions has the Treaty been approved prior to amendment. This should be seen in the light of the cumbersome amendment procedure, and the political priority that is given to ratification over constitutional tidiness.

2.3. Possibilities and impossibilities in overcoming limitations

The procedure for constitutional amendment is complex, and requires the involvement of two consecutive legislatures, with elections in-between, and a two-thirds majority in both Houses of the federal parliament in the second stage. Remarkable, for a federal state, is the fact that constitutional amendment does not currently explicitly involve the participation of the federated entities as such.[604] The Constitution does not contain a constitutional core, nor does it qualify specific provisions as immutable (no eternity clause).

* * *

3. BULGARIA*

3.1. Facilitating constitutional provisions and principles

Article 4 of the Constitution of Bulgaria provides that the 'Republic of Bulgaria shall participate in the building and development of the European Union'.[605]

The Constitution of Bulgaria does not contain any specific provisions on the status and rank of European law. The direct applicability of European treaties can be assumed, since under Article 5(4) Constitution, 'all international treaties which have been ratified, promulgated and published in accordance with the Constitution form part of the domestic legal order.'

The primacy of European treaties over national legislation can be derived from Article 5(4) of the Constitution, which establishes the status and rank of all international treaties in Bulgaria: 'They shall have primacy over any conflicting provision of the legislation.'

The rank of secondary EU law is not explicitly regulated by the Constitution. The Law on Normative Acts, however, provides in Article 15 that: '(1) Normative acts must be in compliance with the Constitution and the superior normative acts. (2) Where ordinances, rules, regulations or directives contravene superior normative acts, the law enforcement authorities shall apply the superior acts.' The Bulgarian Constitutional Court has relied on this in a judgment of 2008. It derived from Article 15(2) of the Law on Normative Acts that

[604] This will change after the entry into force of the 2014 constitutional amendments.
[*] Thanks are due to Katja Swider for her research.
[605] Article 4(3) of the Constitution.

'in the event of conflict, the EU regulations shall have primacy over the Bulgarian pieces of legislation. Regarding the EU directive, its main principles and objectives make it binding on each Member State to harmonize its domestic legislation to what it provides for (Art. 249, paras 2 and 3 of the Treaty Establishing the European Communities). It is the domestic legislation that is subject to checks for compliance with the Constitution.'[606]

Other case law confirms that whenever EU law is invoked, it is given primacy over the national legislation.[607] Lower courts, however, still seem to be cautious about the unfamiliar legal order of the EU, and prefer to decide that a case falls outside of the scope of EU law in order to be able to apply national provisions without dealing with the implications of primacy and direct effect of EU law.[608]

3.2. Limiting constitutional provisions and principles

Substantive

Article 5(1) of the Constitution states that '[t]he Constitution shall be the supreme law, and no other law shall contravene it.' This provision establishes the principle of constitutional supremacy in Bulgaria. There is no provision in the Constitution which addresses more specifically the constitutional supremacy over international treaties. There are no special provisions concerning the rank of EU law vis-à-vis the Bulgarian Constitution, nor is there explicit case law available which would help to draw definitive conclusions on this. By analogy with the status of international treaties in general, and in accordance with Article 5(1) of the Constitution, EU law would be subordinate to the national Constitution.

The Supreme Administrative Court consistently held that European norms which have not been published in the Bulgarian language do not have any effect in the Bulgarian legal order.[609] This was based decisively on ECJ case law on the translation backlog in the Skoma-Lux case.[610]

Procedural

The procedure for the approval of EU treaties is more complex than the procedure for the approval of other international treaties (for which a majority of the members of the Assembly suffices), but is not as rigid as the procedures regulating the amendment of the national Constitution (examined below). There is a special provision in the Bulgarian Constitution for the parliamentary approval of treaties that 'confer on the European Union powers ensuing from the Constitution'.[611] A majority of two-thirds of all members of the National Assembly is required to pass a law approving such a treaty.[612] This procedure was used to approve the Accession Treaty and subsequently the Lisbon Treaty. A referendum was neither required nor held on the optional basis the Constitution provides.[613]

---

[606] Bulgarian Constitutional Court, Decision № 1, 28 February 2008 Case № 10/2007, http://www.constcourt.bg/Pages/Document/WithoutFrame.aspx?ID=1339.

[607] Supreme Administrative Court, decision of 1 July 2009, upholding the provisions of the Directive on long term residents and confirming the obligation of lower courts and administrative authorities to give precedence to applying EU law above conflicting national legal norms; Supreme Administrative Court, decision of 16 December 2008, on Directive 2004/38/EC of 29 April 2004, ignoring the national measure on the same matter, thereby implicitly confirming direct effect and primacy of the Directive.

[608] Even before the accession there were indications that secondary EU and EC law would be directly applicable and have precedence over statutes in Bulgaria, since such a status was given to the decisions of the Association Council under the Europe Agreement.

[609] See, for example, the interpretative decision of the Supreme Administrative Court No. 3 of 6 June 2008 (direct effect of a directive not transposed on time and not translated).

[610] ECJ, case C-161/06, Skoma-Lux sro v. Celní ředitelství Olomouc, 11 December 2007.

[611] Article 85(1)(9) of the Constitution.

[612] Article 85(2) of the Constitution.

[613] Article 84(5) gives the National Assembly the power to call a referendum; compulsory referendums are not envisaged by the Constitution.

The Constitution of Bulgaria provides that 'the conclusion of an international treaty requiring an amendment to the Constitution shall be preceded by the passage of such an amendment'.[614] Also this procedural provision fits into a reading which holds that the Constitution has higher rank than international treaty law and by analogy higher than primary EU law.

3.3. Possibilities and impossibilities in overcoming limitations

As we mentioned above, prior to the conclusion of a treaty that requires constitutional amendment, the Constitution must be amended. The Constitution does not provide for unamendable provisions.

With the exception of amendments reserved under Article 158 Constitution to the Grand National Assembly, constitutional amendments require an initiative from either the President or at least one quarter of the members of the National Assembly, and a majority of three quarters of all members of the National Assembly in order to pass the amendment. Exceptionally, if the bill is not approved by three quarters of all the members, but receives an approval of two-thirds majority, it can be reintroduced after two months, but not later than within five months from the time of the first vote; then it will only need the approval of a two third majority again.

Some constitutional changes are only possible through a special procedure, for which a special constitutional assembly, the Grand National Assembly, of 400 members is elected.[615] Such elections require a majority of two thirds of the votes of all members of the National Assembly, after which the President calls elections within three months. The Grand National Assembly's mandate expires after its task has been accomplished.

Under Article 158 Constitution the Grand National Assembly has the power

to adopt a new Constitution;

to resolve on any changes in the territory of the Republic of Bulgaria and ratify any international treaty envisaging such a change;

to resolve on any changes in the form of state structure or form of government;

to resolve on any amendment to the provision on the direct applicability of the Constitution's provisions and the priority of treaty provisions over conflicting legislation (Art. 5(2) and (4) Constitution);

to resolve on the irrevocability of fundamental civil rights and the temporary curtailment of their exercise in times of war, martial law or a state of emergency (Art. 57 (1) and (3) Constitution);

to adopt any amendment to the Chapter on amending the Constitution (Chapter nine of the Constitution).

Only the President or at least half of the members of the National Assembly have the right to introduce an amendment bill pursuant to Article 158 Constitution. A Grand National Assembly can only decide on the constitutional amendment bills for which it has been elected. To pass a bill, a majority of two thirds of the votes of all members of the Grand National Assembly is required in three ballots on three different days.

[614] Art. 85(9) subparagraph 4.
[615] Apart from acting as constitutional assembly, it also acts as National Assembly during an emergency.

That even the provision on the irrevocability of fundamental rights can be amended, though they are unamendable under the normal rules, suggests that there are no really 'eternal' 'eternal provisions' under Bulgarian constitutional law.

* * *

4. CROATIA

4.1. Facilitating constitutional provisions and principles

The Republic of Croatia has adopted in 2010 the constitutional amendments necessary to facilitate accession to the EU, which was ongoing at the time, and further EU integration. Even though the Croatian Constitution already contained provisions on international law and international organisations in general, the constitutional framers opted for the inclusion of a separate chapter[616] including the legal basis for the membership and the transfer of powers to the EU.

Article 143 of the Constitution is central to EU membership, in providing that 'the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'. Article 144 deals with the participation of the citizens of the Republic of Croatia, the Croatian Parliament and the Government of the Republic of Croatia in the EU institutions. Article 145 prepares the Croatian constitutional and legal order for the application of EU law by the national courts and public administration bodies. The second paragraph states:

'All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.'

Article 146 is a provision on EU citizenship rights. It lists the rights of the Croatian citizens in the territory of the EU Member States guaranteed by the EU acquis communautaire, as well as the rights of the nationals of other EU Member States guaranteed in the territory of Croatia.

4.2. Limiting constitutional provisions and principles

Substantive

The second paragraph of Article 145 of the Constitution states that legal acts and decisions accepted by Croatia in the EU institutions will be applied in Croatia in accordance with the EU acquis communautaire. The provision seems to impose a condition on application of EU law in Croatia: only those acts and decisions which are accepted by Croatia will be applied. It is not certain what the intention of the constitution-framer was at the moment of drafting but this provision could be problematic in the future.[617]

The Croatian Constitution does not explicitly state which provisions are considered to be the core unamendable provisions in the Constitution. However, this does not mean that the Constitutional Court will not develop what can be called the constitutional identity of Croatia. Having in mind that Croatia has joined the Union only a few months ago it remains to be seen how the case law of the Constitutional Court will develop throughout the years.

[616] Chapter VIII of the Constitution (Art. 143-146).
[617] For a discussion see the in-depth report on Croatia, section II D (1).

Procedural

Article 143 provides an explicit permission for the transfer of competences to the European Union, pursuant to Articles 140 and 141 of the Constitution.

Article 140 of the Constitution prescribes the procedure for granting powers derived from the Constitution: ratification by the Croatian Parliament by a two-thirds majority of all deputies. Subsequently, the President of the Republic signs the documents of ratification of international treaties previously ratified by the Croatian Parliament. The procedure under Art. 140 does not require a confirmatory referendum but one can be requested on the basis of Art. 87 of the Constitution. Another option would be to use Art. 142 of the Constitution as a legal basis, as it was done with the Accession Treaty. This procedure requires an approval of a two-thirds majority of all deputies but also a confirmatory referendum. A positive outcome in a referendum requires a majority vote of all voters voting in the referendum.

4.3. Possibilities and impossibilities in overcoming limitations

The Croatian Constitution does not include provisions which are unamendable and any future Treaty reform considered unconstitutional can in principle be rectified by means of a constitutional amendment. If future EU integration would require a constitutional amendment it could take place in two alternative ways.

The first procedure is outlined in section IX of the Constitution (Art. 147-150). Amendments may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the President of the Republic and the Government of the Republic of Croatia. The Croatian Parliament determines, by a majority of all deputies, whether or not the procedure for amending the Constitution will be initiated as well as what the draft amendments will be. The decision to amend the Constitution is made by a two-thirds majority of all deputies.[618]

The second procedure is provided for in Article 87 of the Constitution. It lays down the possibility for the Croatian Parliament or the President of the Republic (at the proposal of the Government and with the countersignature of the Prime Minister) to call a referendum on a proposal to amend the Constitution. The Croatian Parliament will also call a referendum on a proposal to amend the Constitution if so requested by ten per cent of the total electorate of Croatia. At such referendums, decisions are made by a majority of voters taking part therein.

* * *

5. CYPRUS

5.1. Facilitating constitutional provisions and principles

According to its Article 179, the rigid 1960 Constitution is the supreme law of the land. Several provisions on the powers of State institutions were identified as being potentially incompatible with EU membership. Amending the 1960 Constitution is, however, both legally and politically extremely difficult (see below under c.). Despite the fact that many supported the view that a modification of the Constitution prior to EU accession was necessary or desirable, the government decided not to put a constitutional amendment to the Parliament. In any case, Article 50 of the Constitution allows for participation in international organisations. Accordingly, the act of ratification of the Accession Treaty was

[618] Articles 147-149 of the Croatian Constitution.

approved by Parliament under Article 169 of the Constitution and no EU accession referendum was held.

After accession, efforts were made in order to avoid constitutional amendment. Yet, when the Supreme Court in its EAW judgment[619] held that the EAW framework decision could not prevail over the provisions of Article 11(2) of the Constitution, which do not allow the extradition of Cypriot nationals, the Government tabled a bill which became the Fifth Amendment of the Constitution. This amendment introduced the Europe provision, on the model of Article 29(4)(6) of the Irish Constitution, in order to override - with one general provision - all the specific incompatibilities existing between other articles of the Constitution and the EU obligations of Cyprus.

Article 1 of the Constitution provides that Cyprus is an independent and sovereign Republic. Article 1A was added after the amendment and now reads:

'No provision of this Constitution shall be considered as invalidating laws enacted, acts done or measures adopted by the Republic necessitated by its obligations as a Member State of the European Union or shall prevent Regulations, Directives or other acts or binding measures of a legislative character adopted by the European Union or by the European Communities or by their institutions or by their competent bodies under the provisions of the treaties founding the European Communities or the European Union, from having legal effect in the Republic'.

In addition, Article 179 was amended to read:

'Without prejudice to the provisions of article 1A, the Constitution shall be the supreme law of the Republic. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as a Member State in the European Union'.

The combined effect of Article 1A and of Article 179 is that EU law takes precedence over the Constitution. This Europe-friendly approach can be explained by the difficulty to amend the Constitution and the will to render any future amendment unnecessary. The idea of national constitutionalism as a guarantee against the possible concentrations of power from European constitutionalism is, therefore, absent in the Constitution of Cyprus. Nevertheless, EU law is not considered to have supra-constitutional value. Rather, it is treated as constitutional.

The amendment is also considered to constitutionalise the transfer of national legislative and treaty-making powers to the EU institutions, thus dealing with the problems posed under Article 61.[620]

The last provision that was added to the Constitution is Article 169 (4) which states that the Republic may exercise every choice and discretion provided for in the Treaties establishing the European Communities and the Treaty of the European Union and in any Treaties which amend or replace the above and which are concluded by the Republic. It has been argued that the aim of this provision is to allow the Republic to exercise freely all options that it has as a Member State, without being limited by the fact that an option may be incompatible with its Constitution.

[619] Attorney General of the Republic v. Costas Constantinou (2005) 1 C.L.R. 1356

[620] Article 61 provides that "the legislative power of the Republic shall be exercised by the House of Representatives in all matters (…)".

5.2. Limiting constitutional provisions and principles

Substantive

The Supreme Court's case law indicates that there is no room for reviewing acts of the EU institutions, or of Cypriot laws implementing EU law and fully covered by it. The constitutionality of such Cypriot law implementing EU law is guaranteed by Article 1A of the Constitution.[621]

In a recent judgment, the dissenting judge introduced the idea of controlimiti.[622] He stated that national sovereignty has rightly declined in favour of EU law, but recent events and measures taken via undemocratic processes led to an erosion of the idea of fundamental rights. The judge suggested that the compatibility with primary EU law of these processes should, at some point, be checked by the CJEU. The rule of law and legal protection, principles inextricably intertwined with democracy, constitute general principles of EU law, according to the judge, and cannot be neutralized by making exceptions from judicial review every time national governments face difficult situations, which lead to decisions and measures that clearly violate fundamental rights. Therefore, those principles form part of the constitutional identity of both the Cypriot Republic as well as the EU. The judge then stated that the constitutional limits on the exercise of state power should be maintained in times of crisis, with the ultimate goal to safeguard the supremacy of the rule of law and the principle of legality. The majority of the Supreme Court did not follow him. It remains to be seen whether the passages on controlimiti were a reaction against measures taken by the relevant institutions, and reflect the outrage of the Cypriot society at the time, or whether the case law of the Supreme Court will embrace the idea of setting limits to European integration.

Procedural

According to Article 169 of the Constitution, international treaties have to be approved by Parliament, by a simple majority of members present and voting, with at least one third of members present.

Treaty amendments, including the Treaty establishing a Constitution for Europe, have been approved in this manner.

5.3. Possibilities and impossibilities in overcoming limitations

Paragraph 3 of Article 182 of the Constitution provides that a constitutional amendment can only be made 'by a law passed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of Representatives belonging to the Turkish Community'. After the withdrawal of the Turkish Cypriots from the institutions of the Republic, including the House of Representatives, at the end of 1963, it has become impossible to amend the Constitution by the process Article 182(3) provides.

Under the doctrine of necessity, developed by the Supreme Court,[623] it is possible to deviate temporarily from strict compliance with constitutional provisions. The doctrine has been applied to validate public acts facing procedural difficulties that were impossible to remedy because of the political situation and the division of the Island. This also applies to constitutional amendments, even if they are by nature meant to be stable (and not 'temporary'). Thus, pending the solution of the political problem, any necessary

[621] Supreme Court, *Ioannou v. Attorney General*, (2011) Civil Appeal 346/2011.
[622] Supreme Court, *Mirto Christodoulou et alii v. Bank of Cyprus et alii*, (2013) Joined Cases No. 551/2013, 553/2013 etc.
[623] Supreme Court, Attorney General of the Republic v. Ibrahim (1964) CLR 195.

constitutional amendments comprising non-basic constitutional provisions may be made by a law passed by a majority of at least two-thirds of the members of the House of Representatives, belonging to the Greek Community, so long as any such amendments are not contrary to the international obligations of the Republic of Cyprus, and more importantly the European Convention of Human Rights and EU law.

Under Article 182(1) a number of articles of the Constitution, set out in Annex III to the Constitution and incorporated from the 1959 Zurich Agreement, are considered as unchangeable. These cannot be amended, not even under the doctrine of necessity.[624]

* * *

6. THE CZECH REPUBLIC

6.1. Facilitating constitutional provisions and principles

The Czech Republic has adopted in 2001 the necessary constitutional amendments to facilitate European integration and other forms of international cooperation. Even though the Constitution does not make an explicit reference to the European Union, the amendments were adopted primarily to enable accession to the EU and further EU integration. Article 10a of the Constitution is central to EU membership, in providing that 'certain powers of the Czech Republic authorities may be transferred by treaty to an international organization or institution'.

Such a transfer of powers requires the approval of both Chambers of the Czech Parliament: a three-fifth majority of all deputies and a three-fifth majority of all senators (Article 39(4) Constitution), unless a referendum is required by a constitutional act which was the case only with the Accession Treaty.

A number of other provisions specify the role of the judiciary in the EU context: Article 95 of the Constitution authorises all Czech judges to assess the conformity of domestic statutes with international treaties. In addition, Article 87 (2) of the Constitution introduced the preliminary constitutional review of international treaties providing that prior to the ratification of a treaty under Article 10a or Article 49 the Constitutional Court shall have the jurisdiction to decide the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.

Additional 2001 amendments also established the Parliament's responsibilities as well as the extent of control over the Government in EU matters. Article 10b (1) indicates that the government will inform the Parliament in advance on issues connected to obligations resulting from the Czech Republic's membership in an international organization. The second paragraph states that both chambers of Parliament will give their views on draft decisions of such international organization in the manner laid down in their standing orders. The last paragraph further specifies that a statute governing the relations between both chambers may delegate the exercise of the chambers' competence to a common body of both chambers.

[624] The list in the Annex is very long and relates to for instance the bi-communal nature of the Republic, the flag, the institutional set-up of the Republic, the division of legislative competences between the House of Representatives and the Communal Chambers.

6.2. Limiting constitutional provisions and principles

Substantive

In the first Lisbon decision, the Constitutional Court held that the transfer of powers of the Czech Republic to an international organization under Article 10a of the Constitution cannot be such as to breach the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Article 9 (2) in connection with Article 1 (1) of the Constitution). The concept of sovereignty, interpreted in the context of the stated provisions, clearly shows that there are certain limits to the transfer of sovereign powers. However, these limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion; interference by the Constitutional Court should be allowed only where the scope of discretion was clearly exceeded and where a transfer of powers went beyond the scope of Article 10a of the Constitution.[625]

Furthermore, the Court clarified that the material core of the Constitution under Article 9 (2) also includes the protection of fundamental human rights and freedoms. If the standard of protection by the EU became inadequate, the bodies of the Czech Republic would have to take back the transferred powers in order to ensure protection of the standard.[626]

As for the ultra vires review, the Constitutional Court has stated that it is able, in exceptional circumstances, to function as an ultima ratio and review whether any act of Union bodies exceeds the powers which the Czech Republic transferred to the European Union under Article 10a of the Constitution.[627] The Court has done so very recently declaring the judgment of the Court of Justice of the EU in Landtová[628] an ultra vires act.[629] Although it is not certain what kind of effects this judgment of the Constitutional Court might generate in the future, it is generally considered to be a result of an 'internal conflict' between the Czech Constitutional Court and the Czech Supreme Court and is therefore seen as an isolated episode with no major consequences for further EU integration.[630]

Procedural

The new Article 10a provides that "certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution". The ratification of such a treaty requires the consent of the Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum. The consent of the Parliament necessitates the approval of a three-fifth majority of all deputies, and a three-fifth majority of all senators (Art. 39(4)).

Only the Accession Treaty required a confirmatory referendum, other treaty amendments were approved by the Parliament according to the rules provided in Article 39 (4). It is to be expected that the future Treaty reforms will require the same procedure.

A confirmatory referendum may be proposed by either the government or jointly by at least two-fifths of the Chamber of Deputies or two-fifths of the Senate. If a majority of voters who have cast their vote voted in favour, the outcome of a referendum will be considered positive.

[625] Pl. ÚS 19/08, para 109.
[626] Pl. ÚS 19/08, para 196.
[627] *Ibid*.
[628] Case C-399/09, Marie Landtová v Česká správa socialního zabezpečení, judgment of 22 June 2011.
[629] Pl. ÚS 5/12, Slovak Pensions XVII.
[630] See e.g. Komárek (2012), Zbíral (2012).

Prior to the ratification of a Treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the Treaty's conformity with the constitutional order, pursuant to Article 82(2) of the Constitution. A treaty may not be ratified prior to the Constitutional Court giving a judgment.

6.3. Possibilities and impossibilities in overcoming limitations

The Constitution of the Czech Republic does not specifically state which constitutional provisions cannot be amended. However, Article 9(2) of the Constitution provides that any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. The Constitutional Court has dealt with this provision in the Lisbon judgments[631], and more importantly in the Melčák judgment[632]. In the latter judgment, which was a purely national case, the Constitutional Court declared the constitutional Act no. 195/2009 on shortening the Fifth Term of Office of the Chamber of Deputies unconstitutional relying, inter alia, on Article 9(2) of the Constitution.[633]

In the Lisbon judgments the Court ruled that amending the Constitution is 'out of question' if it concerns its material core which is exempted from any changes.[634] The Court further explained that the transfer of powers to the EU is conditional at two levels: the formal and the material level. The formal level limits the transfer of powers by preserving the foundations of state sovereignty of the Czech Republic, which can be found in Article 1 (1) of the Constitution. The material level concerns the manner of exercising the transferred competences, which may not jeopardize the essence of a law-based state. This limitation arises from Article 9 (2) of the Constitution, under which amending the essential requirements of a democratic state governed by the rule of law is impermissible. As the Constitutional Court emphasised, the material limits for transfer of powers are even beyond the reach of the constitutional framer itself.[635]

In conclusion, Articles 1(1) and 9(2) of the Constitution are part of its material core, according to the Czech Constitutional Court, and they have to be respected at all times. If a constitutional amendment would jeopardise these and other provisions which amount to the core of the constitutional order of the Czech Republic, the Court would not hesitate to intervene.

Other provisions, which are not considered to be the material core of the Constitution, can be amended. An amendment can be done by a constitutional act which requires approval of the three-fifth majority in the Chamber of Deputies and in the Senate, unless a referendum is required by a constitutional act (Art. 39(4) Constitution)

* * *

[631] Pl. ÚS 19/08, judgment of 26 November 2008 (Treaty of Lisbon I) and Pl. ÚS 29/09, judgment of 3 November 2009 (Treaty of Lisbon II).
[632] Pl. ÚS 27/09, judgment of 10 September 2009. This is possibly the most important decision of the Czech Constitutional Court in the whole time of its existence.
[633] For more details on the judgment see the in-depth report on the Czech Republic.
[634] Pl. ÚS 19/08, para 91.
[635] Pl. ÚS 19/08, para. 130.

7. DENMARK

7.1. Facilitating constitutional provisions and principles

Article 19 *Grundlov*, the Danish Constitution, *inter alia* allows for EU amendment treaties which

> * change the institutional organisation of the EU, for instance by changing the way in which already transferred powers are exercised by the EU institutions, on the condition that the EU's identity is not altered;
>
> * only 'clarify' the competences which are already delegated to the EU pursuant to an act of parliament adopted under Article 20 *Grundlov*.[636]

Denmark approved the Treaty of Lisbon on the basis of Article 19.

Article 20 *Grundlov* allows for the conferral on the EU of (new) legislative, administrative and judicial competences which may result in decisions having direct effect in Denmark. By virtue of Article 20, Denmark acceded to the EU in 1973 and ratified the Treaties of Maastricht and Amsterdam in respectively 1993 and 1998.[637]

It is an unwritten principle of Danish constitutional law that courts are obliged to consider Denmark's obligations under international law when interpreting and applying Danish law. Moreover, the courts interpret Danish law in accordance with these obligations if possible: the assumption is that Danish legislation respects Denmark's international law obligations, unless the Danish legislature has explicitly stated otherwise.[638]

On the condition that the EU acts *intra vires,* Danish courts accord primacy to EU law on acts of parliament and subordinate legislation.

7.2. Limiting constitutional provisions and principles

Substantive

Danish courts are competent to test whether secondary EU law transgresses the limits of the powers transferred by Denmark (*ultra vires* review of secondary EU law); however, the Court of Justice of the EU has to have had the opportunity to rule on the issue first.[639]

On the basis of competences transferred under Article 20 *Grundlov*, the EU does not have the competence to issue secondary law which is contrary to the Danish Constitution, including the 'rights of freedom' contained therein.[640]

The Article 19 *Grundlov* procedure does not suffice and the Article 20 *Grundlov* procedure needs to be followed in case an EU treaty amendment:

> * results in such fundamental institutional changes within the EU that the EU's identity is altered;

[636] Danish Supreme Court, Decision of 20 February 2013 (Lisbon Treaty) par. 2a.
[637] EU law adopted before 1973 may be directly effective in Denmark on the basis of Art. 3 of the Accession Act.
[638] National report of the Danish Supreme Court to the XVI[th] Congress of the Conference of European Constitutional Courts, available at www.vfgh.gv.at/cms/vfgh-kongress/en/xvi-kongress-2014/landesberichte.html, p. 1-2.
[639] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.6; Danish Supreme, Decision of 20 February 2013 (Lisbon Treaty) par. 3.
[640] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.2.

* changes the exercise of previously delegated powers contrary to the specifications in the act of parliament under Article 20 by which the delegation was authorised; however, there is no such specification in the 1972 Accession Act (as amended);[641]

* directly or indirectly confers on EU institutions new legislative, administrative or judicial competences to act with direct effect in Denmark, or other competences which according to the Constitution are vested in Danish authorities, including the power to enter into treaties with other states.[642]

This *inter alia* implies that rescinding the Danish opt-outs regarding the euro, the development of the Schengen-*acquis*, the Area of Freedom, Security and Justice and the acquisition of second homes in Denmark on the basis of Protocols 16, 19, 22 and 32 require approval under Article 20 *Grundlov*.

Under Article 20 *Grundlov* the transfer of competences is allowed 'to such an extent as is provided in statute'. This implies:

(1) that the competences transferred must be specified and need to be positively delimited 'partly as regards the fields of responsibility and partly as regards the nature of the powers. The delimitation must enable an assessment of the delegation of sovereignty'. However, 'the fields of responsibility may be described in broad categories' and the competences transferred need not to be delimited so precisely that the EU institutions have no discretion or room for interpretation when exercising the competences'; moreover, the competences delegated may be indicated by means of a reference to a treaty;[643]
(2) that the EU may not be given the competence to define its own competences (no *Kompetenz-Kompetenz* for the EU).[644]

The competences transferred under Article 20 *Grundlov* may not be so extensive that Denmark cannot any longer be considered to be an independent state. The determination whether Denmark under (a proposed) treaty still is an independent state 'must rely almost exclusively on considerations of a political nature'[645] and is thus in principle lies in the hands of the Danish political institutions (government and parliament).[646]

Procedural

EU amendment Treaties which fall under Article 19 *Grundlov* have to be approved by the Danish parliament with a simple majority.

EU amendment treaties which fall under Article 20 *Grundlov* have to be approved by the Danish parliament with a majority of five-sixths of its members. If this majority is not obtained, but a simple majority of the members of parliament has voted for the bill and the government does not withdraw it, the bill shall be subjected to a referendum. The referendum is corrective: the bill is defeated if a majority of the voters votes against it and this majority represents not less than thirty per cent of all the persons entitled to vote (Article 42(6) *Grundlov*).

[641] Danish Supreme Court, Decision of 20 February 2013 (Lisbon Treaty) par. 2c.
[642] Danish Supreme Court, Decision of 20 February 2013 (Lisbon Treaty) par. 2a.
[643] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.2; Danish Supreme Court, Decision of 20 February 2013 (Lisbon Treaty) par. 2a.
[644] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.2.
[645] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.8.
[646] Danish Supreme Court, Decision 6 April 1998 (Maastricht Treaty) par. 9.8.

7.3. Possibilities and impossibilities in overcoming limitations

The Danish Constitution holds no unamendable provisions.

The substantive limitations to transfers of powers under Article 20 *Grundlov* can be overcome by the adoption of a constitutional amendment according to Article 88 *Grundlov*. The procedure consists of several stages:

> (1) a constitutional amendment bill has to be adopted by the Danish parliament;
> (2) the constitutional amendment bill has to be approved by a newly elected parliament without amendment;
> (3) within six months after having passed the second stage, the bill has to be submitted to a referendum. The bill is adopted if a majority of the voters is in favour of the bill and this majority represents at least forty per cent of all the persons entitled to vote.

* * *

8. ESTONIA

8.1. Facilitating constitutional provisions and principles

Article 123(2) *Põhiseadus* (the Estonian Constitution) gives treaties ratified by the Estonian parliament primacy of application (not primacy of validity) on acts of parliament and subordinate legislation. On the basis of Article 2 of the Constitution of the Republic of Estonia Amendment Act (CREAA) of 14 December 2003 'only those parts of the Constitution which are in conformity with EU law or which fall outside the scope of EU law are still applicable; the applicability of all the other constitutional provisions is suspended.' [647] This means that EU law also has primacy of application (not primacy of validity) on the Estonian Constitution.

The Constitutional Review Chamber of the Supreme Court has instructed the lower courts and the civil, criminal and administrative chambers of the Supreme Court to deal with EU law in complete EU orthodoxy. If need be after having posed preliminary questions to the Court of Justice, the courts have to solve conflicts between Estonian acts and EU law first by way of an EU-law conforming interpretation of national law. If this is not possible, they have to disapply the conflicting Estonian act (exclusionary effect of EU law), and, if the EU law concerned is directly effective, they have to apply EU law (substitutionary effect of EU law). Moreover, if a national act is allegedly contrary to both the *Põhiseadus* and EU law, the courts have to prioritise the review of the act against EU law.[648]

8.2. Limiting constitutional provisions and principles

Substantive

Article 1 CREAA holds that 'Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia.' According to constitutional literature these fundamental constitutional principles comprise at least: national sovereignty; a state that is based on liberty, justice, and law; the defence of internal and external peace; preservation of the Estonian nationality and culture through the ages; human dignity; the social state; democracy; the rule of law; honouring of fundamental liberties and freedom; and the proportionality of actions taken under state

647 Opinion 3-4-1-3-06 of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, par. 14-16.
648 Constitutional judgment 3-4-1-5-08 of the Constitutional Review Chamber of the Supreme Court of 26 June 2008, par. 31 and 32.

authority. Together these principles make up for Estonian constitutional identity. The provision was introduced to ensure the primacy of the fundamental principles on (secondary) EU law. However, it is not clear whether Estonian courts are competent to test EU law against the principles.

EU amendment treaties probably have at least to respect Estonian constitutional identity. It cannot be ruled out that EU amendment treaties also have to respect the (other) provisions of the Estonian Constitution (or at least those provisions of the Estonian Constitution which have not become inapplicable for being contrary to already existing EU law on the basis of Article 2 CREAA).

Procedural

The *Riigikogu*, the unicameral Estonian parliament, has to approve treaties 'by which the Republic of Estonia joins international organisations or unions' (Article 121, sub 3 *Põhiseadus*).

Estonia may not conclude international treaties which are in conflict with the Constitution (Article 123 *Põhiseadus*). This means that treaties which are contrary to the Constitution can only be ratified after amendment of the Constitution.

A constitutional amendment procedure may not be initiated or completed during a state of emergency or a state of war. Moreover, if a constitutional bill is rejected by the *Riigikogu* or in a referendum, a year has to lapse before a similar bill may be introduced.

8.3. Possibilities and impossibilities in overcoming limitations

The Estonian Constitution holds no unamendable provisions.

The limitations on further integration can be overcome by constitutional amendment. The procedure is contained in Articles 161-168 *Põhiseadus.* A constitutional amendment can be initiated by at least one-fifth of the members of the *Riigikogu* and by the president of the republic. The procedure consists of two stages. In the first stage, the bill has to be debated by the *Riigikogu* in three readings. For the second stage, there are three possibilities.

> (1) The *Riigikogu* may decide to submit the bill to a referendum with a three-fifths majority. A referendum is mandatory if the bill concerns an amendment of the 'General Provisions' in Chapter I of the Constitution or of the constitutional amendment procedure itself. The bill is adopted by referendum if a majority of the voters is in favour; a minimum turnout is not required.
> (2) A majority of the members of the *Riigikogu* can also decide that the second stage of the constitutional amendment procedure consists of the submission of the bill to a second, newly elected parliament. In that case the second, newly elected *Riigikogu* has to adopt the bill with a two-thirds majority of its members without amendment. N.B. This procedure cannot always be followed, see under (1).
> (3) The third procedure for the second stage is an urgency procedure. If the *Riigikogu* with a four-fifths majority considers the bill a matter of urgency, it may subsequently adopt it with a two-thirds majority of its members. N.B. This procedure cannot always be followed, see under (1).

* * *

9. FINLAND

9.1. Facilitating constitutional provisions and principles

One of the express intentions of the new 2000 Constitution was to replace the traditionally formal and strict understanding of sovereignty with a much more modern European and international-oriented construction. The new Constitution placed an entirely new emphasis on international co-operation by expressing a positive attitude towards international co-operation in Section 1, subsection 3:

'Finland participates in international co-operation for the protection of peace and human rights and for the development of society'.

On the other hand, the new 2000 Constitution did not introduce an explicit mention of the European Union in the text of the Constitution. A decade later, it was considered appropriate to sharpen the constitutional approach to EU membership. A constitutional amendment entered into force on 1 March 2012.

EU membership is now explicitly mentioned in the opening provision of the Constitution which now reads:

Section 1 - The Constitution

'Finland is a sovereign republic.

The Constitution of Finland is established in this constitutional act. The Constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society.

Finland participates in international co-operation for the protection of peace and human rights and for the development of society. Finland is a Member State of the European Union.'

With respect to the applicable procedure for the transfer of powers, since 2012 the Constitution provides:

Section 94 - Acceptance of international obligations and their denouncement

'The acceptance of the Parliament is required for such treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require approval by the Parliament under this Constitution. The acceptance of the Parliament is required also for the denouncement of such obligations.

A decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. However, if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the decision shall be made by at least two thirds of the votes cast.

An international obligation shall not endanger the democratic foundations of the Constitution.'

Accordingly, since the entry into force of this constitutional amendment in 2012, amendments to the EU Treaties which are considered to be 'of significance to Finland's sovereignty', have to be approved by two thirds of the votes cast. 'Run-of-the-mill'

revisions of the Treaties which are not so significant can be ratified with simple majority vote.

In addition, section 95 proclaims:

Section 95 - Bringing into force of international obligations

'The provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree.

A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two thirds of the votes cast.

An Act may state that for the bringing into force of an international obligation its entry into force is provided by a Decree. General provisions on the publication of treaties and other international obligations are laid down by an Act'.

9.2. Limiting constitutional provisions and principles

Substantive

There are no landmark cases containing a sort of controlimiti position. Yet, the Constitutional Law Committee has stated that the domestic implementation of EU law may not lower the national standard of constitutional rights' protection and the implementation of EU measures should conform to the requirements originating in the domestic system for the protection of constitutional and human rights.

Procedural

Since 2012, the Constitution requires a two thirds majority of the votes cast in Parliament for the acceptance of international obligations 'if the proposal concerns the Constitution or an alteration of the national borders, or such transfer of authority to the European Union, an international organisation or an international body that is of significance with regard to Finland's sovereignty' (Section 94). The crucial question will be therefore whether the relevant Treaty does indeed fall under this category of treaties requiring a special majority. Yet, the Constitution does not mark off certain areas which could not be transferred.

Nevertheless, Section 94.3 of the Constitution does insist on democracy:

'An international obligation shall not endanger the democratic foundations of the Constitution.'

The sentence seems to suggest that there are indeed limits to what can be transferred to the EU.

9.3. Possibilities and impossibilities in overcoming limitations

Since the new Constitution was adopted in 2000, representing the results of a long process of piecemeal adjustments and constitutional debate, it has been amended several times. When the first amendment was prepared in 2005, the parliamentary Constitutional Law Committee drafted a number of amendment principles to guide amendment processes. These principles are: restrictiveness (everyday politics should not determine the need for

constitutional amendments), correctness (the Constitution should in principle give an accurate picture of the constitutional reality), consensus (amendments should be thoroughly prepared, and be surrounded by broad discussion and consensus), and finally the principles concerning drafting: transparency and completeness.

The normal procedure under Section 73 is the 1/2 + elections + 2/3 procedure (majority in Parliament, then elections and a two-third majority in the new Parliament). The fast track formula of 5/6 + 2/3 is reserved for situations where a quick amendment is absolutely necessary. Both procedures require a high level of agreement among political forces in Parliament. Yet, there is also the alternative of exceptive enactments, which allows deviating from the Constitution without amending it. Yet, the system is circumscribed in the new Constitution: is cannot be used for core features of the Constitution.

* * *

10. FRANCE

10.1. Facilitating constitutional provisions and principles

Article 88-1 of the Constitution 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'. On the basis of this provision:

- the non-constitutional courts give primacy to EU law on acts of parliament and subordinate legislation;[649]
- according to the *Conseil constitutionnel,* France's Constitutional Court, is it a constitutional duty for French authorities to implement EU directives in national law (except when French constitutional identity is at stake).[650] The effects of this jurisprudence are threefold:
  (1) acts implementing mandatory provisions of directives are not subject to a review of their compatibility with the Constitution (unless France's constitutional identity is at stake).
  (2) EU directives *de facto* (or indirectly, on the basis of Article 88-1 Constitution) have force of constitutional law: an implementing act which is contrary to the directive it intends to implement is unconstitutional.
  (3) EU law has primacy of application on constitutional provisions, unless these are part of French constitutional identity.

Arguably, the implementation or execution of other (primary or secondary) EU law is also a constitutional duty on the basis of Article 88-1 Constitution.

[649] The Conseil d'Etat, France's highest administrative court, bases this primacy also on Article 55 Constitution, which stipulates that 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'
[650] *Conseil constitutionnel* decision 2004-498 DC of 29 July 2004, par. 4; *Conseil constitutionnel* decision 2006-540 DC of 27 July 2006, par. 19.

10.2. Limiting constitutional provisions and principles

Substantive

According to the *Conseil constitutionnel*, an act of parliament implementing an EU directive 'cannot run counter to a rule or principle inherent to the constitutional identity of France, except when the constituting power consents thereto'.[651] Probably the same holds for other French acts implementing or executing other secondary EU law. What the notion of French constitutional identity comprises is not clear. The *Conseil constitutionnel* has never clarified the notion. Arguably it refers to those constitutional rules and principles which are specific to France, i.e., those that are protected in the French legal order but not also in the EU's legal order. In this sense, the French constitutional identity is defined by the constitutional '*exception française'* in relation to the EU. The principle of *laïcité*, the definition of the persons entitled to vote in French political elections, the prohibition to give specific rights to ethnic, linguistic and other minorities and the definition of the criteria for access to public functions have been offered as examples of this identity. If indeed this is the way the *Conseil constitutionnel* interprets the notion, its scope is rather limited. But it must be emphasised that constitutional literature also offers other interpretations of the notion.

France's highest administrative court, the *Conseil d'Etat*, seems to conceive the constitutional '*exception française*' more broadly than the Constitutional Council, at least when it comes to fundamental rights protection. In its decision in the *Arcelor* case of 8 February 2007, the *Conseil d'Etat* has followed the Constitutional Council in its interpretation that Article 88-1 Constitution entails a constitutional duty to implement directives. But according to the *Conseil d'Etat* not only the presence of a constitutional provision or principle specific to France, but also a difference in intensity and/or scope of protection of a provision or principle which is found in both legal orders can lead to the non-applicability of secondary Union law.[652]

An EU (amendment) treaty is unconstitutional if it contains a clause which (1) runs counter to the Constitution, (2) calls into question constitutionally guaranteed rights and freedoms or (3) adversely affects the fundamental conditions for the exercise of national sovereignty.[653] The same criteria have been used to review the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union,[654] which as to the form is not part of the EU framework.

Article 89-5 Constitution provides that 'The republican form of government shall not be the object of any amendment'.

Procedural

Article 53 Constitution provides that treaties or agreements pertaining to international organizations have to be approved by an act of parliament before they can be approved or ratified by the president of the republic. A bill approving a treaty may also be submitted to approval by referendum by the president of the republic (Article 11 Constitution); this procedure has been used for the approval of the Treaty of Maastricht on 20 September 1992. Moreover, one fifth of the members of parliament (at least 185 deputies and/or senators out of 925), supported by one tenth of the voters enrolled on the electoral lists, have the constitutional right to initiate a legislative referendum (Article 11 Constitution); this may also concern an act approving a treaty. When it concerns (future) EU accession treaties, a referendum is mandatory, unless both houses of parliament by an identical resolution adopted with a three-fifths majority of the votes cast decide that the bill may be

[651] *Conseil constitutionnel* decision 2006-540 DC of 27 July 2006, par 19.
[652] Conseil d'Etat 8 February 2007 (Arcelor).
[653] *Conseil constitutionnel* decision 2007-560 DC of 20 December 2007, par. 9.
[654] *Conseil constitutionnel d*ecision 2012-653 DC of 9 August 2012, par. 10-11.

approved by *Congrès* (the joint meeting of both houses) with the same majority (Article 88-5 Constitution).

- Article 54 Constitution provides that 'If the Constitutional Council (…) has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or approve the international undertaking involved may be given only after amending the Constitution.'

- A constitutional amendment procedure may not be commenced or continued 'during the vacancy of the Presidency of the Republic or during the period between the declaration of the permanent incapacity of the President of the Republic and the election of his successor' (Article 7 in fine Constitution) and while 'the integrity of national territory is placed in jeopardy' (Article 89(4) Constitution).

10.3. Possibilities and impossibilities in overcoming limitations

According to Article 89 Constitution, both the president of the republic, on the basis of a proposal of the prime minister, and the members of parliament have the right to initiate constitutional amendments. The amendment procedure consists of two stages. Amendments first have to be accepted by the houses of parliament in identical terms. In the house in which the draft is (first) introduced at least six weeks have to expire between the moment of introduction and the plenary discussion, in the subsequent house at least four weeks, counted from the date of transmission. In the second stage, the amendment has to be approved by the people in a referendum if it is of parliamentary origin. In case the origin is governmental, the president may decide to have it approved instead by *Congrès* (the joint chambers of the houses of parliament) with a three-fifths majority of the votes cast.

In 1962, the Constitution was amended by an act which was directly subjected to a referendum, i.e. without first having been accepted by parliament. It concerned the introduction of the direct election of the president of the republic, a proposal to which the majority of one of the houses of the French parliament, the *Sénat*, at that time was adamantly opposed and which therefore could not overcome the first hurdle of the Article 89 procedure. The maneuver was based on Article 11 of the Constitution. The use of this provision for a constitutional amendment has been condemned almost unanimously in constitutional literature. But although the provision has been revised in 1995 and 2008, the constituent power has not seized these opportunities to rule out the use of the provision for constitutional amendments in the future.

As regards the 'unamendable' clause in Article 89-5 Constitution ('The republican form of government shall not be the object of any amendment'), the *Conseil constitutionnel* has ruled that the constituent power has to respect the provision as long as it exists, but also that the constituent power is sovereign and thus competent to amend or repeal the provision as it sees fit, if it wants to even implicitly.[655] Moreover, the Constitutional Council does not make a distinction between constitutional acts which are approved by referendum and those approved by *Congrès*: the Council is not competent to review either.[656] In short, Article 89(5) cannot be considered to be a supra-constitutional provision *à la* Article 79(3) German Constitution, or in other words: In France, the constituent power is sovereign in both its popular and its parliamentary manifestation.

* * *

[655] *Conseil constitutionnel* decision 92-312 DC of 2 September 1992, par. 19.
[656] CC 26 March 2003, decision 2003-469 DC, par. 2-3. See also *Conseil constitutionnel* decision 62-20 DC of 6 November 1962; decision 92-313 DC of 23 September 1993.

11. GERMANY

11.1. Facilitating constitutional provisions and principles

The Preamble to the German Constitution, *Grundgesetz* (literally 'Basic Law', hereinafter: GG), proclaims a Germany that is dedicated to act and promote world peace 'as an equal partner in a united Europe'. The objective of establishing 'a united Europe' is also formulated in Article 23(1) GG.

Article 23(1) GG stipulates the participation of Germany 'in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.'

In its subsequent paragraphs, Article 23 GG stipulates the participation of the federation and German states (*Länder*) in the context of EU decision-making.

11.2. Limiting constitutional provisions and principles

Substantive

Although Article 23(1) GG enables Germany's integration in the European Union, it also sets clear limits, since it specifies that the Union must be committed

- to democratic, social and federal principles,
- to the rule of law, and
- to the principle of subsidiarity,
- and must guarantee a level of protection of basic rights essentially comparable to that afforded by the Basic Law.

Moreover, the *Grundgesetz* specifies in Article 79(3) – the so-called *Ewigkeitsklausel* or 'eternity clause' – that constitutional amendments 'affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'; Article 1 concerns the guarantee of human dignity and fundamental rights, whereas Article 20 GG formulates the following constitutional principles:

> (1) The Federal Republic of Germany is a democratic and social federal state.
> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
> (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
> (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

The German constitutional case law has clarified that under the present EU Treaty framework, the 'equivalent protection' of *fundamental rights* has in principle now been achieved by the European Union, so that complaints of infringement of fundamental rights by EU acts are not admissible unless it is shown that there is an overall lack of protection by the EU institutions, in particular also the Court of Justice.[657]

These principles have been the object of a highly developed case law of Germany's federal constitutional court, the *Bundesverfassungsgericht*. In essence, and too briefly, this case

[657] BVerfGE 102, 147.

law makes clear that EU law remains hierarchically subject to the core values on which the Grundgesetz is based, as expressed in Article 23(1) and 79(3) GG. These must be observed whenever there is a transfer of powers to the EU. Moreover, the EU institutions must remain within the powers thus transferred. By the transfer of powers to the EU within the boundaries set by the GG, Germany has not transferred the *Kompetenz-Kompetenz*, so that in principle it can still determine through its constitutional organs whether the constitutional limits to which the transfer is subject have been observed. The *Bundesverfassungsgericht* has, however, determined that it is first up to the Court of Justice of the EU to supervise whether the EU institutions have remained within the scope of their powers. *Ultra vires* review by the *Bundesverfassungsgericht* would only be admissible if there is an obvious overstepping of competencies by European institutions or bodies resulting in a structurally significant shift detrimental to the powers of the Member States.[658]

Further European integration remains constitutionally premised on German sovereign statehood because the GG is premised on sovereign statehood. A change of Germany from being a sovereign state into a component state in a federal Europe would be stepping out of the framework of the Grundgesetz and hence require a constituent act of the subject of the constitutional order, the German people as intended in Article 146 GG (see further below).

Further European integration must furthermore respect the constitutional identity of the German state as expressed in the GG, also in terms of the values described in Article 23(1) GG in combination with those of the 'eternity clause'.

The *principle of democracy* demands that there should be a significant scope for the national parliament in terms of its autonomous decision-making power with regard to a number of fields of state activity. These regard:

- criminal law,
- disposing over the monopoly of the use of force by police and armed forces,
- fundamental decisions on public revenue and expenditure,
- the circumstances of life in a social state and
- important cultural issues such as
    - family law,
    - the school and educational system and
    - the relations between the state and religious communities.

Procedural

The EU founding Treaties and their amendments 'and comparable regulations' require approval by act of parliament with the consent of the Bundesrat, i.e. the chamber of parliament representing the states. If the relevant treaty or regulation 'amends or supplements the Basic Law', the act of approval (*Zustimmungsgesetz*) must be adopted in accordance with the procedure of amendment of the Grundgesetz itself (Art. 23(1), last sentence). This procedure implies the requirement of a two thirds majority in both houses of parliament, and that the *Ewigskeitsklausel,* 'eternity clause', is respected. There is controversy over the question when there is such an 'amendment or supplement' of the GG, in particular as regards the treaties on accession of new Member States, and as regards treaties like the ESM and Fiscal Compact treaties.

The procedure under Article 23(1) GG applies not only to EU treaties but also to a range of EU decisions, from simplified treaty amendment to explicit and more specific bridging clauses as well as the flexibility clause, as specified in the *Integrationsverantwortungsgesetz* (IntVG). Those EU decisions are considered a form of

[658] BVerfGE 126, 286.

implicit treaty amendment that may involve a transfer of powers in the sense of Article 23 GG.

The *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (hereinafter: *Zusammenarbeitsgesetz*) specifies government duties to inform the houses of parliament and the procedures under which parliament participates in the decision-making in greater detail.

11.3. Possibilities and impossibilities in overcoming limitations

Overcoming procedural limits in the Constitution

The procedural limit involved in the approval of treaties, acts and measures under the procedure for amending the *Grundgesetz* is that of qualified majority as provided by Art. 79(2) GG. This provision is itself not part of the unchangeable provisions of the Grundgesetz, mentioned in Article 79(3) GG, and is therefore amenable to change. Such an amendment to the procedures might be an abolition of the qualified majority for all EU amendments and acts to which it applies, or could refer only to e.g. the case of simplified treaty amendment, and the lesser forms of extending the scope of EU law (bridging clauses, emergency brakes etc.).

Any reform of the procedure, however, might be objected to, given that the procedure follows from the peremptory (and, under the GG, unchangeable) principles of the constitution, in particular also the principle of democracy, i.e. the procedural and substantive hurdles to further integration are closely intertwined.

Overcoming the substantive limits

The major substantive hurdle to further integration is the eternity clause contained in Article 79(3) GG.

As the *Bundesverfassungsgericht* specified in the Lisbon judgment, the respect due to the *Ewigkeitsklausel* is binding on 'the constitution-amending power' ('*der verfassungsändernde Gesetzgeber*', sometimes referred to as *verfassungsgesetzgebende Gewalt*) as constituted power under Article 79 of the Grundgesetz and as such, the principles and rights protected by that clause cannot be amended. The power to amend the Grundgesetz under Article 79 GG cannot give an amendment a specific content that would infringe the principles and rights protected by the eternity clause (as they are elaborated in the case law of the BVerfG).

The BVerfG explicitly left it an open question whether the values protected by the clause also bind the *original* constitutional power under Article 146, the *Verfassungsgebende Gewalt*, *pouvoir constituant originaire*, that is to say, in the words of Article 146 GG, for the case that "the German people, in free self-determination, but in a continuity of legality to the Basic Law's system of rule, gives itself a new constitution".[659] Such binding force of these principles could be argued on the basis of the universality of the principles of dignity, freedom and equality.[660]

The answer to this as yet open question – whether the constituent power is bound to the unchangeable principles protected by the eternity clause – is decisive for the possibility or impossibility to overcome the existing substantive limits to further European integration.

[659] Article 146 GG in full: 'This Basic Law [*Grundgesetz*], which is valid for the entire German people after the achievement of the unity and freedom of Germany, ceases to be valid on the day on which a Constitution [*Verfassung*] enters into force which has been adopted by a free decision of the German people.'
[660] Lissabon Urteil, Rn 217.

The literature is divided over this issue, which has been one of the most contested ones in German constitutional law, and so is the discussion of the constitutionally legitimate scenarios for passing from sovereign German statehood to being a mere component member of a fully sovereign federal European Union. Mostly, however, it is assumed that this would at a minimum require a referendum under Article 146 GG.

* * *

12. GREECE

12.1. Facilitating constitutional provisions and principles

Greece signed the Treaty of Accession to the European Communities in 1979 and became a Member in 1981. The Greek Constitution of 1975 had introduced Article 28, which served as the constitutional basis for the accession. The 1975 Constitution was amended only three times: in 1986, 2001 and 2008. The 2001 amendment added an interpretive statement to Article 28 according to which 'Article 28 establishes the foundation for the participation of Greece in the European integration process.'

Article 28(1) provides that generally recognised rules of international law as well as ratified international conventions shall be an integral part of and shall prevail over any contrary provision of the Greek law. The second and third paragraph provide for the constitutional basis for the transfer of competences to an international organisation. The former states that the transfer of powers to an international organisation requires three-fifths majority approval in the Parliament and the latter provides that any limitation of the exercise of national sovereignty requires absolute majority. This distinction is peculiar since the former is a category of the latter and they are interdependent.[661]

Furthermore, Article 2(2) Constitution provides for the duty of the State to adhere to the generally recognised rules of international law, to pursue the strengthening of peace and justice, and to foster friendly relations between peoples and States.

12.2. Limiting constitutional provisions and principles

Substantive

The limitation of exercise of national sovereignty as stated in Article 28 (3) is only possible 'insofar as it is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is affected on the basis of the principles of equality and under the condition of reciprocity'.

Article 110(1) lists the provisions of the Constitution which cannot be amended, namely the provision on the form of the government in Article 1(1)[662], on the protection of certain fundamental rights and freedoms in Articles 2(1)[663], 4(1)[664](4)[665] and (7)[666], 5(1)[667] and

[661] The prevailing opinion is that the two paragraphs should be read in conjunction and the problem is avoided in practice (e.g. Law 945/1979 ratifying the accession was adopted by two-thirds majority).
[662] The form of government of Greece is that of a parliamentary republic.
[663] Respect and protection of the value of the human being constitute the primary obligations of the State.
[664] All Greeks are equal before the law.
[665] Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.
[666] Titles of nobility or distinction are neither conferred upon nor recognized in Greek citizens.
[667] All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages.

(3)[668], 13(1)[669], and finally a provision on the principle of separation of powers in Article 26[670].

Article 28(1) Constitution gives precedence to international law in case of a conflict with a provision of national law, but there is no explicit regulation of the institutional relationship between EU law and the Greek Constitution. The Council of State has however declared the inviolability of the domestic Constitution and stated that no legal norm can take precedence over the Greek Constitution.[671] Nevertheless, it has been noted that the courts generally adopt Europe-friendly reading of the Constitution and conflicts between EU law and the Constitution rarely arise.

Procedural

Article 28 Constitution, as explained before, makes a distinction between transfer of competences to international organisations by means of a treaty, which requires three-fifths majority approval in the Parliament (paragraph 2) and the limitation of exercise of national sovereignty which (only) requires absolute majority (paragraph 3). The prevailing opinion is that the two paragraphs should be read in conjunction.

As for the revision of the Constitution, the procedure is more complicated (Art. 110(2)-(6)).

A proposal to amend the Constitution must be tabled by a minimum of fifty members of Parliament and approved by a three-fifths majority in two separate ballots, held at least one month apart. The second phase of the amendment procedure is conducted in the course of the opening session of the next Parliament and the amendments are adopted by an absolute majority vote. The majorities can also be reversed: should a proposal for revision be adopted by absolute majority vote and not three-fifths majority as indicated in paragraphs 2 and 3, then the next Parliament may decide on the provision to be revised by a three-fifths majority of the total number of the members of Parliament (paragraph 4). No new revision of the Constitution is permitted until five years have elapsed since the completion of previous revision (paragraph 6).

12.3. Possibilities and impossibilities in overcoming limitations

The duty to respect international law and to foster friendly relations between peoples and States, as one of the principal obligations of the Greek State, provides the basis for the interpretation of the Constitution as consistently as possible with international law. If future Treaty reform would be in conflict with the Constitution, the Constitution could in principle be amended. However, the procedure for constitutional revision is very rigid and not all provisions can be amended. Article 110 lists provisions which are unamendable. Nevertheless, the Europe-friendly interpretation of the Constitution can solve many issues. Alternatively, an amendment of Article 110 is theoretically possible, there are no official rules forbidding it. However, the fact that this provision lists unamendable provisions in the Constitution implies that it is an unamendable provision in itself.

* * *

[668] Personal liberty is inviolable. No one shall be prosecuted, arrested, imprisoned or otherwise confined except when and as the law provides.
[669] Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.
[670] (1)The legislative powers shall be exercised by the Parliament and the President of the Republic. (2) The executive powers shall be exercised by the President of the Republic and the Government. (3) The judicial powers shall be exercised by courts of law, the decisions of which shall be executed in the name of the Greek People.
[671] See e.g. the Council of State rulings in 1809/1997 and 3242/2004.

13. HUNGARY

13.1. Facilitating constitutional provisions and principles

The new 2011 Fundamental Law mentions Europe, Hungary's role in Europe and its commitment to European unity on several instances. The Fundamental Law contains a Europe clause in its Chapter entitled 'Foundation', which is essentially only slightly different from the provisions in the 1989 Constitution:

> Article E
> (1) In order to enhance the liberty, prosperity and security of European nations, Hungary shall contribute to the creation of European unity.
> (2) With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfillment of the obligations arising from the Founding Treaties.
> (3) The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2).
> (4) The 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.

The Fundamental Law hence contains a generous declaration of commitment of the Hungarian State for European unity (which presumably covers also the European Union).[672] This commitment can also be found in the preamble to the new Fundamental Law, the National Avowal of Faith.[673] Nevertheless, there seems to be a tension between the openness to Europe in these phrases, and the more national-State centred constitutional philosophy which is reflected in the Avowal, and in the other chapters of the Fundamental Law.[674] Moreover, the references to the supra-national character of the European Union (exercising the competences transferred independently or separately from the Member States) has been omitted, though the essence of the construction has been maintained.

13.2. Limiting constitutional provisions and principles

Substantive

With respect to the question of the relationship between EU law and the Hungarian Constitution, the Constitutional Court has not made its position entirely clear. In the *Sugar surplus duty* case, as well as in the *EUIN* case,[675] the Court avoided the issue and focused on the constitutionality of the national implementing legislation. Subsection (3) of Article E of the new Fundamental Law is slightly more outspoken the previous Constitution by stating that the law of the European Union 'may stipulate a generally binding rule of conduct', but again, there is no express mention of the principle of primacy of application of EU law *vis-à-vis* Hungarian law. Moreover, it is not yet clear whether the qualification 'subject to the conditions set out in paragraph 2' suggests that

[672] This is in essence the old Article 6(4) of the Constitution.
[673] 'We are proud that one thousand years ago our king, Saint Stephen, built the Hungarian State on solid foundations, and made our country a part of Christian Europe'; We are proud that our people have fought in defence of Europe over the centuries and, through their talent and industry, have enriched Europe's common values; 'We believe that our national culture is a rich contribution to the diversity of European unity'.
[674] For example these passages in the National Avowal of Faith: 'We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin'; 'Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future; a living framework which expresses the nation's will and the form in which we want to live'.
[675] Decision 32/2008, 11 March 2008.

there are constitutional constraints to the applicability or validity of EU law in the Hungarian legal system.

Procedural

The procedure for approval of Treaty amendment and authorisation to recognise the binding nature of an international agreement transferring competences shall require a two-thirds majority of the votes of the Members of Parliament. This is essentially the same procedural requirement as for constitutional amendment. In both cases, a referendum is explicitly excluded.

13.3. Possibilities and impossibilities in overcoming limitations

With respect to the *substantive* review of the constitutionality of constitutional amendments, in a 2011 decision the Constitutional Court began by saying that the Constitution does not contain an eternity clause, or immutable provisions. Accordingly, there are no absolute constitutional limits to the transfer of powers to the EU, as any constitutional obstacles can be removed by amendment.

However, limits to constitutional amendment could be found in international law and *jus cogens*:

> 'Based on the principles enshrined in international agreements, the Hungarian Constitution has immutable parts whose immutability is not based on the will of the Constitutions' creators, but rather on *ius cogens* and those international agreements to which the Republic of Hungary is party. . . The norms, principles, and fundamental values of ius cogens together constitute a standard that all future constitutional amendments and constitutions need to satisfy.'[676]

The Court thus bound to these standards not only the constitutional amendments reviewed in the case, but even new constitutions, and presumably hence the new Fundamental Law. At the same time, it appears that the majority believed that it was not within the jurisdiction of the Constitutional Court to ensure that a constitutional amendment (or new constitution) satisfied these standards, meaning that there is effectively no way to enforce them. The majority did however state that the attained level of constitutional protection of rights and its system of guarantees may not be diminished, and held that the Court had a signalling function.

* * *

14. IRELAND

14.1. Facilitating constitutional provisions and principles

Ireland is the only Member State that generally has a referendum for each EU Treaty amendment, since these are considered to entail an amendment of the Constitution (*Bunreacht na hÉireann*). Via these constitutional amendments, the relevant Treaty is constitutionalized and the law deriving from it is made immune from constitutional review. Today, the 'European clauses' in the Irish Constitution are spread over eight separate subsections (now numbered Article 29.4.3° to Article 29.4.10°). The text reads as follows:

[676] Hungarian Constitutional Court, Decision 61/2011.

3° The State may become a member of the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957).

4° Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.

5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 ("Treaty of Lisbon"), and may be a member of the European Union established by virtue of that Treaty.

6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

i the said European Union or the European Atomic Energy Community, or institutions thereof,
ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
iii bodies competent under the treaties referred to in this section, from having the force of law in the State.

7° State may exercise the options or discretions—

i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
ii under Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and
iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

8° The State may agree to the decisions, regulations or other acts—

i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,
ii under those treaties authorising the adoption of the ordinary legislative procedure, and
iii under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice, but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas.

9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.

In addition, a new paragraph 10° was added by the Amendment of the Constitution in 2012 to authorize the ratification of so-called Fiscal Compact. Since that Treaty is not a Treaty amending the TEU, Article 29.4 did not apply, and accordingly neither did the essential scope and objectives test. An amendment was considered necessary to authorize ratification and to provide constitutional immunity. The *Taoiseach* (Prime Minister) indicated, on the advice of the Attorney General, that, as the Stability Treaty was 'a unique instrument outside the EU Treaty Architecture', a referendum was required 'on balance'. Paragraph 10° reads as follows:

10° The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State.

14.2. Limiting constitutional provisions and principles

Substantive

It is generally agreed that participation in the process of European integration causes inroads in the sovereignty of the Irish people (see above), but these are agreed to each time in a referendum, which amends the Constitution and authorizes the ratification of the relevant Treaty and hence also the inroad in sovereignty it entails.

Nevertheless, once these authorizations have been given, the Irish Constitution is particularly open to EU law, and provides both EU law and national acts necessitated by the obligations of membership with constitutional immunity.

And yet, it is not fully accepted that this immunity would be absolute. in *SPUC v Grogan*, Walsh J stated that:

> '…it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.'

In the same vein, O'Higgins, a former ECJ judge wrote extrajudicially:

> 'Should a question arise as to whether a particular measure is so 'necessitated' [this is the test for immunity under the Third Amendment to the Constitution] it would seem to me to be one exclusively for the High Court under the provisions of Article 34.3.2° of the Constitution. I cannot see on what basis jurisdiction to decide what is, essentially, a question as to the validity of a law having regard to the Constitution can be conferred on or exercised by any other court…'

The concept of constitutional identity does not as such play an important role in the public debate. It can however be argued that some cases demonstrate a particular sensitivity on the part of Irish courts, such as the abortion cases (e.g. *SPUC v Grogan* and the *X case*) and Irish neutrality (see e.g. the *Crotty* case).

Procedural

Approval of Treaty amendments has thus far been considered to require constitutional amendment, and hence, a referendum.

14.3. Possibilities and impossibilities in overcoming limitations

So far, no constitutional impediments have been identified which could not be lifted by constitutional amendment via referendum. Since the people themselves give permission to ratify Treaties, there seems to be no legal limits. There does not seem to be a theory of 'core' or unamendable elements' of the constitution that would be beyond the reach of the Irish people in a referendum. No constitutional provision is immune from amendment, and a constitutional amendment cannot itself be unconstitutional.

* * *

15. ITALY

15.1. Facilitating constitutional provisions and principles

The constitutional basis for EU membership in Italy is firstly and primarily Article 11 of the Costituzione della Repubblica (hereinafter: Cost.). This provision allows Italy 'to agree to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations'; and provides that 'Italy shall promote and encourage international organisations furthering such ends'. The application of this Article to EU law places limits (*limiti*) on the Italian legal and constitutional order, in as much as the EU legal order is considered to be standing in a sense juxtaposed to the national legal order, but must be applied by the competent Italian public institutions.

Moreover, Article 117(1) Cost., introduced in 2001, has been understood as a basis for the effect of EU law in the Italian legal order, in as much as it provides that '[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations'.

At the constitutional level, there are provisions that regulate in some further detail the role of the regions and other entities as regards the EU, while the constitutional amendment of 2012, introducing balanced budget rules for the state and other public entities, can be considered an implementation of the Fiscal Compact in the service of EU objectives concerning the economic and monetary policy in the Eurozone.

At the level of legislation an important instrument is the Act on General Norms on the participation of Italy in the European Union of 2012. It regulates many aspects of the internal constitutional and political organization of the Italian Republic as regards Union affairs in the broadest sense of the word, including issues of parliamentary participation in the decision-making process, the implementation of EU law through legislative and other measures, and the prohibition of 'reverse discrimination' (in terms of strict positive law a matter that is, controversially, outside the scope of EU law).

15.2. Limiting constitutional provisions and principles

Substantive

The main category under which substantive limits on European integration exist is that of the so-called 'counterlimits', *controlimiti*, to the limitations of Italian sovereignty under Article 11 Cost.. These are rooted in well-established case law of the Corte costituzionale and consist of the fundamental and supreme principles of the Italian constitutional order. These principles are explicit or implicit.

Explicit limits are the republican form of the state, which is formulated as a limit on the

power to amend the *Costituzione* (Art. 139 Cost.), and the guarantee of inviolable human rights (Article 2 Cost.). The rights are, according to one part of constitutional scholarship, the fundamental rights set out in Articles 13 to 29 of the Constitution, whereas another part of the scholarship considers, either alternatively or more specifically, the rights which the Constitution declares in so many words to be 'inviolable' (which include personal liberty (Art. 13), the home (Art. 14), the freedom and confidentiality of correspondence and communication (Art. 15), the right to defence in legal proceedings (Art. 24)).

Apart from these fundamental rights, there are also inviolable 'principles' of the constitutional order. Looking at the case law of the *Corte costituzionale*, the 'inviolable principles' in part overlap with fundamental rights (particularly the 'inviolable' ones), as well as with the republican principle broadly understood. The Corte costituzionale has never provided a catalogue of inviolate principles. From the case law we can deduce that they comprise:

- the unity of the state (Art. 5 *Cost.*), as regards unity of constitutional jurisdiction as an indispensable element of the Italian legal order (the effective and uniform interpretation of the Italian Constitution);
- the principle of judicial protection, including access to a court of law and the rights of the defence (Art. 2 jo 24(1) Cost.);
- the right to free and secret communication (Art. 2 jo 15 *Cost.*);
- the right to equal treatment (Art. 3(1) Cost, in itself and in relation to other provisions e.g. religion (Art.8);
- the principle of representation based on pluralist democracy, as expressed in the right to non-discrimination in the electoral context (Art. 51 Cost.);

The secular character of the state, comprising the protection of freedom of religion in a system of confessional and cultural pluralism (Art. 2 jo 3, 7, 8, 19 and 20 Cost.).
In the case law (and literature) in Italy, a distinction is made between the core of inviolable principles, which are considered not to be constitutionally changeable (except through a revolutionary act establishing a new political order), and the particular formulations in and applications of the law, which can change.

Procedural

An act of parliament is required for the approval of a decision concerning the common EU defence (Art. 42(2) TEU), for simplified treaty amendment under Article 48(6), and for a decision on the system of own resources of the EU (Art. 311(2) TEU).

The decisions under 48(7) TEU (to switch from unanimity to qualified majority) can be blocked by a 'negative deliberation' in both chambers only (Art. 11(5) EU Act) within six months after it was communicated to them by the EU.

Finally, also the emergency brake procedures require resolutions of both chambers to be adopted in order for an Italian representative in the Council to trigger the procedure at EU level; these decisions need to be taken within 30 days after the relevant draft decision under the EU Treaty is submitted to them by the government (Art. 12 EU Act).

Abrogative referendums on EU (amendment) treaties and on legislation necessitated by EU law are prohibited (Art. 75 Cost.).

15.3. Possibilities and impossibilities in overcoming limitations

Procedural limits to further European integration can be overcome by amending the legislative or constitutional provisions concerned.

The substantive limitations are more difficult to overcome. The republican form of

government (Art. 139 Cost) cannot be changed. However, part of the constitutional scholarship allows for the amendment of Article 139 Cost itself, after the adoption of which amendment, the remainder of the Constitution can also be amended so as to do away with certain aspects of the republican form of government or with all of it (the so-called double amendment procedure). This, it is assumed, changes the nature of the state and the constitutional order.

Also, the guarantee of fundamental rights (Art. 2) and the inviolable principles of the constitution cannot be changed by constitutional amendment, but it is controversial whether nevertheless one could amend the constitution on these points and move to a new political order beyond the present republic. This presumably requires a constitutional referendum which is understood as an act of the constituent power of the people.

* * *

16. LATVIA

16.1. Facilitating constitutional provisions and principles

The Republic of Latvia has adopted in 2003 the necessary constitutional amendments to facilitate European integration and other forms of international cooperation.

Article 68 of the Constitution (Satversme) is central to EU membership, in providing that 'upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competencies to international institutions'.

Article 68 further provides that such an agreement must be ratified by the Saeima (Parliament) with a two-thirds majority vote of the members of the Saeima while at least two-thirds of the members are taking part in the vote.

Specifically for the EU, Article 68 states that the membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the Saeima, and that any substantial change to membership shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the Saeima.

The rank of international treaties and/or EU law in the Latvian legal order is not extensively regulated in the Constitution. The Constitution does not give explicit precedence to international treaties. With respect to the protection of 'fundamental human rights', Article 89 of the Constitution provides:

> 'The State shall recognize and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.'

However, the precedence and direct applicability of international treaties are regulated on the statutory level: Article 13 of the 1994 Law on International Treaties provides that if a provision of an international treaty approved by the *Saeima* is divergent from (a part of) Latvian law, the former will be applied.

16.2. Limiting constitutional provisions and principles

Substantive

The Constitution does not provide explicit constitutional limits for further transfer of powers to the Union. However, there are implicit 'value' limits, as discussed by the Latvian Constitution Court. The Court adopted the so-called fundamental principles approach and it held that 'Latvian normative acts must be interpreted so as to avoid any conflicts with the obligations of Latvia towards the European Union, unless the fundamental principles incorporated in the Constitution are affected.'[677]

In the decision on the Lisbon Treaty, the Constitution Court held that '[…] the transfer of competencies to the EU and the integration of the legal acts of the European Community into our legal system places certain restrictions that can be acceptable only if EU law is compatible with the principles of a democratic State and the sovereignty of the people that are derived from Article 1 and 2 of the Constitution.'[678] It further stated that, if the members of the Parliament do not initiate a referendum concerning substantial changes in EU membership, an obligation to hold a referendum might arise if the sovereign powers of the people of Latvia (Art.2) are affected (Art.77).[679]

Procedural

Article 68 of the Constitution reads as follows:

'Upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competencies to international institutions. The Saeima may ratify international agreements in which a part of State institution competencies are delegated to international institutions in sittings in which at least two-thirds of the members of the Saeima participate, and a two-thirds majority vote of the members present is necessary for ratification.'

Furthermore, and specifically for the European Union, Article 68 provides that the membership of Latvia in the European Union shall be decided by a national referendum, which is proposed by the Saeima. Substantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the Saeima.

Article 79 of the Constitution specifies the rules on decisions regarding membership of Latvia in the EU or substantial changes to it in a referendum. It states:

'An amendment to the Constitution submitted for national referendum shall be deemed adopted if at least half of the electorate has voted in favour. A draft law, decision regarding membership of Latvia in the European Union or substantial changes in the terms regarding such membership submitted for national referendum shall be deemed adopted if the number of voters is at least half of the number of electors as participated in the previous Saeima election and if the majority has voted in favour of the draft law, membership of Latvia in the European Union or substantial changes in the terms regarding such membership.'

16.3. Possibilities and impossibilities in overcoming limitations

The Latvian constitutional provisions do not explicitly state limits to further EU integration. However, under the current Constitution there is no scope for radical changes due to a

[677] Riga Harbour Case, 2007-11-03, para. 25.4
[678] Lisbon Treaty Case, 2008-35-01, para. 18.3.
[679] Lisbon Treaty Case, 2008-35-01, para. 14 and 18.3.

number of reasons. First, Article 68 states that Latvia may delegate 'part of' its competences 'with a purpose of strengthening democracy'.

Furthermore, the case law of the Constitutional Court shows that the Court scrutinises national institutions' acts dealing with the EU and ensures that they are not in violation of the legal principles enshrined in the Constitution.

Nevertheless, any obstacle could still be overcome by a constitutional amendment because nothing seems to be beyond the reach of the people of Latvia. The procedure for amending the Constitution is outlined in Article 76 of the Constitution providing that the Saeima may amend the Constitution in sittings at which at least two-thirds of the members of the Saeima participate. The amendments shall be passed in three readings by a majority of not less than two-thirds of the members present. However, if the Saeima has amended Articles 1, 2, 4, 6 or 27 of the Constitution, such amendments, in order to come into force as law, shall be submitted to a national referendum (Art. 77 Constitution).

* * *

17. LITHUANIA

17.1. Facilitating constitutional provisions and principles

The Constitution of the Republic of Lithuania contains a number of general provisions on international organisations. Article 136 states that 'The Republic of Lithuania shall participate in international organisations provided that this is not in conflict with the interests and independence of the State'. The Seimas shall ratify or denounce international treaties 'on the participation of the Republic of Lithuania in universal international organisations and regional international organisations' (Art. 138 (5)). Article 138 further states that international treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.

In addition, the Constitutional Act on Membership of the Republic of Lithuania in the European Union[680] (hereinafter the Act) has been adopted in July 2004. It is considered to be a constituent part of the Lithuanian Constitution (Art. 150 Constitution).

Article 1 of the Act is central to the Lithuanian membership in the EU, in providing that:

> 'The Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together with the other Member States of the European Union, jointly meet its membership commitments in those areas as well as enjoy the membership rights.'

In accordance with Article 138 of the Constitution, Article 2 of the Act provides that the norms of the European Union law shall be applied directly and in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

[680] Constitutional Act on Membership of the Republic of Lithuania in the European Union, No. IX-2343, 13 July 2004 (Vilnius).

17.2. Limiting constitutional provisions and principles

Substantive

Article 136 of the Constitution stipulates that Lithuania 'shall participate in international organisations provided that this is not in conflict with the interests and independence of the State'.

Furthermore, Article 1 of the Constitutional Act on the Constitutional Law of the Republic of Lithuania on the State of Lithuania[681] provides that Article 1[682] of the Constitution is a constitutional norm of the Republic of Lithuania and a fundamental principle of the State. Moreover, this provision can only be changed in a national referendum if three-fourths of citizens with electoral right vote in favour (Art. 2 of the Constitutional Act on the Constitutional Law of the Republic of Lithuania and Art. 148 Constitution).

The relationship between EU law and the Lithuanian Constitution is not explicitly stated in the Constitution or the supplementing Act. However, the Constitutional Court has concluded that EU law has supremacy over the legal acts of the Lithuanian Parliament, but not over the Constitution.[683]

Procedural

Article 148 of the Constitution poses some procedural limits for the alteration of certain provisions of the Constitution. E.g. it provides that the provisions of the First Chapter 'The State of Lithuania'[684] and the Fourteenth Chapter 'Alteration of the Constitution'[685] may be altered only by referendum.

More specifically, Article 1 of the Constitution may only be altered by referendum if no less than three-fourths of the citizens of Lithuania with the electoral right vote in favour.

Lastly, amendments of the Constitution concerning chapters of the Constitution other than those mentioned above must be considered and voted at the Seimas twice. There must be a break of not less than three months between the votes. A draft law on the alteration of the Constitution shall be deemed adopted by the Seimas if, during each of the votes, not less than two-thirds of all the members of the Seimas vote in favour thereof (Article 148 Constitution, last paragraph).

17.3. Possibilities and impossibilities in overcoming limitations

Article 1 of the Constitution, providing that Lithuania is a democratic independent state, is considered to be a fundamental principle of the Republic of Lithuania and thus a core provision of the Constitution. It can only be altered in a referendum in which a minimum of three-fourths of the Lithuanian citizens with electoral vote, vote in favour of the amendment. Yet, Article 1 of the Constitution is still amendable. There are no provisions in the Lithuanian Constitution which are non-amendable and thus also no limits for further EU integration which cannot be overcome (if there is public support for it). The procedure for amendment of all core provisions requires a vote in a national referendum with different majorities. Other provisions do not require a referendum and can be amended by the Parliame

* * *

[681] Constitutional Act on the Constitutional Law of the Republic of Lithuania on the State of Lithuania, No. I-1051, 11 February 1991 (Vilnius).
[682] 'The State of Lithuania shall be an independent democratic republic'.
[683] Constitutional Court of Lithuania, Case No. 17/02-24/02-06/03-22/04 (14 March, 2006) chapter III, para. 9.4.
[684] Art.1-17 Constitution.
[685] Art. 147-149 Constitution.

18. LUXEMBOURG

18.1. Facilitating constitutional provisions and principles

The exercise of (new) legislative, executive and judicial competences may be transferred temporarily to 'institutions of international law' by treaty (Article 49bis of the Luxembourg Constitution); the treaty concerned needs to be approved the *Chambre des députés*, the unicameral Luxembourg parliament, with a qualified majority. Article 49bis was introduced in 1956 in view of the accession to the European Economic Community (EEC) and has also been used for the approval of the Treaties of Maastricht, Amsterdam and Lisbon. Currently, Luxembourg is discussing a revision of its Constitution and, in this context, the introduction of a specific EU clause has been proposed.[686]

Treaties reorganising the internal distribution of competences within the EU and EU accession treaties may be approved by the *Chambre des députés,* the unicameral Luxembourg parliament, with a simple majority of the votes cast (Article 37 jo. 62 Luxembourg Constitution).[687]

The Luxemburg courts disapply national law, including the Constitution, in case of conflicts with international or EU law.[688] This primacy of international law and EU law is not based on the Luxembourg Constitution, but on the superiority of international and EU law themselves.[689] This is related to the fact that the Luxemburg state owes its existence to international law, more specifically to the Final Act of the Congress of Vienna of 9 June 1815. International law in Luxembourg is traditionally not viewed as a threat to national sovereignty, but rather as an indispensable guarantee for the existence and the continuity of the state.[690]

18.2. Limiting constitutional provisions and principles

Substantive

Article 49bis Luxembourg Constitution allows for the transfer of the exercise of competences, but only temporarily. A precondition for the transfer of (new) competences to the EU therefore is that Luxembourg retains the right to withdraw from the EU.[691]

Not counting transfers of the exercise of competences to the EU under Article 49bis, a treaty may not be contrary to (a provision of) the Constitution.[692] The Luxembourg Constitutional Court has no competence to rule on the constitutionality of (acts approving) treaties (Article 95ter(2) Luxembourg Constitution); the legislature has the last word on the issue. In practice the opinions of *Conseil d'Etat*, whose advice is compulsory for every bill

[686] In its opinion on the proposal for a new Constitution which is currently debated, the *Conseil d'Etat* has proposed to insert an EU clause in the Constitution. The proposed Article 5 holds that 'The Grand-Duchy takes part in European integration' (Le Grand-Duché de Luxembourg participe à l'intégration Européenne) and that 'The exercise of competences of the State may be transferred to the European Union and to international institutions by an act of parliament adopted with qualified majority' (L'exercice de pouvoirs de l'Etat peut être transféré à l'Union européenne et à des institutions internationales par une loi adoptée à la majorité qualifiée); Opinion of 6 June 2012 on the 'proposition de revision portant modification et nouvel ordonnancement de la Constitution', available at <www.conseil-etat.public.lu/fr/avis/2012/06/48_433/48433_Constitution__l_avis_avec_l_annexe_1_-_Texte_coord__1.pdf>, p. 19.

[687] See for instance the act of 29 November 2012 approving the Croatian Accession Treaty, *Mémorial* A no. 259 of 13 December 2012, p. 3394.

[688] Idem, p. 165.

[689] Idem, p. 166.

[690] Georges Wivenes, 'Luxembourg: Le Droit Européen et les Constitutions Nationales', in: *FIDE: XX Congres London, 30 October – 2 November 2002* (London, British Institute of International and Comparative Law 2003) p. 267 (p. 271, 283-285).

[691] Opinion of the *Conseil d'Etat* of 26 May 1992 on the Treaty of Maastricht, under IV; opinion of the *Conseil d'Etat* of 22 March 2005 on the Treaty establishing a Constitution for Europe, p. 2.

[692] Opinion of the *Conseil d'Etat* of 26 May 1992 on the Treaty of Maastricht, under IV.

(Article 83bis Luxembourg Constitution), are of paramount importance; in view of the lack of competence of the Constitutional Court, the Council of State feels obliged to scrupulously examine the compatibility of treaties with the Constitution.[693]

So far, no EU treaty provision has been deemed unconstitutional. Closest to that qualification came the provision in the Treaty of Maastricht which granted the right to vote at municipal elections to EU citizens of other Member States. However, the *Conseil d'Etat* reasoned that that Treaty provision was compatible with Articles 52 and 107 of the Luxembourg Constitution, which reserved the right to vote to Luxembourg citizens; in the view of the Council of State, the Treaty provision on the one hand operated a transfer of competences to the EU institutions which was covered by Article 49bis, on the other 'only' obliged Luxembourg to adapt the Constitution in due time, i.e. before the EU Council would have issued the necessary directive making the voting rights (more) concrete.[694] According to the Council of State the Constitution therefore could be amended after the ratification of the Treaty of Maastricht.

Article 49bis of the Luxembourg Constitution allows for the transfer of the *exercise* of competences. Arguably, the transfer of sovereignty as such, the *Kompetenz-Kompetenz* (competence to determine one's own competences) or the loss of independent statehood under international law would require a constitutional amendment.[695] However, it should be noted that the procedure for a constitutional amendment is only slightly heavier than the procedure for the approval of a treaty under Article 49bis.

Procedural

All acts of parliament, including acts approving treaties under Article 49bis Luxembourg Constitution, have to be adopted by the *Chambre des députés* in two successive votes separated by period of not less than three months. However, the second vote can be dispensed with if the *Chambre,* in agreement with the *Conseil d'Etat*, so decides (Article 59 Luxembourg Constitution). The second vote *inter alia* was dispensed with for the act approving the Treaty of Lisbon.[696]

Treaties under Article 49bis Luxemburg Constitution by which (new) legislative, executive and judicial competences are transferred to the EU have to be approved by an act of parliament adopted with a two-thirds majority of the members of the *Chambre des députés;* voting by proxy is not allowed (Article 37 jo. Article 114(2) Luxembourg Constitution).

The *Chambre des députés* may decide to submit (EU amendment) treaties to a referendum (Article Art. 51(7) Luxembourg Constitution). This happened with the Treaty establishing a Constitution for Europe. Although a referendum based on Article 51(7) Constitution is not legally binding, parliament will nevertheless feel bound by it politically.[697]

The rules in the Constitution regarding the prerogatives of the Grand Duke, his personal statute and his succession may not be amended during a regency (Article 115 Luxembourg Constitution).

[693] Opinion of the *Conseil d'Etat* of 26 May 1992 on the Treaty of Maastricht, under I.
[694] Opinion of the *Conseil d'Etat* of 26 May 1992 on the Treaty of Maastricht, under IV.
[695] See the opinion of the *Conseil d'Etat* of 22 March 2005 on the Treaty establishing a Constitution for Europe, p. 2 (a contrario); Wivenes, *supra* n. 4, p. 271-275.
[696] See the opinion of the *Conseil d'Etat* of 17 June 2008 in which it agrees with the *Chambre* to dispense with the second vote.
[697] Opinion of the *Conseil d'Etat* of 6 June 2012, *supra* n. 1, p. 115-116.

18.3. Possibilities and impossibilities in overcoming limitations

The constitutional amendment procedure has been simplified in 2003 to facilitate the possibility of ratifying treaties which contain provisions contrary to the Constitution. In particular, the necessity of the dissolution of the *Chambre des députés* (and thus, of approval by two consecutive Chambers) has been dropped.

Both the government and the *Chambre des députés* have the right to initiate constitutional amendments (Article 57 Luxembourg Constitution). The amendment has to be adopted by the *Chambre* in two successive votes separated by a period of no less than three months with a two-thirds majority of its members, voting by proxy not being allowed. The second vote is substituted by a referendum on request of more than a quarter of the deputies or of 25.000 registered voters; in case of a referendum, the amendment is adopted if the majority of the voters votes in favour of the amendment (Article 114 Luxembourg Constitution).

In comparison with the procedure for approving treaties under Article 49bis, the constitutional amendment procedure is only slightly heavier: in a constitutional amendment procedure the second stage, consisting of either a second vote by the *Chambre des députés* or of legally binding referendum, cannot be dispensed with.

* * *

19. MALTA

19.1. Facilitating constitutional provisions and principles

Since a constitutional amendment at the time of accession to the European Union, Article 65(1) of the Maltese Constitution (*Kostituzzjoni*) provides that the Maltese legislature is bound to observe human rights, international law and the EU Accession Treaty:

> "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the Treaty of accession to the European Union signed in Athens on 16th April, 2003."[698]

Malta has a dualist system. In order to guarantee the priority of a treaty over conflicting national law also for the future – i.e. in order to avoid that a later act overrules the act incorporating the treaty – the act of parliament incorporating a treaty can provide that in case of conflict with national laws, the treaty provisions referred to in that incorporating Act prevail over an ordinary law which is inconsistent with those treaty provisions and such law shall to the extent of its inconsistency be void. A particular act of parliament can give to a treaty priority also by providing for the overriding effect of national measures implementing the relevant treaty. This is for instance the case with the 1951 Geneva Convention on Refugees, and the Act amending the European Convention Act (July 2006) on the basis of which the Prime Minister can amend or delete any legal instrument or provision thereof which has been judged by the European Court of Human Rights in a case against Malta to be in conflict with the ECHR.

[698] See Act V of 2003, European Union Act as published in its original version at <http://www.justiceservices.gov.mt>.

International treaties, or the laws implementing them, may in such cases have a rank between the Constitution and other laws adopted by the House of Representatives, depending on the provisions of the authorising act.

The Constitution itself has no explicit provision on the status and rank of EU law. With regard to the status of EU law as opposed to Maltese national law, the European Union Act states in Article 3 (1):

> "From the First day of May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty."

Article 3 (2) states:

> "Any provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable."

These two provisions taken together imply that EU law has a higher rank than conflicting national law and guarantees direct effect in the sense of European law for acts adopted by the EU. This can also be derived from the wording of Article 6 Constitution, which provides that the Constitution prevails over contrary law, in combination with Article 65(1), which provides for the duty of the legislature to comply with the Accession Treaty. Were the House of Representatives to enact legislation that is inconsistent with the obligations of Malta under the European Union Act, such law would be deemed 'null and void' because in breach of Article 65(1) Constitution.

On the basis of Article 3 of the European Union Act as well as on the basis of Articles 65(1) and 6 Constitution, primary and secondary sources of EU law are supreme over any national legislation.

Moreover, Article 4 (1) EU Act states that

> "All rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty, and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, shall be recognized and available in Law, and be enforced, allowed and followed accordingly."

In other words, this provision recognizes the effect of both primary and secondary law, such as regulations and directives, and all other instruments and obligation which are deemed to have direct effect, and do not need implementation under EU law. For all intents and purposes they are declared directly applicable under this provision of the EU Act as well as all other EU law.

As to implementation, Article 4(2) EU Act provides that the Prime Minister or a designated Minister or authority may make provisions to implement any obligations or rules coming from the EU, including legislative powers normally reserved to Parliament, except for provisions with retroactive effect and as concerns legislation creating serious criminal offences punished with specified sanctions (Article 4(4) EU Act).

19.2. Limiting constitutional provisions and principles

Substantive

The constitutional supremacy clause of Article 6 Constitution stands out. It reads:

"[I]f any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of this inconsistency, be void".

If a treaty should not come in the category of "any other law", the incorporating act does. So if a provision of an implemented international treaty conflicts with the Constitution, the Constitution shall prevail and that provision shall, to the extent of its inconsistency, be void.

Although EU law has priority over ordinary law (including acts of parliament), priority over the Constitution is a different matter. The Constitutional Court has not as yet given an indication of its stance on this point. It is unclear whether Maltese judges would accept the self-proclaimed primacy of EU law over national constitutional law, or whether they would argue that the national law has to be interpreted in conformity with EU treaties and the case law of the Court of Justice. Perhaps, as one interpretation of Article 6 of the Constitution would allow, the Constitution always prevails, also in the case of treaties other than EU treaties.

The general consensus in Malta, however, is that there is no actual conflict between the Constitution and EU law. Article 65 of the Constitution, in combination with Article 3(2) EU Act, can be read as an obligation for the House of Representatives to bring the Constitution in line with EU law, thus indicating primacy of EU law: national law, including the Constitution, has to be in conformity with EU law. To this extent, EU Law can be considered to prevail over the Maltese Constitution. Whether under Maltese constitutional law this is an obligation for the makers of the constitution only, or whether also a court of law and the Constitutional Court would grant that priority is, however, uncertain.

Maltese constitutional doctrine holds that the primacy of EU law must be read in light of the provision on respect of national identity (now Art. 4(2) EU): EU law can only have priority if its institutions acted within the parameters of the EU Treaty, including this provision. We understand this to mean that as regards fundamental constitutional principles the national constitution prevails, similar to the positions of the Italian Corte costituzionale and the German Bundesverfassungsgericht.

However, definite conclusions can only be drawn after a decision on this point by the Constitutional Court.

Procedural

As a dualist country, incorporation of treaties is by or pursuant to an act of parliament.[699]

In principle, treaty law has the rank of an act of parliament, so that as a general rule later acts of parliament can override earlier ones. The exception to this rule is in cases in which an act of parliament authorising the ratification of a treaty has given specific treaty provisions incorporated into Maltese law an overriding effect, as has happened in Section 3 of the European Convention Act.

International treaties are approved, not on the basis of the Constitution itself, but on the basis of the Ratification of Treaties Act of 1983, which distinguishes three types of cases,

[699] Ratification of Treaties Act, Chapter 304 of the Laws of Malta, http://docs.justice.gov.mt/lom/legislation/english/leg/vol_7/chapt304.pdf, Article 3(3): 'No provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament.'

each providing for a different instrument by which approval takes place; however, for any of these treaties to sort effect in the national legal order, they need to be incorporated by act of parliament.

Before accession in 2004, a consultative referendum was held in which 53.6% of the valid votes in favour of EU membership and 46.4% against, reflecting the highly polarised political climate in Malta. However, there was and is no obligation to hold such a referendum.

19.3. Possibilities and impossibilities in overcoming limitations

Presumably, the constitutional primacy of the *Kostituzzjoni* implies that should there be constitutional obstacles to further integration, the Constitution must be amended.

According to Article 66(1) Constitution, the Parliament has the power to amend any provision of the Constitution. Different amendment procedures apply to different provisions of the Constitution, as provided in Article 66 paragraph 2, 3, and 5 Constitution.

Article 66(2) determines that the amendment of certain enumerated constitutional provisions has to be passed by the House of Representatives by a majority vote of not less than two-thirds of the members of the House. It concerns a number of fundamental provisions, in particular on individual constitutional rights, parliamentary rights, constitutional supremacy, and the article on constitutional amendment itself.

Article 66(3) of the Constitution states furthermore that in case of amendment of two other provisions, a Bill for an Act of Parliament must not only be approved by two thirds of the members of House, but also in a referendum in which a majority of the votes must be in favour of the amendment. This concerns amendment of the duration of Parliament (5 years under the present Constitution) and of the conditions of the right to vote in a constitutional referendum and amendment of Article 66(3) itself.

Article 66(5) Constitution determines that in case of altering any of the other constitutional provisions, a Bill for an Act of Parliament shall be passed in the House of Representatives with a majority of all members of the House. Article 65(1) – the power of parliament to pass legislation 'in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003' is in this category of constitutional provisions, which can be changed by normal majority. This is not a surprise, given that an implementing act of parliament can entrench a treaty and give it direct and overriding effect.

For secondary constitutional sources, such as the European Union Act, the normal procedure for an act of parliament applies.

* * *

20. THE NETHERLANDS

20.1. Facilitating constitutional provisions and principles

There are three specific 'facilitating' provisions in the Constitution of the Kingdom of the Netherlands (*Grondwet*), and one general aspect:

- the duty to contribute to the development of the international legal order (Art. 90 Grondwet);
- attribution of legislative, executive and judicial powers to international organizations is constitutionally allowed (Art. 92 Grondwet);
- priority of directly effective EU law over conflicting national law (in principle inclusive of constitutional provisions) is facilitated in light of the general provision on this priority in Article 94 Grondwet;
- a feature of constitutional and political culture: the democratic nature of the constitutional order is amenable to change through practice; this includes 'European integration' friendly normative attitudes.

The Netherlands Constitution (*Grondwet*) makes no explicit reference to the European Union. But the first three provisions we just mentioned were adopted in 1952, less than a year after the ECSC Treaty was signed, and a few months before the latter entered into force, to become effective in the revised Constitution of 1953. The provision on the priority of decisions of international organizations and of treaties over conflicting national law was adopted by a parliamentary amendment to the constitutional amendment bill proposed by the later judge and president of the European Court of Justice, Serrarens, and was explicitly also aimed at facilitating the direct effect of European law (decisions of the European Coal and Steel Community) with precedence over acts of parliament.

20.2. Limiting constitutional provisions and principles

Substantive

A substantive 'limiting' principle is arguably that EU law must be in conformity with the provisions of the ECHR, either because these are considered unwritten quasi-supraconstitutional principles, or because under Dutch constitutional law courts can review EU law against other treaty obligations, and in cases in which human rights obligations (in particular the ECHR) are involved, in practice they let the latter prevail.

Another point is arguably that EU law has no priority over the provisions of the Charter of the Kingdom of the Netherlands (regarding relations between the country of the Netherlands and the Caribbean countries of the Kingdom), in as much as it has higher rank than the *Grondwet*, while some authors have maintained, in line with certain case of the Hoge Raad (Netherlands Supreme Court), that the Kingdom Charter does not allow for review of its provisions and legislative instruments based thereon against international and European law. Charter provisions are the protection of fundamental rights, principles of good governance and legal certainty.

Procedural

Procedural limitations are: the prior parliamentary approval of the founding treaties (if these diverge from the provisions of the *Grondwet*, with a two thirds majority in both houses of parliament) (Art. 91 Grondwet); and the requirement of (prior) publication of directly effective primary and secondary EU law (Art. 93 Grondwet).

20.3. Possibilities and impossibilities in overcoming limitations

The Charter of the Kingdom can be amended so as to cater for the priority of EU law, should there be an obstacle, presumably by guaranteeing the priority of EU law vis-à-vis the Charter and instruments based thereon. This requires adoption by the parliaments of all the countries of the Kingdom (the Netherlands, Aruba, Curaçao, Saint Maarten), with two readings in the Caribbean countries unless it is passed in first reading with at least two thirds of the votes cast.

Substantive obstacles posed by provisions of the Grondwet can be overcome either by amendment of the Grondwet (which requires two readings with elections for the Lower House in between, and a majority of at least two thirds of the vote in second reading in both houses), or by adopting a treaty with a qualified majority of two thirds of the vote.

The binding effect on all public authorities, including courts, of public international law, in particular directly effective provisions from international human rights treaties such as the ECHR, cannot be overcome except by rescinding those treaties, by amending the Constitution specifically providing that international (human rights) law will not be binding in connection with EU law, or by EU law conforming to such human rights treaties in its practice.

* * *

21. POLAND

21.1. Facilitating constitutional provisions and principles

The new Polish Constitution enacted in 1997 includes the amendments necessary to enable European integration and other forms of international cooperation. Even though the Constitution does not make an explicit reference to the European Union, it was adopted with a view to possible accession to the EU and further EU integration. Article 90(1) Constitution is central to EU membership, in providing that 'the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'. The second, third and fourth paragraph of Article 90 outline the procedure for granting consent to ratification of such an agreement.[700]

The relationship between national and international law is addressed in Article 91 of the Constitution. Article 91(1) provides that a ratified and promulgated international agreement 'shall constitute part of the domestic legal order and shall be applied directly', and Article 91(2) grants supremacy to such treaties. The third paragraph represents the constitutional accommodation of supremacy for the laws adopted by those international organizations where so provided in the ratified treaty.[701] The content of Article 91 is further reinforced in Article 9 of the Constitution, which provides that the Republic of Poland shall respect international law binding upon it.

[700] A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.
[701] For more details on the relationship between national and international law in Poland see section II C.

21.2. Limiting constitutional provisions and principles

Substantive

The Constitutional Tribunal has always recognised that the accession of Poland to the EU and the relevant transfer of competences involve surrendering sovereignty to the EU. However, the transfer is not without limits. The constitutional judges identified, as their German colleagues before, a specific 'constitutional identity' which determines the scope of excluding - from the competence to transfer competences – the matters which are 'fundamental to the basis of the political system of a given state', the transfer of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting such a detailed catalogue of inalienable competences, the Constitutional Tribunal has been able to specify matters under the complete prohibition of transfer, namely decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences. The guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of the transfer of competences specified therein.

In addition, the Tribunal held that neither Article 90 nor Article 91 of the Constitution could be used as a legal basis for the delegation of competences to the EU permitting adoption of legal acts contrary to the Polish Constitution (being 'the supreme law of the Republic of Poland') or to such an extent that it would signify the inability of Poland to continue functioning as a sovereign State and where an international organisation would in fact become the sovereign.[702] Such a situation would at the same time amount to an infringement of the principles expressed in Article 4[703] and Article 5[704] of the Constitution. These inalienable competences of the organs of the state constitute the constitutional identity[705] of the Republic of Poland.

Procedural

International agreements envisaged in Article 90 (1) of the Constitution, concerning the transfer of competences of State authority organs to an international organisation or an international organ, constitute a category of international agreements subject to ratification. Ratification of such an agreement requires two-thirds majority vote in the presence of at least half of the statutory number of Deputies, both in the Sejm and in the Senate - the two Chambers of the Polish Parliament (Article 90 (2) and (3)).

Alternatively, the Sejm can decide by an absolute majority vote in the presence of at least half of the statutory number of Deputies to call a referendum on the matter, which it did when the ratification of the Accession Treaty was at stake. If a referendum takes place, the majority of those eligible to vote have to cast their vote in order for the referendum to have binding legal force. If this threshold is not reached, the matter is returned to the Parliament for the final decision.

[702] K 18/04, para. 8.
[703] "Supreme power in the Republic of Poland shall be vested in the Nation".
[704] "The Republic of Poland shall safeguard its independence".
[705] The concept is equivalent to (or at least comprises) the concept of national identity as used in the Treaties, in particular in Article 4 (2) TEU.

21.3. Possibilities and impossibilities in overcoming limitations

According to the Constitution as it stands now and the judgments of the Polish Constitutional Tribunal, there are limits to further transfer of competences which include specific factors determining the constitutional identity of Poland. Moreover, any transfer of competences that would allow adoption of acts contrary to the Polish Constitution is not permitted. Yet, the Constitution could still be amended. There are no provisions in the Constitution which are unamendable and thus nothing that is beyond the reach of the Polish constitutional legislature. The procedure for the amendment of the constitution, outlined in Article 235 Constitution, is as follows:

1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.

2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.

3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.

5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.

6. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

7. After conclusion of the procedures specified in paras 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

* * *

22. PORTUGAL

22.1. Facilitating constitutional provisions and principles

Article 7(5) of the Constitution contains a commitment 'to reinforce the European identity and to strengthen the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples'. This can be viewed as a ground for constructive cooperation towards an ever closer union between Europe's peoples.

Article 7(6) Constitution allows – on the conditions mentioned above – the sharing of powers needed not only for the construction of the EU, but also for the deepening of integration in the European Union.

> 'Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union.'

Article 8(4) Constitution provides that, with due 'respect for the fundamental principle of a democratic state based on the rule of law',

> '[t]he provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law'.

The *Tribunal Constitucional* has held that if ordinary law conflicts with EU law, this is not a matter of a direct conflict with the Constitution, even though EU law has effect as a consequence of Article 8(4) Constitution; the *Tribunal Constitucional* does not therefore consider such claims of unconstitutionality admissible, and ordinary courts have to decide on the compatibility of national law with EU law and act accordingly.[706]

Article 277(2) Constitution allows international treaty provisions that depart from the Constitution to be effective in the national legal order, unless they concern 'the breach of a fundamental provision of this Constitution'.

The counterpart of this is Article 279(2) which allows for becoming a party to a treaty that has been declared unconstitutional by the *Tribunal Constitucional* if the Assembly of the Republic approves the treaty with a majority of two thirds *of the votes cast,* constituting a majority of the members of the Assembly (normally treaties can be approved by *simple majority* of the votes cast; constitutional amendment is by two thirds *of the members*) (cf. Finland and NL). The procedure under Article 279(2) has not been used so far.

There are several specific constitutional provisions that can be considered as facilitating integration of EU law within the Portuguese legal order, such as provisions guaranteeing EU citizens the same rights as Portuguese citizens[707], a derogatory clause to the extradition provisions to the advantage of EU law[708], transposition of EU legislation[709], the constitutional basis for parliamentary scrutiny of EU decision-making on topics within the

[706] TC Ruling Nº 621/98, 3 November 1998, and earlier Ruling Nº 163/90, 23 May 1990. Abstracts in English available via http://www.tribunalconstitucional.pt/tc/en/acordaos/.
[707] Art. 15(1): 'Foreigners and stateless persons who fund themselves or who reside in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.'
[708] Art. 33(5): 'The provisions of the previous paragraphs shall not prejudice the application of such rules governing judicial cooperation in the criminal field as may be laid down under the aegis of the European Union.'
[709] Art. 112(8): 'The transposition of European Union legislation and other legal acts into the internal legal system shall take the form of a law, an executive law, or, in accordance with (4) above, a regional legislative decree.'

legislative powers of parliament[710], and responsibilities of autonomous regions within their autonomous powers.[711]

22.2. Limiting constitutional provisions and principles

Substantive

Article 7(6) of the Constitution makes membership of the EU conditional on reciprocity and on respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity.[712]

Article 8(4) of the Constitution makes the direct effect and primacy of EU law dependent on 'respect for the fundamental principle of a democratic state based on the rule of law'.[713]

Although there are some dissenters, the doctrine generally holds that neither international law in general nor European Union law ranks hierarchically above the Constitution. International and EU law can therefore only be applied as long as they are in line with the provisions of the Constitution, or at any rate the most fundamental principles and fundamental rights protected by the Constitution, although there is a variety of views on the question whether and to what extent the Portuguese Tribunal Constitucional would have jurisdiction on the compatibility of EU law with the Constitution.

This would seem to be in line with Article 277(2) of the Constitution, which stipulates that, although the unconstitutionality in form or substance of provisions of international treaties does not prevent their application in the Portuguese legal order, this does not apply to treaty provisions the unconstitutionality of which 'results from the breach of a fundamental provision of this Constitution'.[714]

Also, recent case law of the Tribunal Constitucional suggests the same. The Tribunal Constitucional held that the Memoranda of Understanding in the framework of the public finance crisis, concluded between the Portuguese government, IMF and EU, are constitutionally binding to the extent that they are based on international law and European Union law instruments. However, it also held that the serious economic and financial situation could not dispense the legislature from being subject to 'the fundamental rights

[710] Art. 161: 'The Assembly of the Republic shall be responsible for […]. (n) Pronouncing, as laid down by law, on such matters awaiting decision by European Union bodies as concern the sphere of its exclusive legislative responsibility'; Art. 163: 'In relation to other bodies the Assembly of the Republic shall be responsible for [..] (f) As laid down by law, supervising and considering Portugal's participation in the process of constructing the European Union'; Art. 164: 'The Assembly of the Republic shall possess exclusive responsibility to legislate on the following matters: […] (p) The rules governing the appointment of members of European Union bodies, with the exception of the Commission'.

[711] Art. 227(1): The autonomous regions shall be territorial bodies corporate and shall possess the 'following powers: […]v) On their own initiative, or when consulted by bodies that exercise sovereign power, to give their opinion on issues that fall under the latter's responsibility and concern the autonomous regions, and in matters that concern their specific interests, on the definition of the Portuguese state's positions within the ambit of the process of constructing the European Union; x) To participate, when matters that concern them are at stake, in the process of constructing the European Union by means of their representation in European regional institutions and on delegations involved in European Union decision-making processes, as well as to transpose Union legislation and other legal acts in accordance with Article 112.

[712] Art. 7(6) Const.: 'Subject to reciprocity and to respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union.'

[713] Art. 8(4) Const.: 'The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.'

[714] Art. 277(2) Const.: 'On condition that the rules laid down by properly ratified international treaties are applied in the legal system of the other party thereto, the unconstitutionality in form or substance of such rules shall not prevent their application in the Portuguese legal system, save if such unconstitutionality results from the breach of a fundamental provision of this Constitution.'

and key structural principles of the state based on the rule of law', and this is particularly true of the principle of equality. In the relevant judgment it remained implicit that, consequently, an appeal to the international and European legal acts that are at the basis of the contested measures would also have to respect this 'fundamental right or key structural principle of the state based on the rule of law'.[715] Reviewing the budget act against this principle, the Tribunal Constitucional subsequently held a number of provisions of the Budget Law unconstitutional. In earlier and later case law no further reference was made to EU or international obligations.

Procedural

Treaties can be adopted by simple majority.

Referendums can be called at the proposal of parliament or the government by the president, or at the request of at least 35000 citizens. They are limited to important issues concerning the national interest upon which the Assembly of the Republic or the Government must decide by passing an international agreement or by passing legislation (Art. 115(3) Const.), but a separate provision (Art. 295 Const.) stipulates that this does 'not prejudice the possibility of calling and holding a referendum on the approval of a treaty aimed at the construction and deepening of the European Union'.[716] The referendum is valid only if the number of votes cast is more than half of the number of registered voters.

22.3. Possibilities and impossibilities in overcoming limitations

The Constitution can be amended by a majority of two thirds *of the members* every five years. The Constitution can also be amended within that period of five years, but that requires a majority of four fifths of the members (Art. 284 Const.). The latter has happened in 1992, 2001 and 2004.

There is a long list of issues that cannot be the object of a constitutional amendment (Art. 288 Const.):

- National independence and the unity of the state;
- The republican form of government;
- The separation between church and state;
- Citizens' rights, freedoms and guarantees;
- The rights of workers, workers' committees and trade unions;
- The coexistence of the public, private and cooperative and social sectors in relation to the ownership of the means of production;
- The requirement for economic plans, which shall exist within the framework of a mixed economy;
- The elected appointment of the officeholders of the bodies that exercise sovereign power, of the bodies of the autonomous regions and of local government bodies by universal, direct, secret and periodic suffrage; and the proportional representation
- system;
- Plural expression and political organisation, including political parties, and the right to democratic opposition;
- The separation and interdependence of the bodies that exercise sovereign power;
- The subjection of legal rules to a review of their positive constitutionality and of their unconstitutionality by omission;
- The independence of the courts;
- The autonomy of local authorities;
- The political and administrative autonomy of the Azores and Madeira archipelagos.

[715] TC RULING No. 353/12, 5 July 2012.
[716] Art. 115(11) Const provides: 'Referenda shall only be binding in the event that the number of voters exceeds half the number of registered electors.'

This provision itself, however, is not exempted from constitutional revision, and has in fact been revised in the past.[717] This means that in principle it is possible to amend the Constitution on points in the list with a double amendment procedure, the first amending the list, the second amending the substantive provisions (cf Italy).

Although this list does not refer to treaties departing from the Constitution, and therefore theoretically there might arise the situation in which such an 'unconstitutional' treaty becomes effective in Portugal, there is still the clause of Article 8(4) Constitution which prescribes that EU law shall respect the fundamental principles of a democratic state based on the rule of law' which would limit the applicability of the relevant EU law. Presumably, also this provision is liable to amendment.

* * *

23. ROMANIA*

23.1. Facilitating constitutional provisions and principles

The Romanian Constitution contains a Europe provision, introduced in 2003, in its Article 148, entitled 'Integration into the European Union', which 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 take precedence 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 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.

The provisions thus sets out the procedure for approval of accession and amendment of the Treaties (2/3 majority in a joint session of both Houses), ensures the primacy of EU law, confirms that EU law is to be applied and enforced in the land, and that Parliament is to be involved *ex ante* in the EU legislative process. The provision will be adapted in the constitutional revision that will take place in May 2014.[718]

In addition, and more generally relating to international treaties, Article 11 of the Constitution states that

> (1) The Romanian State pledges to fulfill as such and in good faith any obligations as may derive from the treaties to which it has become a party.

[717] Act 1/89 of 8 July 1989 has in fact eliminated one of its sub-paragraphs and re-drafted two others.
[*] Thanks are due to Vlad Perju (Boston College) for his comments on an earlier draft.
[718] The final text of the amendment it not available at the time of writing.

> (2) Once ratified by Parliament, subject to the law, treaties shall be part of domestic law.
> (3) Where a treaty to which Romania is to become party comprises provisions contrary to the Constitution, ratification shall only be possible after a constitutional revision.

Specifically relating to human rights treaties (but not the EU Charter of Fundamental Rights, which always takes precedence as part of EU law on the basis of Art. 148), Article 20 reads:

> '(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.
> (2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions'.

he provisions of Article 20 and Article 148 of the Constitution require courts to apply the provisions of international treaties and of EU law with precedence over conflicting provisions of national law, except for the situation envisaged by Article 20(2), *in fine,* which is meant to ensure a high protection of fundamental rights and freedoms. As said, the latter exception does not apply to the EU Charter of Fundamental Rights.

Furthermore, at the time of the 2003 constitutional revision to prepare for accession, the 1991 Constitution was also amended in order to strengthen the rule of law, the institutional and constitutional guarantees of fundamental liberties and rights, to emphasise the supremacy of the Constitution, and enhance the status of the Constitutional Court as final arbiter. Accordingly, a provision was added emphasising the core constitutional values of Romania as 'a democratic and social state, governed by the rule of law, in which human dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed' (Art. 1(3)). The supremacy of the Constitution was confirmed explicitly in a new Art. 1(5).[719] The amendments sought to address the EU's concerns in promoting democracy and the protection of human rights and minorities, and they are generally not seen as an attempt to identify a constitutional core that should be protected against the EU.[720]

Finally, a number of provisions was amended to conform with the requirements of EU law, e.g. the right to vote (Art. 16(4)), the right to property of land for foreign nationals (Art. 44(2)) and the announcement that the Leu, Romania's currency, will at some stage be replaced by the euro (Art. 137 (2)).

23.2. Limiting constitutional provisions and principles

Substantive

The Constitution does not seem to contain specific limiting provisions or principles, and the emphasis on fundamental principles such as rule of law, democracy, protection of fundamental rights aim to comply with the requirements of membership, rather than imposing limits on EU law.[721] The provisions emphasising the core constitutional values of Romania as 'a democratic and social state, governed by the rule of law, in which human

[719] Article 1(5): 'In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.'
[720] The constitutional amendment was promoted under the slogan 'Yes *to Europe'.*
[721] It should ne noted that Romania continues to be monitored by the EU under the Cooperation and Verification Mechanism.

dignity, the citizen's rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed' (Art. 1(3)), and the supremacy of the Constitution (which was confirmed explicitly in a new Art. 1(5)[722]) are generally not seen as an attempt to identify a constitutional core that should be protected against the EU.

In Decision No. 125824 of 8 October 2009 the Constitutional Court found Act No. 298/2008, transposing the Data Retention Directive into Romanian legislation, unconstitutional for infringement of Art. 53 of the Constitution (right to privacy) and of the ECHR. Although the Constitutional Court did not refer explicitly to the Data Retention Directive, its criticism went beyond specific provisions of the transposing Romanian law. The Court did not discuss the issue of the primacy of EU law and did not make any reference to the Data Protection Directive, so its position towards the primacy of European over national law "can best be described as ambivalent".[723]

Yet overall, there seem to be no formal or explicit limitations on EU law, now or in the future.

Procedural

Approval of EU Treaties and amendments thereto requires 2/3 majority in a joint session of both Houses, and no referendum is required.

23.3. Possibilities and impossibilities in overcoming limitations

The Romanian Constitution can be amended by two-thirds majority in both Houses and a referendum (Art. 151-152). The procedure is cumbersome, which explains why the Constitution has been amended only rarely.

In addition, there are limits to constitutional reform, as is stated in Art. 148 of the Constitution:

> (1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.
> (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.
> (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime.

It is unclear whether the provision would have an impact on amendment of the EU Treaties. The Constitution will be subject to revision in May 2014. Part of the amendment will relate to the provisions concerning EU membership.

* * *

[722] Article 1(5): 'In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.'
[723] Murphy (2010) at 941.

24. SLOVAKIA

24.1. Facilitating constitutional provisions and principles

The Slovak Constitution was amended in 2001 in order to facilitate European integration and other forms of international cooperation. The amendments address both the EU and international organizations. The new Article 7(2) Constitution is central to EU membership, in providing that Slovakia may 'transfer the execution of a part of its rights to the European Communities and European Union.'

The 2001 revision also introduced a specific provision on primacy of EU law: legally binding acts of the European Communities or European Union shall have primacy over the laws of the Slovak Republic (Art. 7(2), second sentence). The Constitution also contains a general provision on the duty to respect international law and international treaties in Article 1(2) Constitution.

The 2001 amendment package of the Constitution also included a provision on the role of the courts in the EU context: Art. 144 obliges all courts to suspend proceedings and initiate constitutional review should a national law contradict the Constitution or an international treaty provision.

In addition, the 2001 amendments in Slovakia grant non-national residents the right to vote and stand in local elections (Art. 30(1)), facilitate the implementation of EU obligations and execution of international treaties according to Art. 7(2) (Art. 120(2)), and permit the imposition of duties on citizens by Government decrees under that provision.

24.2. Limiting constitutional provisions and principles

Substantive

The Constitution does not clarify the relationship between EU law and national Constitution. It appears that Article 7(2) is designed to give EU law precedence over (ordinary) laws only, thus maintaining the primacy of the Slovak Constitution.

In contrast to some other EU Member States, there is a limited amount of case law of the Constitutional Court concerning the relationship between EU law and the Constitution in Slovakia. A relevant case in this context is the case concerning a national measure implementing Council Directive 2000/43/EC of 29 June 2000 on the principle of equal treatment of persons irrespective of racial or ethnic origin.[724] The government challenged the Act arguing that one of the provisions of the transposed law was in violation of Articles 1 and 12 of the Constitution. The Court found the alleged provision to be unconstitutional and annulled it. Even though the rationale of the Constitutional Court for its decision was very weak, it still proved that in the eyes of the constitutional judges in Slovakia, the Constitution takes precedence over EU law.

Procedural

Article 84(4) Constitution states that amending the Constitution as well as approving an international treaty pursuant to Article 7(2) will require the consent of a three-fifths majority of all Members of the Parliament.

Article 93 determines the rules regarding referendums in Slovakia. It reads as follows:

> (1) A constitutional law on joining a union with other states or the secession from it, shall be confirmed by a referendum.

[724] Pl. ÚS 8/04-202, judgment of 18 October 2005.

(2) A referendum may also be used to decide on other crucial issues of the public interest.
(3) No issues of fundamental rights, freedoms, taxes, duties or state budget may be decided by a referendum.

Article 125a provides for the preliminary constitutional review of treaties by the Constitutional Court. Such a review can be requested by the President or by the Government before the treaty is passed on to the National Council for approval. If the Constitutional Court holds that the treaty in question is not in conformity with the Constitution, it cannot be ratified. The review is, however, not compulsory. In addition, the Constitution does not provide a legal basis for the constitutional review of treaties after they have been ratified.

24.3. Possibilities and impossibilities in overcoming limitations

The Slovak Constitution does not impose limits on amendments of certain provisions of the Constitution. Thus, a conflict between EU law and the Slovak Constitution may be rectified by means of a constitutional amendment. Article 84(4) Constitution states that amending the Constitution will require the consent of a three-fifths majority of all Members of the Parliament. A confirmatory referendum is not obligatory but it may be requested if the ratification of the Treaty is considered as a crucial issue of the public interest.

Even though the Slovak Constitution does not contain unamendable core provisions and any provision in the Constitution can in principle be amended, some constitutional scholars have called for judicial review of constitutional amendments in order to protect the Constitution's substantive core.

* * *

25. SLOVENIA

25.1. Facilitating constitutional provisions and principles

The Republic of Slovenia has adopted the necessary constitutional amendments in 2003[725] to facilitate European integration and other forms of international cooperation. Even though the Constitution does not make an explicit reference to the European Union, the amendments were adopted primarily to enable accession to the EU and further EU integration. Article 3a Constitution is central to EU membership, in providing that 'pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations.'

The very first EU-related amendment dates from 1997, when Article 68 was amended to enable ownership and property rights of aliens. Since the Article had preserved the condition of reciprocity, it was revised again in 2003. The 2003 amendment also included revision of Article 47, which facilitated the implementation of the European Arrest Warrant framework decision in Slovenia.

Article 8 Constitution provides that laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified treaties are applied directly in the Slovenian domestic order. The Constitutional Court has confirmed the precedence of international law over statutory law. However, the

[725] Official Gazette RS, No. 24/03 (articles 3a, 47 and 68 of the Slovenian Constitution).

relationship between EU law and the national Constitution is not entirely clear and the Court has not given a clear answer. Nevertheless, on the basis of the principle of loyalty and generally EU-friendly attitude of the Constitutional Court judgments, the prevalent scholarly opinion is that principles of primacy/supremacy and direct effect of EU law are in principle recognised in the Slovenian legal order.

25.2. Limiting constitutional provisions and principles

Substantive

The first paragraph of Article 3a states that Slovenia may transfer the exercise of part of its sovereign rights to international organisations, which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law. This implies that the transfer of competences is conditional upon the fundamental characteristics of the international organisation to which the competences are being transferred. The Slovenian Constitutional Court never clarified the exact meaning and scope of these conditions in the context of the EU.

Nevertheless, a doctrine of 'permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia' is emerging in the non-EU related case law of the Constitutional Court.[726] This permanent and inexhaustible constitutional source of statehood in Slovenia essentially incorporates the state sovereignty and the protection of fundamental rights and freedoms.[727] This could eventually develop into what other Member States call the national identity limit; however it is a still constitutionally undeveloped concept.

Procedural

Article 3a Constitution states that treaties which transfer the exercise of sovereign rights require prior parliamentary approval (two-thirds majority vote in the National Assembly). Before ratifying such treaty the National Assembly may call a referendum (a proposal shall pass at the referendum if a majority of voters who have cast valid votes vote in favour).

As for the revision of the Constitution, the procedure is similar but more difficult. The National Assembly adopts acts amending the Constitution by a two-thirds majority vote of all deputies (Art. 169 Constitution). However, the National Assembly must submit a proposed constitutional amendment to voters for adoption in a referendum, if so required by minimum of thirty deputies. The amendment is adopted in a referendum if a majority of those voting voted in favour, provided that a majority of all voters participated in the referendum (Art. 170 Constitution).

25.3. Possibilities and impossibilities in overcoming limitations

The Slovenian Constitution does not contain unamendable provisions and there are no other inherent limits to further EU integration. The transfer of more powers to the EU will require two-thirds majority approval by the National Assembly or a positive vote by the majority of voters who have cast valid votes in a referendum.

Substantive conditions (not necessarily limits) can be found in Article 3a(1) of the Constitution: the sovereign powers may only be transferred to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the rule of law. The exact meaning and scope of these conditions remains undeveloped. The reason for this is that there is an evident self-restraint of the Slovenian courts including the Slovenian Constitutional Court in EU matters. There are only few 'piecemeal' decisions

[726] See e.g. Rm-1/09 Official Gazette RS, No. 25/2010.
[727] *Ibid*. para 32-33.

laying down the main principles regulating the relationships between the EU and Slovenia but in a very abstract manner.

Nonetheless, as mentioned before, there is a gradual development of the doctrine of 'permanent and inexhaustible constitutional source of the statehood of the Republic of Slovenia' in the non-EU related case law of the Constitutional Court. This could eventually develop in the constitutional identity limit in Slovenia in the context of further EU integration; however it has never been used before and it still remains constitutionally undeveloped.

* * *

26. SPAIN

26.1. Facilitating constitutional provisions and principles

Article 93, first sentence, *Constitución Española* (CE) authorises the transfer of the exercise of competences derived from the Constitution to international organisations by treaty; the treaty has to be approved by an organic act. This provision has been specifically devised as the constitutional means for the integration of Spain in the EU. [728]

In general, duly ratified international treaties form part of the internal legal order once they have been officially published in Spain; their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law (Article 96 CE). Concerning EU law specifically, Article 93 CE is the 'basic constitutional support' for the integration of EU law in the Spanish legal order 'through the transfer of the exercise of competences resulting from the Constitution.'[729]

The Spanish Constitution is in general no criterion for assessing the validity of secondary EU law, in other words: Spanish courts will not review the validity of secondary EU law in the light of the Spanish Constitution.[730]

Within the limits of the competences conferred on the EU, EU law has primacy of application (not primacy of validity) on Spanish law, presumably even on those constitutional provisions which do not express Spanish constitutional identity (*infra*).[731]

Article 93, second sentence, CE instructs the *Cortes Generales,* the bicameral Spanish parliament (Congress and Senate) and the government to guarantee compliance with the treaties by which the exercise of constitutional competences has been attributed to international or supranational organisations, and with the resolutions emanating from them. In addition, it is a constitutional duty for Spanish courts and Spanish executive institutions not to apply any national act which is contrary to directly effective EU law; moreover, the *Tribunal Constitucional*, the Spanish Constitutional Court, will under certain circumstances scrutinize whether the ordinary courts have correctly applied EU law.[732]

Constitutional fundamental rights and liberties shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon

[728] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[729] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[730] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[731] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 4.
[732] *Tribunal Constitucional*, Judgment 145/2012 of 2 July 2012.

ratified by Spain (Article 10(2) CE). The latter treaties and agreements comprise the ECHR and the EU Charter of Fundamental rights.[733]

26.2. Limiting constitutional provisions and principles

Substantive

Secondary EU law must respect Spanish constitutional identity, i.e. 'the fundamental principles of the social and democratic State of Law established by the national Constitution'. More specifically, EU law is required to respect the sovereignty of the Spanish State, the Spanish basic constitutional structures and the Spanish 'system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Art. 10.1 CE).' [734] In the 'unlikely case' that secondary EU law breaches Spanish constitutional identity and the breach is not remedied by the EU institutions (Court of Justice of the EU) themselves, in the last instance the *Tribunal Constitucional* will intervene to protect the 'conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution'.[735]

The *Tribunal Constitucional* is competent is to review the constitutionality of acts implementing EU law.[736] In theory this indirectly can lead to review of the constitutionality of EU acts.

Transfers of the exercise of competences derived from the Constitution under Article 93 CE have 'material limits' and may not affect Spanish constitutional identity.[737] This means that an EU amendment treaty which affects Spanish constitutional identity is unconstitutional.

Procedural

A transfer of competences to the EU on the basis of Article 93 CE requires the approval of an absolute majority of the members of Congress (the legislatively and politically most important house of the bicameral Spanish parliament; Articles 93 jo. 81(2) CE).

Treaties containing stipulations contrary to the Spanish Constitution require prior constitutional amendment (Article 95(1) CE). Until now, only one EU Treaty stipulation has been declared contrary to (a provision of) the Constitution (the right given by the Treaty of Maastricht to non-Spanish EU citizens to stand as a candidate at local elections was contrary to Article 13(2) CE).[738]

A constitutional amendment may not be initiated in a state of war or in state of emergency etc. (Article 169 CE).

26.3. Possibilities and impossibilities in overcoming limitations

The Spanish Constitution contains no unamendable provisions.

There are two procedures for amending the Constitution, a 'heavy' one and a 'lighter' one. In both cases the right of initiative is given to the government, Congress, the Senate and the Assemblies of the Autonomous Communities (Article 166 jo. Article 87 (1) and (2) CE). The heavy revision procedure needs to be followed in case of a total revision of the Constitution, or of an amendment to the Articles 1-9 (concerning fundamental principles),

[733] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 6.
[734] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[735] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 4.
[736] *Tribunal Constitucional*, Judgment 58/2004 of 19 April 2004.
[737] *Tribunal Constitucional*, Opinion 1/2004 of 12 December 2004, par. II, 2.
[738] *Tribunal Constitucional*, Opinion 1/1992, par. II, 3.A.

15-29 (concerning fundamental rights and public liberties) and 56-65 (concerning the Crown). In all other cases the lighter procedure is applicable.

The heavy procedure is contained in Article 168 CE and consists of four stages:

- the principle of the proposed amendment has to be approved by both houses of parliament with a two-thirds majority of the members;
- both house have to be dissolved and elections have to take place;
- the newly elected houses have to ratify the decision of their predecessors and to adopt the new constitutional provision(s) with a two-thirds majority of their members;
- the new constitutional provision has to be ratified by referendum.

The lighter procedure in Article 167 CE requires that the constitutional bill is approved by a majority of three-fifths of the members of each house. If the bill in the Senate is approved by an absolute majority of its members but not by a majority of three-fifths, Congress may pass the amendment by a two-thirds majority of its members. The amendment has to be submitted to referendum for ratification if so requested by one-tenth of the members of either house within fifteen days after its adoption.

* * *

27. SWEDEN

27.1. Facilitating constitutional provisions and principles

In Sweden, constitutional provisions on EU integration can be found in the so-called Instrument of Government, one of the four 'fundamental laws' that make up the constitution of Sweden;[739] it was last revised *in toto* as per 1 January 2012.

Article 10, first sentence, Chapter 1, Instrument of Government states:

> 'Sweden is a member of the European Union.'

In the parliamentary history of constitutional provisions on Sweden's cooperation in EU context it is acknowledged that EU law has priority over ordinary legislation, which has been confirmed in the Swedish case law, and may also have priority over the Constitution.[740] In the latter case, however, the Constitution needs to be amended, which would presumably happen at the time of the approval and transfer of powers decisions. This also applies in case the transfer of powers affects the principles of government.[741]

Article 10 of Chapter 10 of the Instrument of Government provides that the Government shall keep the Riksdag (the Swedish Parliament) continuously informed and consult bodies appointed by the Riksdag concerning developments within the framework of European Union cooperation.

[739] Art. 3 Instrument of government: 'The Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression are the fundamental laws of the Realm.'
[740] SOU 2008: 125/ 153, 497 : 'Gemenskapsrätten har på dessa områden företräde framför konkurrerande nationella bestämmelser, däribland i princip även regeringsformen och våra andra grundlagar.' ['Community law takes precedence over competing national laws, including in principle even the Instrument of Government and our other fundamental laws.']
[741] See SOU 2008: 125/ 153, 493.

The provision that allows 'transfer of decision-making power in the framework of EU cooperation' is Article 6 of Chapter 10 of the Instrument of Government, which we discuss in the next section.

27.2. Limiting constitutional provisions and principles

Article 6 of Chapter 10 of the Instrument of Government found its present form in 2002, when it was amended so as to include certain conditions attached to such a transfer that had until then been stipulated only in the *travaux préparatoires* of the Constitution. It allows a transfer of powers to the EU on the following two conditions:

- that it 'does not affect the basic principles by which Sweden is governed';
- that 'protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

The expression 'the basic principles by which Sweden is governed' in this provision refers to the provisions of the first Chapter of the Instrument of Government, entitled 'Basic principles of the form of government'. Its ten articles define the principles of democracy, rule of law (legality), equality, minority protection and indicates the most important constitutional organs.

Various statements made in parliament at the time of accession, in the course of the formulation of this section of the Instrument of Government as well as at the time of the parliamentary approval of the Treaty on a Constitution for Europe[742] make clear that this particular condition has a twofold meaning. Firstly it means that the provisions on the basic principles of the state in the first Chapter of the Instrument of Government should not be rendered invalid through the transfer of powers to the EU, and in particular the position of the Riksdag as the primary organ of the state was emphasized: a transfer of legislative power may not substantially diminish parliamentary powers.[743] Secondly, it means that also other provisions that underpin the basic principles of the Swedish constitutional system cannot be transferred. Since the early 1990's (in preparation of Sweden's accession to the EU), the parliamentary Committee on the Constitution has pointed by way of example to the great importance of freedom of expression (and openness) for the Swedish Instrument of Government.[744]

The 'fundamental rights and freedoms' to which Article 6, Chapter 10, refers are defined in Chapter 2 of the Instrument of Government.

The protection of constitutional fundamental rights is extended to the ECHR rights as such. To that purpose Article 19, Chapter 2 of the Instrument of Government provides:

> 'No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

The rights of freedom of expression and the right to information are further guaranteed under the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which both have constitutional rank, and to which Chapter 2 of the Instrument of Government refers regularly.

[742] As summarized in the report of the Working Committee on Constitutional Reform that prepared the constitutional revision that entered into force in 2012, En reformerad grundlag, Del 1, Betänkande av Grundlagsutredningen, Stockholm 2008, Staten Offentligar Utredningar, SOU 2008, 125/153 at 492.
[743] SOU 2008: 125/ 153, 492.
[744] SOU 2008: 125/ 153, 493.

The legislative history and opinion of parliament (and government) are important in Sweden. This must be understood in light of the tradition by which courts show due deference to the legislature and could only disapply any piece of legislation if it was manifestly contrary to the Constitution or any higher statute than the regulation reviewed. Since 2012, when courts were given more integral powers of review and the criterion of 'manifest conflict' was dropped, they still have the constitutional duty to balance the precedence of fundamental laws over ordinary law against the views of the legislature.[745]

In the legislative history of the provision now found in Article 6, Chapter 10, Instrument of Government it was made clear that it was addressed to the legislature, not to courts and other law enforcing organs or bodies; even if a court or other administrative authority would find the transfer contrary to the Constitution, they would still have to apply the relevant EU law. However, already at that time the question whether a secondary act of EU law exceeds the powers that have been transferred was distinguished, so that if an EU act was alleged to be *ultra vires*, then this was considered a matter that might be decided by a court.[746]

The Committee that prepared the constitutional reform of 2012 reconsidered the matter anew. It found that there was no reason to change the conditions posed to a transfer of powers. However, it also found that there are no reasons nor clues in the provisions of the Constitution to hold that the review of whether an EU act exceeds the powers transferred is reserved for Parliament. Moreover, it held that it cannot be argued that compliance with transfer conditions can only be assessed on the basis of the situation at the time of the transfer decision. In other words, it was considered 'not impossible' that questions concerning the constitutional conditions to a transfer of powers may be subject to examination in a Swedish court, although it was thought this question would only arise 'if very special circumstances exist, such as in the less probable situation that the EU freedoms protection was greatly weakened'.[747]

In light of the changed powers of review of courts, it may now also be the case that a court reviews whether the transfer itself was in agreement with the conditions stipulated in Article 6, Chapter 10 of the Instrument of Government.

It should be noted that parliament and government have deemed the transfers of powers under the Treaty of Lisbon, just as those under the Treaty on a Constitution for Europe, to be in accordance with the constitutional conditions.[748]

Procedural

The transfer of powers requires approval in a separate vote, after the Treaty transferring the powers has been approved under Article 3 Chapter 10, in either of the following ways:

- with a majority of at least three quarters of the votes with at least half of the members of the Riksdag being in favour (Art. 5 Chapter 10 Instrument of Government);
- under the procedure for amending the fundamental laws.

The latter procedure requires two votes of the Riksdag with elections being held in between the votes; these elections may as a rule only be held after at least nine months have passed since the proposal was submitted to the Riksdag[749]; simultaneously with the

[745] Art. 14, chapter 11, Instrument of Government: 'If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law.'
[746] SOU 2008: 125/ 153, 494.
[747] Ibidem, p. 500.
[748] Ibidem, p. 499.
[749] An exception can be granted by the Constitutional Committee by a majority of five sixths of the votes.

elections, a referendum can be held on the proposal by request of at least one tenth of the members of the Riksdag, if at least one third of the members votes in favour of this request; the referendum is decisive if the majority of the votes constituting at least half of those having the right to vote are against the proposal; it is advisory in all other circumstances, so the newly elected Riksdag will give a final decision (Art. 14-16 Chapter 8 Instrument of Government).

27.3. Possibilities and impossibilities in overcoming limitations

The history of the constitutional provisions on the EU suggests that in principle the constitutional laws can be amended, should a new EU Treaty framework require this. The procedure for constitutional amendment is relatively cumbersome, though technically not impossible, not even when the amendment concerns the constitutional conditions which are posed to the transfer of power to the EU, as long as the constitutional amendments are passed before the transfer takes place. These constitutional conditions to transferring powers to the EU have been strongly influenced by the case law of the *Bundesverfassungsgericht*, and have been directly inspired even in their language by this case law. But in Sweden the resulting limits to EU integration are technically not part of 'eternity clauses': the relevant constitutional provisions can be changed under the normal rules for constitutional amendment, which are cumbersome but not insuperable.

It is doubtful, however, whether the various fundamental laws, in particular on points concerning freedom of expression and openness of government will ever be amended in the sense of reducing the level of protection to be offered under Swedish law or by Swedish authorities including the Swedish courts, since they have a long and deeply entrenched history and form an integral and inseparable part of Swedish constitutional identity over the centuries.

* * *

28. THE UNITED KINGDOM

28.1. Facilitating constitutional provisions and principles

The European Communities Act 1972, as amended at the occasion of EU accession, amendment and successor Treaties,

(1) holds a gateway provision by which all directly effective EU law, whether existing or arising in the future, is incorporated and has effect in British law (Section 2(1));
(2) in principle authorises the government to implement non-directly effective EU law by way of subordinate legislation;
(3) obliges the UK courts to treat any question as to the meaning or effect of primary or secondary EU law as a question of law (Section 3(1)). If they do not refer the question to the Court of Justice of the European Union via the preliminary procedure in Article 267 TFEU, they have to answer the question in accordance with EU law and more in particular the case law of the Court of Justice. This gives decisions of the Court of Justice force of precedent in the UK.

In contrast to ordinary Acts of Parliament, the European Communities Act cannot be repealed impliedly; thereby, directly effective EU law is also protected against implied repeal. This implies that the primacy of application of directly effective EU law on Acts of Parliament is ensured until an Act of Parliament expressly states that it wishes to derogate from EU law on a specific point or issue, or states that it wishes to repeal the European Communities Act 1972 altogether.

28.2. Limiting constitutional provisions and principles

Substantive

In British case law, issues such as respect for the UK's constitutional identity, for fundamental constitutional principles, for fundamental rights and for the division of competences between the Member States and the EU (*Kompetenz-Kompetenz* issue) are not very developed. There also seems to be very little need to develop them as long as Parliament's legislative omnipotence is only limited by the 'no implied repeal' restriction. However, Lord Neuberger and Lord Mance in their joint opinion in the recent Supreme Court judgment in the so called HS2 case, clearly envisaged substantive limits to the primacy of EU law:

> 207. (…) It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[750]

Procedural

The European Union Act 2011:

- forbids a British minister to vote in favour of or 'otherwise support' a whole series of autonomous (draft) decisions[751] in the (European) Council until the draft has been approved nationally. The approval requirements differ depending on the subject matter: sometimes only approval by a motion adopted by both

[750] UK Supreme Court, R (on the application of Buckinghamshire County Council and others) (Appellants) v The Secretary of State for Transport (Respondent), [2014] UKSC 3.
[751] Autonomous decisions are defined here as those decisions which can be validly made and enter into force after adoption by the EU institutions themselves; in other words, they do not require any kind of national approval.

Houses of Parliament is required, other times approval by Act of Parliament or by Act of Parliament *and* a referendum;

- stipulates that a British minister generally may not vote in favour of a (European) Council decision to use the general passerelle clause in Article 48(7) TEU or one of the special passerelle clauses unless it has been approved by Act of Parliament *and* a national referendum;

- requires that most ordinary or simplified Treaty revisions (Article 48(6) TEU) are to be approved by Act of Parliament *and* by referendum. This is especially the case where new competences are conferred on the EU.[752] In contrast, (future) EU accession treaties are exempted from the referendum requirement.[753] Most of the other EU decisions which according to the Treaties require approval of the member states according to their respective national constitutional requirements, 'only' have to be approved by Act of Parliament.

28.3. Possibilities and impossibilities in overcoming limitations

Generally, the opinion is that the referendum requirements in the European Union Act 2011 at least can be repealed or amended expressly: although the Act subjects most EU Treaty revisions to a referendum, the amendment or repeal of the Act itself is not conditioned by approval by referendum. Whether the referendum requirements can also be repealed impliedly is not entirely clear.

* * *

[752] Section 2 and 3 jo. section 4 EU Act 2011.
[753] Section 4(4) EU Act 2011.

ANNEX III: SCHEMATIC OVERVIEW OF THE CONSTITUTIONAL STATE OF AFFAIRS IN THE MEMBER STATES

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
Austria	Art I EU-beitritts-BVG	Art. 23a-23k B-VG	Art. 9(2) B-VG	Art. 50(4): 2/3 votes in presence of half members in both houses	In case of an accompanying Verf-Gesetz comprising a partial const. amendment, an optional referendum at request of 1/3 of members of either house; in case of 'total revision' compulsory referendum	Art. 44 B-VG: 2/3 votes in presence of half members in both houses	Partial const. amendment, referendum only at request of 1/3 of members of either house; in case of 'total revision' compulsory referendum		No, but some uncertainty as to giving up statehood
Belgium		Art. 8 (right to vote), Art. 117 and 195 (transitional provisions 5 and 14) of refer to the European Union merely to ensure the coincidence of the Belgian elections with the European elections	Art. 34	Simple majority at the federal or federated level	--	Two consecutive legislatures, with elections in-between, and a two-thirds majority in both Houses of the federal parliament in the second stage	--	--	No
Bulgaria	Art. 4	Art. 5(4) (priority), 22 (land), 42 (elections), 105 (information of National Assembly)	Art. 85(9)(1)	Art. 85(9)(2) (2/3 members)	--	Const amend's: 2/3 of members in Nat Ass in three votes	--	Amend status EU law and fundamental rights: 2/3 of members Nat. Ass. for holding	No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
								Elections of Grand Assembly; bills at initiative of half of members Gr Nat Ass or the President; adoption by 3x2/3 of members	
Croatia	Art. 143	Art. 144 (participation in EU institutions), 145 (status of EU law), 146 (EU citizens' rights)	Art. 143(2)	Art. 140(2) (2/3 members)	Art. 87(2): Possibility to call a referendum to amend the Constitution or any other issue as he/she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia	Const. amend's: 2/3 majority of all deputies	Art. 87(2)	--	No
Cyprus	Art. 1A	Art. 1A and 79	Art. 169	Simple majority of members present and voting, with at least one third of members present.	--	Art. 182(3): Majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of Representatives belonging to the	--	Pending the solution of the political problem, any necessary constitutional amendments comprising non-basic constitutional provisions may be made by a law passed by a majority of at least 2/3 of the	No.

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
						Turkish Community'. After the withdrawal of the Turkish Cypriots from the institutions of the Republic, including the House of Representatives, at the end of 1963, it has become impossible to amend the Constitution by the process Article 182(3) provides.		members of the House of Representatives, belonging to the Greek Community, as long as any such amendments are not contrary to the international obligations of the Republic of Cyprus, and more importantly the European Convention of Human Rights and EU law	
Czech Republic	No	Art. 10 (direct applicability of international law), 10b (Parliament's control in EU matters)	Art. 10a	Art 39(4) 3/5 in both chambers of the Parliament	Approval by the Parliament unless a constitutional law requires an approval from a referendum.	Const. amend's: 3/5 in both chambers of the Parliament.	--	--	Art. 9(2): amend's of the essential requirements for a democratic state governed by the rule of law are impermissible.
Denmark	No	No	(1) Art. 19: i.a. limited changes in the way transferred competences are exercised etc.;	Art. 20: approval of treaty by parl. with 5/6 majority members.	Art. 20: if bill approving treaty is approved by majority but not by 5/6 members, and govern. does not retract it → refendum.	Const. amend's: Art. 88.: Three stages: (1) adopted by parl. (2)elections and approval by new par. without amendment (3) referendum.	Art. 88: third stage of the const. amendment procedure: amendment adopted if majority votes in favour and represents at		No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
			(2) Art. 20: transfer of competences which may result in decisions with direct effect in Denmark		bill defeated if majority votes against and represents not less than 30 % of the electorate.		least 40% of the electorate		
Estonia	Constitution of the Republic of Estonia Amendment Act (= CREAA)	Art. 1 CREAA (the Constitution of Estonia applies taking into account EU law)	Art. 121 (sub 3)			Const. amend's: Art 161-169. Two stages; (1) bill debated by parl. in three readings with time intervals. (2) parl. has three options: a. ref. (is sometimes mandatory) b. approval by newly elected parl. with a 2/3 majority members c. urgency procedure: first resolution on urgency with 4/5 majority, then approval, with 2/3 majority members.	Approval of amendment of general provisions of the Const. or of the const. amendment procedure require a referendum (Art. 162); in other cases parl. may submit to referendum with 2/3 majority members (Art. 164). CREAA may be amended only by ref. (Art. 3)		No
Finland	S1 and S94	S66 and S93-95-96-97	S94	S95: 2/3 majority needed		1/2 + elections + 2/3 procedure (majority in Parliament, then elections and a two-third majority in the	--	There is also the alternative of exceptive enactments which allows to deviate from the Constitution without	No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
						new Parliament).The fast track formula of 5/6 + 2/3 is reserved for situations where a quick amendment is absolutely necessary		amending it. Yet, the system is limited in the new constitution: it cannot be used for core features of the Constitution.	
France	Art. 88-1(general), Art. 88-2 and 88-3 (specific)	Art. 88-1 (general), Art. 88-2(European Arrest Warrants), Art. 88-3 (participation EU citizens local elections), Art. 88-4, 88-6, 88-7 (participation French parliament in EU decision making at national and EU level).	Art. 53	Approval by simple majority parl.	- Art. 11: Ref. on bill approving treaty (1) by decision of pres. of the republic (2) on the initiative of 1/5 MP's supported by one tenth of the voters. - Art. 88-5: mandatory ref. on EU accession treaties unless houses with 3/5 majority votes cast decide that bill may be approved by joint meeting of houses with same majority	Const. amend's: Art. 89: two stages: (1) adopted by both houses (2) approved by joint meeting houses with 3/5 majority of votes cast, unless ref. (mandatory or voluntary)	Art. 89: if amend. is initiated by parl. → approval by referendum mandatory; if initiative by govern., president may decide to have it approved by referendum.		Yes, Art. 89(5), but can be amended by the constituent power also in its parliamentary manifestation
Germany	Art. 23	Art. 23; several legislative provisions in IntVG, EUZBBG, EMSFinG.	Art. 23	2/3	--	Art. 79(2) (2/3 members Bundestag, 2/3 vote Bundesrat)	--	Art. 146	Yes, possibly limited to GG (statehood, structure of the state,

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
									democracy fundamental rights)
Greece	No	Art. 70(8) (relationship between Parliament and Government in EU affairs), Art. 80 (currency clause)	Art. 28(2) and (3)	3/5 and absolute majority (in practice it is 3/5 majority)	--	Art 110 (2)-(6): 3/5 majority in two ballots, held at least one month apart. Upon the resolution of Parliament absolute majority needed in the next Parliament	Art. 44(2): Referendum possible in case of crucial national matters under very strict conditions.	--	Yes, Art. 110(1) lists the provisions which cannot be amended: Art. 1(1), 2(1), 4(1), (4) and (7), 5(1) and (3,) 13(1), and 26.
Hungary	Art. E	Art. 19 (information of Parliament)	Art. E(2)	2/3 majority in the Parliament	Explicitly excluded	2/3 majority in the Parliament	Explicitly excluded	--	No
Ireland	Art. 29.4.3°-29.4.10°			Constitutional referendum is required. A proposal for a const. referendum must be introduced in the Dáil (house of representatives) as a Bill, setting out the proposed amendment to the Constitution. The Bill must be passed by both houses.	After being passed in both houses of the Parliament, referendum is then submitted to the people where the majority of the votes cast is needed	A proposal for a const. referendum must be introduced in the Dáil as a Bill, setting out the proposed amendment to the Constitution. The Bill must be passed by both houses.	After being passed in both houses of the Parliament, referendum is then submitted to the people where the majority of the votes cast is needed	--	No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
Italy	Art. 117 (legislative power)	Art. 117 (regions)	Art. 11	--	Prohibited	Art. 138 (at least majority of members in 2nd vote; or 2/3 of members in second vote)	Art. 138 (if adopted in 2nd vote with less than 2/3 of members, at request of 1/5 members of each house or 500 000 voters or 5 regions)	Possibly by constituent referendum in case of eternity clause and supreme principles	Art. 139 (republican form of state); implied supreme principles
Latvia	Art. 68 and 79	Art. 98 (EAW), Art. 101 (voting rights)	Art. 68.	2/3 vote in the Parliament with at least 2/3 of the members present or referendum, if requested by at least one-half of the members of the Parl.	Art. 79: outcome in a referendum considered positive if the number of voters is at least half of the number of electors as participated in the previous Parl. election and if the majority has voted in favour	Art. 76: The Parl. may amend the Constitution in sittings at which at least 2/3 of the members of the Parl. participate. The amendments shall be passed in three readings by a majority of not less than 2/3 of the members present.	Art. 79: referendum shall be deemed adopted if at least half of the electorate has voted in favour.	Amendment of Articles 1, 2, 3, 4, 6 and 77 shall be submitted to referendum (Art. 77).	No
Lithuania	Art. 1 and 2 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union (which is constituent part of the Constitution)	Art. 13 (EAW), 47 (land), Art. 119 (voting rights)	Art. 1 of the Constitutional Act on Membership of the Republic of Lithuania in the European Union (which is constituent part of the Constitution)			Art. 148: two votes in the Parl. There must be a break of at least three months between the votes. During each of the votes 2/3 majority is needed.	Chapter I and XIV of the Const. may only be altered by referendum. More specifically, Article 1 of the Constitution may only be altered by referendum if no less than three-fourths		No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
							of the citizens of Lithuania with the electoral right vote in favour.		
Luxemburg	No	No	Art. 49 bis allows for transfer of the *exercise* of competences to international institutions	A transfer under Art. 49bis requires approval by parl. with 2/3 majority members in two successive votes separated by period of not less than three months; second vote can be dispensed with if parl. in agreement with the *Conseil d'Etat* so decides	Parl. may decide to submit treaties to a referendum (Art. 51(7)); referendum not legally binding.	Const. amendment requires approval parl. with a 2/3 majority members in two successive votes, separated by a period of not less than three months, voting by proxy not being allowed (Art. 114).	The second vote is substituted by a ref. on request of more than quarter of deputies or of 25.000 registered voters; amendment is adopted if the majority of the voters is favour (Art. 114).		No
Malta	Art. 65 (1)	Art. 3(2) EU Act (priority); 4(1) EU Act (direct effect); 4(2) EU Act - simplified implementation	--	--	Not compulsory (advisory)	Art. 66(2) 2/3 of members; (amend constitutional primacy of Art 6),	Art. 66(3) concerning duration of parliament	--	--
Netherlands			Art. 92	Art. 91(3) Normal majority unless deviation from Grw	Only advisory is allowed but not compulsory	Art. 137 (2/3 of vote in 2nd reading)	No (but elections between 2 readings)	PM Art. 55 Kingdom Charter (amend. of Kingdom Charter under special procedure)	Possibly human rights treaties and legal certainty

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
Poland	No	55 (European Arrest Warrant)	Art. 90(1)	2/3 in the Sejm and the Senate, or referendum	Art. 125(1): a national referendum may be held concerning matters of particular importance to the State	Art. 235(4): 2/3 in the Sejm and absolute majority in the Senate	Art. 235(6): confirmatory referendum may be required for certain chapters of the Constitution	--	No
Portugal	Art. 7(5) and (6)	Art. 15 (citizens), 33 (extradition), 112 (transposition of EU legislation), 161 (responsibilities), 163-164, and 227 (autonomous regions)	Art. 7(6)	Simple majority	Optional at request of parliament of government or citizens, Art. 115 jo Art. 295	Const. amendment every 5 yrs: two thirds of the members; interim const. amd: four fifths of the members (Art. 284 Const.)	Art. 7(5) and (6)	Art. 277(2) and 279(2):legislative overruling of (declaration of) unconstitutionality (except fundamental principles of democratic State under rule of law) by two thirds of the vote	Yes, list in Art. 288 (amendable list of unamendable provisions); fundamental principles of democratic state under rule of law possibly amendable
Romania	Art. 148	Art. 16(4) (right to vote), Art. 44(2) (the right to property of land for foreign nationals), 137(2) (announcement that the Leu will at some stage be replaced by the euro)	Art. 148	2/3 majority in joint session of both Houses	Referendum not required	Two-thirds majority in both Houses and a referendum (Art. 151)	Yes, within 30 days of the date of passing the draft or proposal of revision. (Art. 151)		Yes, Art. 152.
Slovakia	Art. 7(2)	Art. 30(1) (right to vote in local elections to non-national residents), 120(2) (facilitating of implementation	Art. 7(2)	Art. 84(4): 3/5 majority	In principle not but a referendum may be used to decide on crucial issues in of the public interest	Art. 84(4): 3/5 majority	In principle not but a referendum may be used to decide on crucial issues in of the public interest (Art.	--	No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
		of EU obligations),125 a (role of courts in EU context), 144 (judicial application)			(Art. 93(2))		93(2))		
Slovenia	No	Art. 47 (extradition), 68 (property rights)	Art. 3a	2/3 majority of all deputies	Art. 3a (National Assembly may call a referendum)	Art. 169 (2/3 of all deputies)	Art. 170 (confirmatory referendum if so required by at least thirty deputies)	--	No
Spain	No	Art. 13(2) (EU citizens candidate at local elections)	Art. 93 allows for transfer of the *exercise* of competences	Art. 93: absolute majority of the members Congress	Art. 93: absolute majority of the members Congress	Two const. amend procedures: 1) Art. 168 (*i.a.* total revision and amend's fundamental rights); four stages: a) 2/3 majority members in both houses; b) elections c) 2/3 majority members both houses; d) ref. 2)Art. 167 (other amend's): 3/5 majority members both houses; if only majority in Senate, Congress may approve with 2/3 majority members.	Art. 168: mandatory ref. as final stage const. amend. procedure. Art. 167: ref if 1/10 members of either house so requests.		No

Member State	Europe clauses	Adapting clauses	Transfer of powers	Procedural clauses for adopting EU law		Procedural clauses for overcoming constitutional obstacles			
				Qualified majority	Referendums	Qualified majority	Referendums	Otherwise	Eternity clause
Sweden	Ch. 1 art. 10	Ch. 10 art. 10 (parliamentary scrutiny)	Ch. 10 art. 6 (see next column)	3/ 4 votes constituting more than half of the members, or procedure for constitutional amendment (two readings with elections in between with possibility of referendum)	Only consultative referendums (e.g. on joining Euro in 2004), but negative vote of at least half of the number those who have the right to vote in a constitutional referendum is binding.			Procedure of constitutional amendment prior to approval of treaty and transfer of powers (two readings with elections in between, with possibility of referendum)	Not formally, but freedom of expression and transparency are deeply engrained in Sweden's constitutional identity
United Kingdom	EU Act 2011	European Communities Act 1972: gateway provision for incorporation of directly effective EU law (section 2(1)).	EU Act 2011 transfers of competences generally require approval by Act of Parl. and ref.	Simple majority in Parl.	EU Act 2011: generally mandatory ref. if treaty/EU (draft) decision transfers competences.	EU Act 2011 can be repealed with simple majority Parl.		EU Act 2011 can be repealed with simple majority Parl.	No

ANNEX IV: GLOSSARY OF TECHNICAL TERMS

Acquis communautaire

The term '*acquis communautaire'* refers to the body of common rights and obligations binding on the Member States. Applicant countries have to accept the acquis and adopt it into their legal system before they can join the Union. Derogations are granted only in exceptional circumstances and are limited in scope. The *acquis* is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- the legislation adopted in application of the treaties and the case law of the Court of Justice;
- the declarations and resolutions adopted by the Union;
- measures relating to the common foreign and security policy;
- international agreements concluded by the Union and those concluded by the Member States between themselves in the field of the Union's activities.

Controlimiti

The Italian expression *controlimiti* means literally 'counterlimits'. It refers to 'limits to the limitations of sovereignty due to European integration'. Although the concept has been developed in the Italian constitutional case law, and refers to a number of specific national constitutional principles (see the in-depth study on Italy in Annex I), the concept has also been used in a more general sense to refer to national constitutional limits to European integration.

Constitutional Identity

The concept of 'constitutional identity' has been used both in national constitutional law and in Union law. As a concept of EU law, it has usually been understood as referring to the following particular phrase in Article 4(2) TEU: 'The Union shall respect [Member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Some important controversial questions as to this concept are whether and in what way this 'respect' can entail a restriction of the primacy of EU law, what this 'identity' precisely consists of, and who is competent to decide on its interpretation and application.

As a concept of national constitutional law, it refers to certain core principles of the national constitution. It can refer to two different notions of 'identity': firstly, to that which essentially makes the constitution (and the state it governs) into what it is, and secondly, to that in which a constitution (and the state it governs) is different from (some) other constitutions.

Dualism

The term 'dualism' refers to a constitutional system in which international law, more particularly international treaty law, that is internationally binding for a particular state does not automatically form part of national law. In order for a provision of international law to be operative within the legal order, it needs to be incorporated or transformed into national law, which is usually done by an act of parliament. Only after this incorporation, the provision of international law can be relied on in court. In the European Union, for instance, Denmark, Germany, Italy, Sweden, the United Kingdom are said to be 'dualist'. See also under 'monism', below.

Eternity clause (*Ewigkeitsklausel*)

An 'eternity clause' is a provision or set of provisions in a national constitution that states that the constitution cannot be amended on a number of specified points. An 'eternity clause' can refer to the republican nature of the state, to the protection of fundamental

rights, to democracy and the rule of law, or to a more specific provision of the relevant Constitution. In European constitutions, the formulation and importance of such clauses differ considerably. Many constitutions do not have an either implicit or explicit 'eternity clause'. A strong version of an 'eternity clause' is found in Article 79(3) of the German Basic Law, which is referred to in German as the '*Ewigkeitsklausel*', from which the English term 'eternity clause' derives.

Flexibility clause

This refers to Article 352 of the Treaty on the Functioning of the European Union (TFEU), which allows the Council, acting on a Commission proposal and after approval of the European Parliament, to adjust the Union's competences to the objectives laid down by the Treaty when the latter has not provided the powers of action necessary to attain them. Conditions for using the flexibility clause are that

- the action envisaged is necessary to attain, in the context of the policies defined by the Treaties (with the exception of the Common Foreign and Security Policy), one of the Union's objectives;
- no provision in the Treaty provides for action to attain the "objective";
- the envisaged action must not lead to the Union's competences being extended beyond what is provided for by the Treaties.

In some Member States, the agreement of the representative in the Council is conditional on prior approval by parliament.

Kompetenz-Kompetenz

The German term '*Kompetenz-Kompetenz*' means literally 'the competence on competence'. It refers to the question who has the ultimate power to decide and determine the scope and meaning of a certain competence. In the context of this report, it is generally used in the context of whether it is the Member States or the Union institutions that have the ultimate power to decide on the scope of EU competence. In this regard, a further distinction can be made as regards, on the one hand, the competence to allocate powers and competences (sometimes referred to as 'constitutional *Kompetenz-Kompetenz'*), and, on the other, the competence to decide on the interpretation of the scope of the powers allocated (judicial *Kompetenz-Kompetenz*). There is general agreement on the former to the extent that the Member States are 'masters of the Treaties', but on the latter there is controversy on whether and to what extent the Member States have transferred the ultimate judicial *Kompetenz-Kompetenz* to the Court of Justice of the European Union.

Mandating system

The expression 'mandating system' is used in connection with the manner in which national parliaments scrutinize the participation of their governments in the process of EU decision-making. A parliament is said to follow a 'mandating system' if the representative in the Council of the European Union requires a 'mandate' of its national parliament in order to be able to agree to a certain Council act. The 'mandate' in question usually indicates in more or less broad outlines the framework within which the representative in the Council can agree to a Council act. The classic example of a mandating system is that of the Danish parliament's *Europaudvalget* (EU Committee), but it is also used in Austria, Finland and Sweden. A 'mandating system' is usually distinguished from a 'documentary system'. A 'documentary system' focuses on the possibility for a parliament to examine a draft EU act, which is accompanied with the possibility of a 'parliamentary scrutiny reserve', which prevents a representative in the Council to agree to a certain Council act until the national parliament has had the opportunity to examine the draft act. A 'mandating system' is often combined with some form of documentary system.

Monism

The term 'monism' refers to a constitutional system in which international law, more particularly international treaty law, that is internationally binding for a particular state

automatically forms part of national law. A provision of international law is operative within the legal order from the moment that it becomes binding under international law, and can in principle be relied on in court. If a constitutional order of a state is monist, this does not mean that there are no requirements of parliamentary approval for treaties; also in monist states parliamentary approval of treaties is required (at least for certain important treaties) before they can become binding on the relevant state. The term does mean that the provision of international law is as such part of the domestic legal order, and that this is not dependent on an act of 'incorporation' or 'transformation' into national law. In the European Union, for instance, France, the Netherlands and Spain are said to be 'monist'. See also under 'dualism', above.

Pacta sunt servanda

This literally means 'agreements must be kept'. It is a general principle of law which expresses that treaties, contracts, and all other obligations a party has entered into are legally binding and must be faithfully observed.

Parliamentary scrutiny reserve

See under Mandating system.

Passerelle clause

Passerelle clauses (or bridge clauses; *passerelle* means footbridge in French) are provisions in the EU Treaties which allow the Council or European Council, with a unanimous decision, to change the voting procedure in the Council from unanimity to qualified majority voting, or to make the ordinary legislative procedure applicable instead of a special legislative procedure.

There are general and specific passerelle clauses. The general passerelle clause is Article 48(7) TEU. This provision regards Title V of the TEU (with certain exceptions) and the TFEU in general. The specific passerelle clauses are Article 31(3) TEU (Common Foreign and Security Policy), Article 81 (3) TFEU (judicial cooperation regarding family law with cross-border implications), Article 153(2)(b) TFEU (certain aspects of the position of workers), Article 192(2) TFEU (certain aspects of environmental protection), Article 312(2) TFEU (adoption of the multiannual financial framework) and Article 333 TFEU (reinforced cooperation).

Ultra-vires review

An act is said to be *ultra vires* if no legal authority (power, competence) exists for that particular act, either because the power to act has never been conferred, or because the act exceeds the power that was conferred. The possibility of scrutinizing whether this is the case is called '*ultra vires* review'. If upon review an act is found to be *ultra vires*, it cannot be operative legally. In this report the term refers more particularly to the review as to whether acts of the European Union and its organs are taken within the limits of the powers conferred on the Union.

Venice Commission

'Venice Commission' is the colloquial name for the European Commission for Democracy through Law, which meets in Venice. It acts under the aegis of the Council of Europe and is an advisory body on constitutional matters composed of specialists in the field of constitutional matters, appointed by the Member States mainly from academia, constitutional or other courts, or the civil service. It tenders its advice to Council of Europe Member States and other states that are members at their request or at the request of an international body of organization.

ANNEX V: LIST OF EXPERTS

Professor Anneli Albi, Kent Law School (Estonia)

Dr Gavin Barrett, University College Dublin (Ireland)

Professor Tamara Ćapeta, Zagreb University (Croatia)

Dr Barbara Guastaferro, Pegaso University (Italy)

Dr Jan Komárek, London School of Economics (Czech Republic)

Dr Adam Łazowski, University of Westminster (Poland)

Dr François-Xavier Millet, Université Toulouse 1 Capitole (France)

Dr Jo Eric Kushal Murkens, London School of Economics (United Kingdom)

Professor Tuomas Ojanen, University of Helsinki (Finland)

Professor Pál Sonnevend, Eötvös Lórand University ELTE (Hungary)

Dr Mattias Wendel, Humboldt-Universität zu Berlin (Germany)

We have profited greatly from the valuable comments from Bruno De Witte, Vlad Perju, Willem Verrijdt.

EUROPEAN PARLIAMENT

CATALOGUE: QA-02-14-131-EN-C

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: **http://www.europarl.europa.eu/studies**

PHOTO CREDIT: iStock International Inc.

ISBN: 978-92-823-5393-6
DOI: 10.2861/52990

Publications Office