The Protection of Fundamental Rights in Europe

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Since the entry into force of the Treaty on European Union (TEU) on 1 December 2009 the people of Europe,[1] the citizens of the European Union (EU), have taken a great leap forward in terms of their codified legal rights and liberties. For a long time they have been living mostly under judge-made law, be it as a result of the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) by the European Court of Human Rights (ECtHR) in Strasbourg or of the creation or recognition of fundamental rights by the European Court of Justice (ECJ) in Luxembourg. While the Strasbourg Court grants legal protection as measured by human rights with universal character, the ECJ in its established case law guaranteed the protection of fundamental rights which the relevant parties sought within the scope of application of the Community Treaties.[2] Now the Treaty of Lisbon recognises rights, freedoms and principles at Union level in a more comprehensive understanding – beyond the mere market-based context – setting them out in the Charter of Fundamental Rights of the European Union (EUCFR) and giving its provisions binding legal force (Art. 6.1 TEU).

The development of fundamental rights on the supranational level is mainly the result of the admonitions on the part of the national (constitutional) courts,

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[1]Cf. the first paragraph of the Preamble of the Charter of Fundamental Rights of the European Union: "The people of Europe [. . .]."

[2]Cf. Müller (2005), p. 15, 25; Skouris (2005), p. 31, compares the ECJ in its function with a "supreme specialised court".

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especially of the Italian *Corte Costituzionale*[3] and the French *Conseil Constitutionnel*. Most striking, however, was the support given by the German *Bundesverfassungsgericht*, which called for a protection of such rights in the Community or even reserved for itself the right to review Community action on grounds of fundamental rights as long as the Community did not dispose of its own guarantees (*infra* Sect. 6).[4] These signals, which originated from national actors in the framework of the European protection of fundamental rights, were enhanced by initiatives by the other institutions, in particular by those of the European Parliament which introduced several proposals for recognition of fundamental rights in the European Community's (EC) legal order.[5] Thus, the call for a review of "secondary Union law and other acts of the European Union" on grounds of fundamental rights[6] and the abstention from exercising this national jurisdiction only as long as the EU guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the German Basic Law[7] is obviously *the* paradigm

[3]Cf. for this analysis the decision of the Italian Constitutional Court, judgment 349/2007 (22 October 2007), Legal considerations sub 6.1.

[4]Cf. German Federal Constitutional Court, 2 BvL 52/71 (Order of 29 May 1974) para 44 et seqq. (in: BVerfGE 37, 271, 280 et seqq.) – *Solange I* (English translation in: Bundesverfassungsgericht (1992), pp. 270 et seqq.): "As long as the integration process [. . .]."

[5]Resolution adopting the Declaration of fundamental rights and freedoms, O.J. C 120/51 (1989); in a modified version reconsidered as Title VIII of the Draft Constitutional Treaty of 10 February 1994, O.J. C 61/155 (1994).

[6]Cf. German Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) para 104 (in: BVerfGE 73, 339, 376) – *Solange II* (English translation in: Bundesverfassungsgericht (1992), pp. 613 et seqq.): "In so far as sovereign power is accorded to an international institution within the meaning of Article 24 (1) which is in a position within the sovereign sphere of the Federal Republic to encroach on the essential content of the fundamental rights recognized by the Basic Law, it is necessary, if that entails the removal of legal protection existing under the terms of the Basic Law, that instead, there should be a guarantee of the application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law [. . .]."; in the same way the German Federal Constitutional Court, 2 BvL 1/97 (Order of 7 June 2000) para 61 (in: BVerfGE 102, 147, 164) – *Banana Market* (English translation available online).

[7]German Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) (in: BVerfGE 73, 339) – *Solange II* – Headnote 2: "As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) Basic Law for those purposes are therefore inadmissible."

of a dialogue between the Luxembourg Court and the German Federal Constitutional Court.[8]

Both systems, that of the Council of Europe and, in some degree, that of the EU, exhibit several similarities to national systems of constitutional protection. Thus, the superior European courts and the superior domestic courts are dealing with similar matters, applying similar provisions of substantive law and following similar procedural rules. As a result, the standards of European fundamental rights, especially those of the Union, are "constitutionalised" by the guarantees enshrined in the various national bills of rights. Simultaneously, there is "a kind of bilateral interplay between the EU and Convention law, thereby producing a twofold process of 'conventionalisation' of Union law and 'unionisation' of Convention law, though with different timings and intensity."[9] Therefore, it is possible to draw a triangle that has, at its three vertices, the various supreme or constitutional courts, the ECJ and the ECtHR. As the legal systems concerned do not only coexist but also overlap each other,[10] it is within this triangle that cooperation in the field of human rights develops and provokes collisions at the same time.[11]

1 The Protection of Fundamental Rights Under the EC and the EU Treaty of Maastricht in the Case Law of the European Court of Justice

Although the 1957 Treaty of Rome did not contain specific provisions on the protection of fundamental rights, the ECJ has nonetheless upheld the need for respect for fundamental rights in the context of action at EC/EU level since the Community's early days.[12] In the *Stauder* judgment on occasion of its review of a disposition of secondary Community law about the purchase of butter at a reduced price for reasons of social assistance the Court concluded its analysis: "Interpreted in this way the provision at issue contains nothing capable of prejudicing the

[8]For the term "judicial dialogue" cf. Advocate General *Poiares Maduro* in his Opinion submitted to the Court (ECJ, Case C-127/07, Opinion of Advocate General Poiares Maduro, 21 May 2008, para 15–17): "On the contrary, it is inherent in the very nature of the constitutional values of the Union as constitutional values common to the Member States that they must be refined and developed by the Court in a process of ongoing dialogue with the national courts, in particular those responsible for determining the authentic interpretation of the national constitutions. The appropriate instrument of that dialogue is the reference for a preliminary ruling and it is in that context that the question raised here must be understood" (para 17). Cf. further the contributions by Oeter (2007) and Merli (2007).

[9]Callewaert (2008).

[10]Wildhaber (2005b), p. 43.

[11]Garlicki (2008), pp. 511 et seq.

[12]Cf. Rodriguez Iglesias (1995), pp. 1271 et seqq.; Blanke (2006), pp. 267 et seq.

fundamental human rights enshrined in the general principles of Community law and protected by the Court."[13] In *Internationale Handelsgesellschaft*, the ECJ concluded that "[i]n fact, respect for fundamental rights forms an integral part of the general principles of law protected by the ECJ. The protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured within the framework of the structure and objectives of the Community."[14] General legal principles which are common to the legal systems of Member States form an element of unwritten primary Community law.

Following the cases of *Stauder* and *Internationale Handelsgesellschaft*, the ECJ, both in the opinions of its Advocates General and in its judgments, has regularly referred to its duty to ensure observance of the general principles of law, of which fundamental rights form an integral part. This recourse to the general principles of law reflects the French approach to fundamental rights, according to which they are understood rather as principles, attributing to them the character of objective rights.[15] In identifying particular rights and interpreting their content, the Court in *Internationale Handelsgesellschaft* draws inspiration also from the constitutional traditions common to the Member States and thus reaffirms and specifies the general principles of law as sources for recognition of fundamental rights within the legal order of the Community. Finally in the case of *Nold* the Court referred to guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, including in particular the ECHR,[16] thus underpinning the Community's protection of fundamental rights in a twofold concept: "As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law."[17]

These international instruments are not directly applied as legally binding provisions under international law but rather used as sources for establishing

[13]Cf. Case 29/69 *Erich Stauder v City of Ulm* (ECJ 12 November 1969) para 7; see also Case 44/79 *Hauer v Land Rheinland-Pfalz* (ECJ 13 December 1979) para 15: "[. . .] that fundamental rights form an integral part of the general principles of the law, the observance of which [the Court] ensures [. . .]".

[14]Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECJ 17 December 1970) para 4.

[15]Cf. Mayer (2009), p. 89; see also Rodriguez Iglesias (1998).

[16]For the first time the ECJ explicitly referred to the ECHR in Case 36/75 *Roland Rutili v Ministre de l'intérieur* (ECJ 28 October 1975) para 32.

[17]Cf. Case 4/73 *Nold KG v Commission* (ECJ 14 May 1974) para 13.

general principles common to the legal orders of the Member States. At the same time, examination of the extensive case law in which reference is made to the ECHR (beginning with *Rutili* to *Hoechst* and *Orkem* up to *Defrenne* and *Wachauf*) shows that the Court has indeed applied the provisions of the Human Rights Convention as part of Community law independent of the theoretical explanation of their legal significance as an element for the identification of general principles of law. Thus one can say that even before the forthcoming accession of the Union the ECHR has had a function equivalent to that of a formally recognised catalogue of fundamental rights.[18]

This interplay between both sources, the general principles of law, especially the constitutional traditions common to the Member States, and the ECHR was already enshrined in the Treaty of Maastricht in 1992 (Art. 6 TEU) as a cornerstone of the protection of fundamental rights at the level of the Union. Since the beginning of the 1990s, though, the fundamental rights arguments of the ECJ have focused unequivocally on the ECHR rights. Although general principles are still mentioned, they are not developed on a comparative legal basis in the case law of the ECJ. Successive Treaties from Maastricht onwards have strengthened the position of fundamental rights in the EU. But it is the Charter of Fundamental Rights which is supposed to be a "huge step forward for the European citizen" (*A. Duff*) for it provides for visibility and publicity of fundamental rights guarantees and thus leads to increased legal certainty. It facilitates the Europe-wide discourse on, and enhances the legitimating power of, fundamental rights.[19]

2 The Protection of Fundamental Rights in the Union According to Art. 6 TEU

2.1 An Interwoven System of Protection

The Treaty of Lisbon, which is a reform treaty, substantially revises Art. 6 TEU. Articles 6.1 to 3 TEU cover a tripartite interwoven system for the protection of fundamental rights in the EU[20] by:

[18]Cf. Rodriguez Iglesias (1995), p. 1273, 1275, 1280, with an interpretation of the references in the various cases to the ECHR.

[19]Cf. Kühling (2003), p. 586.

[20]See also Pernice (2008), p. 240: "three pillars"; contrary to this systematisation, German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 35 (in: BVerfGE 123, 267, 283) – *Lisbon* (English translation available online), considers the protection of fundamental rights in the TEU as based on *two* foundations, the Charter of Fundamental Rights of the European Union and the Union's unwritten fundamental rights, both complemented by the authorisation and obligation of the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. Recognising the rights, freedoms and principles set out in the EUCFR in its revised version of 12 December 2007[21] in a legally binding way and thus declaring them a legal source of Union law, establishing at the same time a safeguard for the competences of the Member States,
2. Setting out the authorisation and obligation of the EU to accede to the ECHR, which by this means becomes a legal source of Union law as well, and
3. Declaring the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constituent "general principles" of Union law which thus remain a source of legal guidance for the interpretation especially of the Charter of Fundamental Rights as a legal source of the Union.[22] Thereby, the Treaty of Lisbon – with slight adaptions – takes up the case law of the ECJ and its codification by the Treaty of Maastricht (*supra* Sect. 1). The source for the interpretation of the law – as opposed to an actual source of law – is not directly binding but rather has an effect similar to that of a norm by serving as a means of orientation for the interpretation of the source of law.[23]

The juxtaposition of the codified (Art. 6.1 (1) TEU) and uncodified (Art. 6.3 TEU) catalogue of fundamental rights has been criticised as "unusual" and in need of reform. For a dynamic development of the fundamental rights with regard to further development of the ECHR and the national constitutions to be possible,[24] Art. 6.3 TEU would not have been required since Art. 52.3 and 4 EUCFR bind the ECJ in this respect anyway.[25] On the other hand, with regard to the codification of European fundamental rights, emphasis has been put on the "interaction of the fundamental rights culture at Member State and European level" as well as the significance of the "diversity of the human rights culture in the current and future Member States" that has proven to be an "impetus for the steady improvement of the protection of human rights".[26] This solution, which is based on the competition of different systems of fundamental rights by means of constitutional comparison, however, misjudges the fact that for a long time the ECJ has derived fundamental rights essentially from the ECHR which it applies as part of Community law (*infra* Sect. 2.3). In the future it will see its task to be the decision of cases with fundamental rights implication submitted to it by applying the Charter of Fundamental Rights, whose guarantees – in the light of the authentic interpretation

[21] *Charter of Fundamental Rights of the European Union*, O.J. C 303/1 (2007).

[22] Hilf and Schorkopf, in Grabitz and Hilf (2002), Art. 6 EUV para 46; also – regarding the common constitutional traditions of the Member States – Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 65 et seqq.

[23] For the concept of a source for the interpretation of the law (*Rechtserkenntnisquelle*) cf. Kühling (2003), p. 589.

[24] See the Considerations of Working Group II of the Constitutional Convention, CONV 354/02 of 22 October 2002, p. 9.

[25] Cf. Kingreen, in Calliess and Ruffert (2011), Art. 6 EUV para 16 et seqq.

[26] Cf. Kirchhof (2003), p. 902; cf. also p. 928 (our translation).

of the rights of the Convention by the ECtHR – it has to lead to a high level of protection.

2.2 *Fundamental Rights as Principles (Art. 6.3 TEU)*

The Union Treaty restates the differentiation already found in the Preamble of the Charter of Fundamental Rights (6th recital) and Art. 52 EUCFR between "rights" and "freedoms" on the one hand and "principles" on the other (Art. 6.1 TEU). The Explanations of the Praesidium of the Convention[27] classify individual Articles of the Charter of Fundamental Rights as principles (e.g. Art. 25, 26 and 27, but also Art. 34.1 and 3 and Art. 35, 36, 38). The distinction is another confusing and unsatisfactory peculiarity of the Charter which is further consolidated by the wording of Art. 6.1 TEU and 51 EUCFR. The United Kingdom has been most reluctant to talk about economic and social *rights*,[28] but preferred instead to use the word "principles". "Principles" have no definite, but a *prima facie* validity and are thus rather imperatives for optimisation. Their implementation is only feasible within the framework of a balancing with other objectives of primary law.[29] As such, they are "factors to be taken into account by courts when interpreting legislation, but which do not in and of themselves create enforceable rights".[30] "Principles" are binding, but justiciable only in so far as Member States have adopted laws or taken administrative actions (i.e. have adopted "acts") when "implementing" Union law (Art. 52.5 EUCFR).[31] Subjectively enforceable fundamental rights are different from the fundamental principles which may be implemented through legislation. It would be decisive for the distinction, whether the relevant provision (also) relates to the *protection of rights of individuals* or this is expressly excluded.[32] However, the stumbling block for the distinction remains

[27]Updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention – notably to Art. 51 and 52 EUCFR.

[28]See Cologne Presidency Conclusions 1999, Annex IV.

[29]Schmidt (2010), pp. 55 et seqq., 112 et seqq., 178 et seqq.

[30]House of Lords Constitution Committee, European Union (Amendment) Bill and the Lisbon Treaty: *Implications for the UK Constitution*, 6th Report, 2007-8, HL Paper 84, para 60–61. See also Goldsmith (2001), p. 1212.

[31]Cf. Hogan, Der Einfluß der Europäischen Grundrechte-Charta auf die irische Verfassung, in Tettinger and Stern (2006), A VI para 41; with the same result Schmidt (2010), pp. 90 et seqq., 198 et seqq., who favours a judicial review competence in so far as the observing of all guarantees of these principles within this balancing of objectives can be subject to review; Mik, The Charter of Fundamental Rights: determinants of Protective Standards, in Barcz (2009), Sect. 12 II pp. 66 et seqq.; Bodnar, The Charter of Fundamental Rights: Differentiated Legal Character of Charter's Provisions, Their Consequences for Individuals, Courts and Legislator (2009), Sect. 33 IV pp. 155 et seqq.

[32]Cf. Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 98 et seqq.

that the Charter does not identify which provisions contain rights and which principles.

The principles pursuant to Art. 6.1 TEU are to be distinguished from the "general principles" of Art. 6.3 TEU. By using this term – following the case law of the ECJ (*Stauder*) as well as Art. F.2 TEU-Maastricht – it summarises the fundamental rights of the ECHR and the fundamental rights as they result from the constitutional traditions common to the Member States, thereby making them a source for the interpretation of Union law.[33] The significance of the common constitutional traditions is so far regarded marginal, since the ECJ will not refrain from an autonomous interpretation of the Charter, equivalent to the interpretation of the Treaties. At the same time, comparative evaluation would affect the achievements made by the codification of fundamental rights in the Charter.[34] The interpretation of the Charter itself is bound by its general provisions in Title VII (Art. 51–54 EUCFR) on the one hand and by the "Explanations referred to in the Charter" (historical interpretation) which themselves are limited to those "that set out the sources of those provisions" (Art. 6.1 (3) TEU) on the other.

2.3 The European Charter of Fundamental Rights

2.3.1 Origin, Entry into Force and Relevance of the Charter

The EUCFR was prepared by the first broadly based Convention, encompassing members of the European Parliament and of national parliaments. At the summit in Nice in December 2000, the Member States were not yet unanimously ready to incorporate the Charter into the Treaty of Nice. Instead, the EUCFR, drawing on the "constitutional traditions and international obligations common to the Member States" was "solemnly proclaimed" by the European Parliament, the Commission and the Council.[35] Prior to the adoption of the draft Charter by the Convention, the Bureau of the Convention prepared Explanations for each Article of the Charter. The Explanations are intended to clarify the provisions of the Charter, indicating the sources and scope of each of the rights set out.

The second Convention incorporated the Charter as Part II into the Treaty establishing a Constitution for Europe (TCE) signed in Rome on 29 October 2004.[36] Since the Constitutional Treaty failed to be ratified by all Member States,

[33]Cf. Kingreen, in Calliess and Ruffert (2011), Art. 6 EUV para 6 et seq.

[34]Cf. Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 78.

[35]*Charter of Fundamental Rights of the European Union*, O.J. C 364/1 (2000).

[36]*Treaty establishing a Constitution for Europe*, O.J. C 310/1 (2004) with the *Charter of Fundamental Rights of the European Union* at p. 41 et seqq.

the Charter continued to live on as a solemn political proclamation. The Intergovernmental Conference (IGC 2007) decided, in line with its June mandate, to make the Charter legally binding but without incorporating the text into the Treaty of Lisbon.

One day before the signing of the Treaty of Lisbon, the Charter was solemnly proclaimed in Strasbourg for a second time by the European Parliament, the Council and the European Commission. The EUCFR has been published in the Official Journal of the EU with the Explanations relating to the Charter of Fundamental Rights.[37] It entered into force on 1 December 2009 along with the TEU and the Treaty on the Functioning of the European Union (TFEU) without, however, becoming a part of the Union Treaty itself. The United Kingdom and the Netherlands were afraid that the incorporation of the Charter into the Reform Treaty would create the impression of a "statehood" at Union level. In order to make it a fully adequate and equivalent document in the legal system of the Union, the second clause of Art. 6.1 TEU provides that the Charter shall have the same legal value as the TEU and the TFEU. Nevertheless, this is an impairment of the concept of unity envisaged by the Constitutional Treaty.

The Charter of Fundamental Rights "confirms the fundamental rights 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."[38] Their guarantees concern civil, political and economic freedoms and social rights ("rights to respect", "rights to protect" and "rights to fulfil"). Bringing together various rights which were previously enshrined preponderantly in other human rights documents, and thus making them "more visible"[39] for the citizens of the Union, the Charter is a manifestation of shared European values. The codification not only underlines and clarifies the legal status and freedoms of the Union's citizens vis-à-vis the institutions of the Union, but also satisfies the need for fundamental rights facing and limiting the enlarged powers at Union level – especially the crucial ones regarding the "area of freedom, security and justice" (Title V of the TFEU) which were brought within the "Community method".[40] The result will be the most up-to-date human rights document in the world, and it offers the citizens a basis for scrutinising EU institutions and Member States when they implement EU law.

[37]Cf. the *Declaration concerning the explanations relating to the Charter of Fundamental Rights (Declaration 12)* annexed to the Treaty establishing a Constitution for Europe, O.J. C 310/424 (2004), updated once more in O.J. C 303/17 (2007).

[38]See the first clause of the *Declaration (1) concerning the Charter of Fundamental Rights of the European Union* annexed to the Treaty of Lisbon, O.J. C 83/337 (2010).

[39]Cf. the Preamble of the EUCFR (3rd consideration).

[40]Pernice (2008), p. 238.

2.3.2 The Likely Effect of the Legally Binding Force of the Charter for the Protection of Fundamental Rights in the Case Law of the ECJ

The most important change relates to the legal status of the Charter: new Art. 6.1 (1) TEU provides that the Charter, which has been excluded from the Union Treaty, will have the same legal value as the Treaties ("incorporated by reference"). Declaring the Charter to be legally binding will of course be likely to encourage and probably speed up the development of the case law of the ECJ which within the framework of Union law will try to gain mastery in the protection of human rights in competition with the Strasbourg Court. So far the ECJ has rarely proved itself to be a pioneer and precursor with regard to the establishment of a high level of protection. The ECJ has only rarely declared a European legal act void for its incompatibility with European fundamental rights.[41] Nonetheless, even without the Charter of Fundamental Rights it could examine European acts for their conformity with fundamental rights more resolutely. It is true that in its *Omega* ruling the Court has shown a sense of proportion for the somehow vague guarantee of "human dignity" as a fundamental cornerstone of the German Constitution: Here the Court recognises that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law" and "that the objective of protecting human dignity is compatible with Community law"; therefore human dignity as a principle validated in the Union's legal order[42] "justifies (within the scope of proportionality) a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services."[43]

Nevertheless, "it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected."[44] In fact the "double test" which the ECJ applies to national restrictions of the obligations imposed by Union law allows for different standards of protection in domestic law.[45] Contrary to this filtered and differentiated method of the handling of the fundamental rights

[41]As one of the few cases Mayer (2009), p. 97, mentions the decision in Case C-340/00 *Commission v Cwik* (ECJ 13 December 2001).

[42]Nickel (2009), p. 334, criticises that "not all EU Member State constitutions contain a legal concept of human dignity which guarantees it *as an individual right*, and to some – such as the UK – such a concept is completely alien to the legal system. Additionally, only few Member States would interpret the protection of human dignity in a way that it could also be used *against* its bearers (in the *Omega* case, the players of Gotcha). In the end, the ECJ created a "new" common constitutional concept in the name of constitutional pluralism."

[43]Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (ECJ 14 October 2004) para 34, 36.

[44]Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (ECJ 14 October 2004) para 37.

[45]Cf. Schwarze (2005), pp. 41 et seq.

traditions of the Member States, in the *Bosphorus* decision, although the Luxembourg Court thoroughly examined the principle of proportionality, it rather blurred the question of the limits of Art. 1 of the first Protocol to the ECHR on the protection of property by merely stating that the guarantee of property can be limited by a public interest/general interest but without a detailed review as to whether the seizure of the aircraft by the Irish authorities met the requirements of "the conditions provided for by law and by the general principles of international law."[46]

Summarising the "fundamental rights rhetoric" of the ECJ, the question of the protection or the normative area (which fundamental right is affected?) and the question of the admissible restrictions (to be determined in the future according to Art. 52.1 and 52.3 EUCFR) and consequently the justification for such restriction needs to be made clearer and dealt with more extensively in its case law. In those cases in which there is no express restriction, the possibility of a de facto or indirect invasion, which may also lead to a violation of fundamental rights, should be examined.[47] Despite the codification of the principle of proportionality with regard to its second element (necessity) and third element (appropriateness: "limitations [must] meet objectives of general interest [...] or [...] the rights and freedoms of others"), a coordinated method of application is still often lacking in the ECJ's examination of fundamental rights.[48] However, after the rulings in *Kadi*[49] and *Yussuf*,[50] there is no doubt about the Court's willingness to give its case law a higher profile in matters concerning fundamental rights. The reason for a predictable evolution of the substantial standards of fundamental rights protection by the Luxembourg Court lies also in the fact that the ECJ will be increasingly asked to interpret the ECHR, given that a number of Charter rights are derived from that document. By this means, the growing caseload of the ECtHR can be alleviated in the long run.

2.3.3 The Effect of the Charter on the Interpretation and Application of Fundamental Rights

The entry into force of the Charter following the ratification of the Lisbon Treaty will not be without impact on the method of defining the scope and content of fundamental rights in the case law of the ECJ. So far its task has been in a first step

[46]Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications et al.* (ECJ 30 July 1996) para 21, 26.

[47]Blanke (2006), pp. 271 et seq.; Kühling (2003), pp. 613 et seqq.

[48]Cf. Blanke (2006), pp. 273 et seq.

[49]Case T-315/01 *Kadi v Council and Commission* (CFI 21 September 2005), appealed by Joined Cases 402/05 P and 415/05 P *Kadi et al. v Council and Commission* (ECJ 3 September 2008).

[50]Case T-306 *Yusf et al. v Council and Commission* (CFI 21 September 2005), appealed by Joined Cases 402/05 P and 415/05 P *Kadi et al. v Council and Commission* (ECJ 3 September 2008).

to identify the common European standards of fundamental rights by analysing the national legal orders as part of the general legal principles of European law and align them with the guarantees of the ECHR as they have been interpreted in the case law of the Strasbourg Court. Due to codification of the fundamental rights of dignity, freedom and equality as well as the incorporation of social ("solidarity"), civil and judicial rights into the Charter, the Luxembourg Court's task will now be to outline especially those guarantees which have no parallel provision in the ECHR,[51] as subjective rights[52] ("rights to fulfil") in contrast to the "rights to respect" and the "rights to protect",[53] and to determine their content with regard to human rights in such a way – also in the analysis of the scope of protection – that they are not reduced to mere ciphers. In so far as the guarantees recognised by the Charter are a reception of the constitutional traditions common to the Member States, the Court is obliged to interpret these rights "in harmony with those traditions" pursuant to Art. 52.4 EUCFR. Thus, the ECJ could be confronted with national essential principles on which the respective guarantees are based. However, on the one hand, the sphere of the rights included in paragraph 4 is vague, for many rights are founded on several sources. On the other hand, the explanations of the Praesidium in paragraph 4 call for "a high standard of protection" so that it is not to be expected that the ECJ will be kept by paragraph 4 from an autonomous interpretation of the Charter according to the established method of interpretation of the Treaties.[54]

Meanwhile the Court will have to be more systematic and methodically stringent in its interpretation of fundamental rights in order to ensure rationality and understanding of its decisions. On this basis the second step of defining the scope of fundamental rights will still be determined by a process that has been characteristic of the established interpretation of fundamental rights by the ECJ. The Court will have to fit the various listed fundamental rights into the structures and aims of the Union which are spelt out in Art. 3, 6 and 9 TEU and the horizontal clauses of Art. 10–13 TEU in particular. This "Union reserve competence" is now partially codified by the specification of "objectives of general interest recognised by the Union" in Art. 52.1 EUCFR. This implies that restrictions cannot be justified merely by reference to aims for which a competence is conferred upon the EU even though the Union legislator may not impose restrictions to fundamental rights for the pursuit of discretionary chosen aims or "as such". Safeguarded interests include among others the status of churches and of secular and religious

[51]According to Art. 52.3 EUCFR "the meaning and scope of those rights [i.e. Charter rights which correspond to rights guaranteed by the ECHR] shall be the same as those laid down by the said Convention."

[52]In German terminology it describes the normative obligation for the protection of individual interests, giving the beneficiary the legal power to enforce those interests in a court of law.

[53]See for the differentiation of these three categories Blanke, The Economic Constitution of the European Union, in this Volume, sub. 5.1.

[54]Cf. Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 68, 77 et seq.

communities, the rights of children, and consumer and animal protection.[55] Restrictions of fundamental rights are to be in accordance with the principle of proportionality, in accordance with its definition in Art. 52.1, second sentence, where EUCFR requires appropriateness for purpose as well as necessity (adequateness) and the balancing with other interests. Thus, in addition to objectives of general interest to the Union, the "need to protect the rights and freedoms of others" has to be taken into consideration. Any limitation to the exercise of a fundamental right of the Charter may in each individual case be justified not only by a specific Union interest, but also by individual interests of third parties. In return, however, these conflicting interests are themselves restricted by general limits to the restrictability or "counter limits" (i.e. the so-called *Schranken-Schranken*). In the existing case law on the review of the proportionality of a restriction the ECJ has too strongly stressed the interest of the Community, thereby neglecting the examination of the importance of conflicting interests.[56]

In recent cases the ECJ seems to be, however, more sensitive for the need to weigh and balance the interests involved on the ground of the principle of proportionality.[57] Thus, the Court argues, that any limitation to the exercise of a fundamental right "must apply only in so far as is strictly necessary".[58] The ruling also spells out the clear message to the Union's institutions to justify more intensively their measures, both, with regard to pursue the adoption of measures which might affect fundamental rights and in the context of a judicial review of such measures.[59]

If the Court more thoroughly systemises also the methodical approach of the examination of fundamental rights, expectations set in the Charter will be met: Due to its legally binding force the Charter will make it more straightforward for individuals to enforce rights which are guaranteed under international law. Although the Charter reaffirms rights and principles which already substantially exist, albeit in many cases only at an international level, the Luxembourg Court will turn the "soft" law standards in the field of international human rights on the basis of the Charter into "hard" law. A risk could be that a difference in approach to the human rights guarantees which are enshrined identically in the Charter and in the Convention may develop between the Strasbourg and Luxembourg Court. This might be remedied by the Union signing up to the ECHR.

[55]Cf. Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 37.

[56]Cf. Selmer (1998), pp. 81 et seqq.; critical Mayer (2009), p. 98; see also v. Arnauld (2008).

[57]Cf. Schroeder (2011), pp. 465 et seqq.

[58]Joined Cases C-92/09 and C-93/09 *Schecke GbR and Eifert v Land Hessen* (ECJ 9 November 2010) para 77, 86.

[59]This can be inferred from Case C-58/08 *Vodafone et al. v Secretary of State for Business Enterprise and Regulatory Reform* (ECJ 8 June 2010) para 63 et seqq., 68 et seqq.

2.3.4 Further Provisions on Interpretation

Art. 6.1 (3) TEU also stipulates that the Charter rights are to be interpreted in accordance with the "horizontal" provisions of the Charter, i.e. Art. 51 through 54 EUCFR clarifying the Charter's scope and applicability and with "due regard" to the Explanations prepared by the Bureau of the Charter Convention. The Explanations now referred to in this general provision on fundamental rights of the TEU, and retained in the Preamble to the Charter (5th recital, sentence 2) as well as in its Art. 52.7, are attached to the text of the Charter and published in the same Official Journal as the Charter itself.[60]

The Explanations do not have the value of an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" or of an "instrument which was made by one or more parties in connection with the conclusion of the treaty" in the sense of Art. 31 VCLT.[61] These Explanations are rather "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" in the sense of Art. 32 VCLT. In literature and comments on Art. 6 TEU this meaning of the Explanations is briefly confirmed by emphasis on their lack of any "legal value" or on their "non-binding" character.[62]

Article 51.1 EUCFR provides that the Charter provisions are addressed to EU institutions, bodies, offices and agencies of the Union and to Member States only when implementing EU law, a qualification which is absent from the terms of Art. 6.1 TEU itself. This means that the ECJ will be in a position to examine whether the Member States comply with their obligations resulting from the fundamental rights guarantees of the Charter when implementing Union law because exclusion of this control on the basis of ex-Art. 46 lit. d TEU is no longer possible since the entry into force of the Lisbon Treaty (Art. 19.3 lit. c TEU). The Charter also provides that the principle of subsidiarity is to be respected. Article 51.2 EUCFR states that the Charter does not extend the field of application of Union law beyond the powers of the Union; nor does it establish or modify any Union powers or tasks. From Art. 51.1 EUCFR it follows that it does not apply to situations involving purely domestic

[60]Cf. the *Declaration concerning the explanations relating to the Charter of Fundamental Rights (Declaration 12)* annexed to the Treaty establishing a Constitution for Europe, O.J. C 310/424 (2004), updated once more in O.J. C 303/17 (2007). Following Pernice (2008), p. 242, the explanations will have at least symbolically "more weight" by reason of their new position within the Treaty compared to the Constitutional Treaty where they have been situated amongst the basic principles and objectives.

[61]Cf. the Introduction to the explanations (O.J. C 303/17 (2007)): These explanations "do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter".

[62]Ladenburger, in Tettinger and Stern (2006), Art. 52 GrCh para 127; Kornobis-Romanowska, Strengthening of an Individual's Status in the EU after the EU's Accession to the ECHR – Consequences for the Legislator and National Courts – Practical Results, in Barcz (2009), Sect. 65 I pp. 305 et seqq.

law; for the Charter to be directly relevant there must be a link to Union law. National courts may, however, find inspiration in EU law even when applying purely domestic law.

Article 52.3 EUCFR contains the obligation to an interpretation of the provisions of the Charter that is consistent with the ECHR ("the meaning and scope of those rights shall be the same"); this does not change the ECHR's character as a source for the interpretation of the law (Art. 6.3 TEU).[63] As a result, this leads to a synchronisation of substantive law of the Charter with the law of the Convention. Although this does not mean that the Convention becomes an integral part of Union law, the normative content of the Charter provisions is adapted to that of the corresponding provisions of the Convention by means of systematic interpretation. In principle, this inclusion refers to the scope, the definition of what is considered an interference with fundamental rights as well as the requirements of the corresponding Charter provisions to justification of interferences. Nonetheless, it also requires – depending on the respective level of the review – a differentiated and, referring to the individual case, flexible solution.[64] Article 52.4 EUCFR provides that rights resulting from constitutional traditions common to the Member States are to be interpreted in harmony with those traditions.[65] Thus, Art. 52.4 EUCFR can be understood in the sense that in addition to the general reservation of Art. 52.1 EUCFR – and also in addition to Art. 52.3 EUCFR – one can deduce further requirements for the justification of limitations.[66] In particular, the need for guidance on the distinction between "rights" and "principles" was the justification for the new Art. 52.5 EUCFR.

2.3.5 Limits of the Guarantees

Article 6.1, sentence 2, TEU makes clear that "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". It also confirms that the Charter does not extend the field of application of Union law or of Union tasks. Additionally the Declaration on the Charter of Fundamental Rights (included in the Final Act under No. 1) was annexed to the Treaty of Lisbon, in which the Conference and thus all of the Member States assert that the Charter which is to have a legally binding force confirms the fundamental rights guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States.

New Art. 6.3 TEU reflects ex-Art. 6.2 TEU-N, a provision which has been used extensively by the ECJ in developing its case law on fundamental rights. It provides that "[f]undamental rights, as guaranteed by the [ECHR] and as they result from the

[63]See Kingreen, in Calliess and Ruffert (2011), Art. 52 GrCh para 21, 37 et seq.

[64]See Kingreen, in Calliess and Ruffert (2011), Art. 52 GrCh para 27 et seqq.

[65]Cf. Frenz (2009), para 132 et seqq.

[66]Schneiders (2010), pp. 226 et seqq.

constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Limits to a wide interpretation of the European "Bill of Rights" by the ECJ are not only set by the already mentioned Art. 6.1, first sentence, TEU and the Declaration on the Charter of Fundamental Rights, but also by Art. 52.6 EUCFR, which provides that full account is to be taken of national laws and practices as specified in the Charter, and this would appear to give some weight to the references to national law.

On the basis of Art. 6 TEU it can therefore be concluded that the application of the Charter is limited on several levels by conditions set in the Charter itself, confirmed subsequently by the Treaty of Lisbon in Art. 6.1 and given political weight by the Declaration of the Conference (i.e. the Member States).

3 The Loss of Unity and Unanimity on Human Rights Standards Among the Member States?

The somewhat awkward status of the Charter of Fundamental Rights came to an end with the ratification of the Treaty of Lisbon. However, unanimity among the Member States' governments has come at a price. The United Kingdom and subsequently Poland have insisted on a Protocol on the application of the Charter of Fundamental Rights, containing an exemption from the "operation of specific provisions of the Charter" (10th indent of Protocol No. 30) in both countries. According to the Protocol, neither "the Court of Justice of the European Union, [n]or any court or tribunal of Poland or of the United Kingdom" will be entitled "to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that [the Charter] reaffirms" (Art. 1.1 of the Protocol). Title IV referring to "social rights" ("solidarity") does not create "justiciable rights applicable to Poland or the United Kingdom except insofar as Poland or the United Kingdom has provided for such rights in its national law" (Art. 1.2 of the Protocol). References in the Charter to domestic law or practice do not apply to the United Kingdom or Poland unless the rights are recognised in the law or practices of these countries (Art. 2 of the Protocol). As provided in Art. 51 TEU, the Protocol has the same legal value as the Treaties.

According to the British Foreign Minister in the European Scrutiny Committee of the UK House of Commons this is not meant to be an "opt-out" from the Charter as a whole.[67] *Alan Dashwood*, who has advised the UK government extensively on the

[67]Cf. European Scrutiny Committee, Thirty-fifth Report of Session 2006-07, European Union Intergovernmental Conference, HC 1014; cf. in this sense also: Pernice (2008), p. 245; Mayer (2009), p. 94. See also Barnard (2008), p. 258, according to whom "for Eurosceptic audiences, the UK government has been willing to let it be referred to as an opt-out. Yet for more informed audiences the UK government insists that it is not an opt-out but merely clarification."

Constitutional Treaty, also writes that the function of the Protocol is "interpretative – to state unequivocally, and with the force of primary law, what ought to be obvious from a reading of the Charter in the light of the horizontal provisions and of the official explanations."[68] This view is supported by the Preamble to the Protocol which says, as mentioned above, that the purpose of the Protocol is to "clarify certain aspects of the application of the Charter." In other words, following this view the Protocol contains clarifications, but does not change the *status quo* of the protection of fundamental rights in the EU and does not exclude the jurisdiction of the ECJ in this field in relation to Poland and the United Kingdom.

However, depending on the reading of Art. 1 of the Protocol, there might be elements of opt-out for the United Kingdom and Poland. While Art. 1.2 states that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except insofar as Poland or the United Kingdom has provided for such rights in its national law", the Protocol obviously covers some economically crucial provisions of the Charter on workers' rights under the heading of "Solidarity". The United Kingdom believed that the content of this title related to non-justiciable *principles*, not rights (*supra* Sect. 2.2), so that the question of their direct effectiveness would not arise. However, two of the provisions under the title of solidarity which caused British businesses most concern, Art. 28 EUCFR on collective bargaining and action and Art. 30 EUCFR on unjustified dismissal, appear to be drafted in terms of rights, not principles, and are thus potentially justiciable.[69] Article 1.2 of the Protocol therefore makes clear that if any of the provisions of Title IV are in fact classed as rights they are not justiciable in respect to the United Kingdom and Poland. Why are Art. 28 and Art. 30 EUCFR so sensitive to the United Kingdom and Poland, respectively?[70]

The United Kingdom, with its absence of a written constitution, has no "right to strike". Instead, trade unions enjoy only immunity from being sued in tort when certain conditions are satisfied. By contrast, in the immunity-based system, strikes are seen as unlawful and trade unions have to justify why they are going on strike. Given the structural differences in approach between common law and civil law, the UK government has been concerned about the EU introducing a "right" to strike in the United Kingdom. Beyond this, UK businesses were concerned that Art. 30 EUCFR gave individuals the right to protection against unfair dismissal. Finally,

[68]'The paper tiger that is no threat to Britain's fundamental rights' *Parliamentary Brief*, 10 March 2008 (http://www.thepolitician.org/articles/the-paper-tiger-646.html).

[69]See e.g. the UK's submissions to the Court in the *Viking* case (Case C-438/05 *International Transport Workers' Federation* v. *Viking Line ABP* [2007] ECR I-000) discussed in Bercusson, 'The Trade Union Movement and the European Union: Judgment Day' (2007) 13 *ELJ* 279, 300; see also Mik, The Charter of Fundamental Rights: determinants of Protective Standards, in Barcz (2009), Sect. 14 I p. 75.

[70]See for the following interpretation Barnard (2008), p. 269 et seqq.

there is a perplexing irony about the Polish position under Art. 1.2 of the Protocol in particular. The Polish Declaration on the Protocol stated:[71]

> Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

This Declaration appears to undermine significantly any potential use of Art. 1.2 of the Protocol as an "opt-out" with respect to Poland. In fact, as this Declaration shows, Poland's concerns are not with social and labour rights. Poland's real fears lie with subjects such as gay marriage and abortion, but the Protocol does not touch on these issues.[72]

Reading the Protocol, one comes to the conclusion that in "reality" it "lies somewhere in between [. . .] opt-out" and mere "clarification".[73] Federal admissibility of different levels of protection of fundamental rights – even in the application of federal law in the relation between the states and the federation – can be seen in the federal model of the Federal Republic of Germany (Art. 142 GG) with derogation from the principle that "Federal law shall take precedence over *Land* law" (Art. 31 GG). However, this provision requires "consistency" of the fundamental rights provided for by *Land* constitutions and the rights of the individual as guaranteed by the federal constitution.[74] The differences regarding fundamental rights between the relevant norms of labour and social rights in the United Kingdom (and Poland) on the one hand and the guarantees of the Charter of Fundamental Rights of the Union on the other would be substantially diminished in that, regardless of the Charter's limited scope of application in these two countries, their commitment to the fundamental rights of the ECHR – which are in most cases identical to those of the Charter – and the constitutional traditions common to the Member States (Art. 6.3 TEU) as general principles of law and thus the binding case law of the ECJ in the field of fundamental rights remain untouched. The binding case law relating to fundamental rights of the ECtHR would remain unaffected. In the field of the protection of fundamental rights the Union seems to become once

[71] *Declaration (No. 62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom* annexed to the TEU, O.J. C 83/358 (2010).

[72] With regard to gay marriage the Charter is concerned in so far as the anti-discrimination clause (Title III: Art. 21 EUCFR) prohibits also discriminations on grounds of "sexual orientation".

[73] Convincingly Barnard (2008), p. 258.

[74] Article 28.1 GG reads: "The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. 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 [. . .]." See also Tettinger and Schwarz, in v. Mangoldt et al. (2010), Art. 28 GG para 11 et seqq. (26 et seqq.) with further reference.

more a "Europe à la carte". The unity and the common basis of values in EU law seem to be partly diminished.

4 The Relationship Between the System of Protection of Fundamental Rights by the Union and the ECHR

4.1 Coherence in the Case Law

For some time the Luxembourg Court has obviously tried to stress coherence of its case law with that of the ECtHR.[75] So far the most obvious conflict between the two European courts in the case of *Senator Lines* has been alleviated by the ECtHR's decision on dismissal of the action. This case was about provisional legal protection against the setting of a fine by the European Commission for infringement of European competition rules. The applicant company – the Senator Lines shipping company with its registered office in Bremen, Germany – regarded its economic existence as threatened due to the refusal of deferment of the required security by means of a bank guarantee. It took legal remedies against the decision of the ECJ[76] by bringing an action before the ECtHR (as *ultima ratio*) against all the Member States of the EC – a highly unusual procedure. In a later decision, which became final in the absence of an appeal, the Luxembourg Court of First Instance quashed the fine.[77] Therefore the ECtHR in accordance with the ECHR could find that there was no continuing infringement of fundamental rights and that the applicant was not a victim of a violation.[78] Hence there was no more room for a possible diverging interpretation of fundamental rights by the ECtHR and the ECJ.

4.2 Remaining Potential for Conflict

At the same time there still remains the potential for conflicts in European competition law, in particular concerning the right to refuse to provide testimony in anti-trust suits or the question whether the Court provides the same level of protection for actions within business premises as for those within private residences or whether it will – regardless of the decision by the ECtHR in the case of *Niemietz*[79] – stick to the

[75]Cf. Krüger and Polakiewicz (2001), p. 97.

[76]Case T-191/98 R *DSR-Senator Lines v Commission* (CFI 21 July 1999), appealed by Case C-364/99 P(R) *DSR-Senator Lines v Commission* (ECJ 14 December 1999).

[77]Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line et al. v Commission* (CFI 30 September 2003).

[78]Case 56672/00 *SENATOR LINES GmbH v Members of the EC* (ECtHR 10 March 2004).

[79]Case 13710/88 *Niemietz v Germany* (ECtHR 16 December 1992).

general line of the *Hoechst* decision[80] in the sense of differentiating between "private premises" and "business premises", thereby holding on to the distinction between "employed" and "self-employed". According to Advocate General *Juliane Kokott* the protection of legal professional privilege does not apply for the benefit of enrolled in-house lawyers in anti-trust proceedings of the European Commission. Internal company communications with enrolled in-house lawyers, even if he/she is a member of a Bar or Law Society, does not enjoy legal professional privilege as guaranteed by fundamental rights at Union level (Art. 8.1 ECHR in conjunction with Art. 6.1 ECHR and Art. 6.3 lit. c ECHR – right to fair trial – Art. 7 EUCFR in conjunction with Art. 47 (1), Art. 47 (2), second sentence, and Art. 48 (2) EUCFR) between a lawyer and his client.[81] It could not be concluded that the principle of equal treatment (Art. 20 and 21 EUCFR) was infringed as "with regard to their respective degrees of independence when giving legal advice or providing representation in legal proceedings, there is therefore usually a significant difference between a lawyer in private practice or employed by a law firm, on the one hand, and an enrolled in-house lawyer, on the other."[82] Hence the protection of the legal privilege with regard to documents seized during a search according to EU anti-trust law is reduced. Evidently, the ECJ is influenced by the argument that further-reaching protection of fundamental rights would interfere with the proper functioning of effective control by the authorities of compliance with anti-trust and competition rules.[83]

4.3 *The Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950*

In the light of the efforts for coherence, compatibility and harmony between the legal principles of the existing Treaties (Art. 6.3 TEU), the rights of the Charter of Fundamental Rights and the rights contained in the Strasbourg Convention, Art. 6.2, first sentence, TEU provides for the accession of the Union to the ECHR. By now the guarantees of the ECHR form a *European public order* with objective character, i.e. an order that is not limited to bilateral commitments among states but rather imposes objective obligations on them. The Court called the Convention

[80]Joined Cases 46/87 and 227/88 *Hoechst v Commission* (ECJ 21 September 1989) para 57 et seqq.

[81]Cf. Opinion of Advocate General J. Kokott delivered on 29 April 2010, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission et al*., para 45 et seqq. (in appeal procedures of Akzo Ltd. Against a judgment of the General Court – (former Court of First Instance), Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd und Akcros Chemicals Ltd v Commission* (CFI 17 September 2007).

[82]Opinion of Advocate General J. Kokott delivered on 29 April 2010, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission et al*., para 75 et seqq. (82).

[83]See Schwarze (2005), p. 43 et seq.

"a constitutional instrument of European public order (*ordre public*)", thereby stressing the states' obligation "to have regard to the special character of the Convention and the Protocols thereto as a treaty for the collective enforcement of human rights and fundamental freedoms."[84] As a consequence of the accession of the Union to the Convention the Strasbourg Court will be recognised as the final authority in the field of human rights.

At the same time the new provision meets the requirement of a treaty revision spelled out by the ECJ in its Opinion 2/94 on the accession of the EC to the ECHR.[85] Realisation of the accession is only possible by meeting the strict prerequisites set by the Lisbon Treaty. The Council must decide unanimously to accept the terms of accession. Moreover, accession requires not only the consent of the European Parliament but also of all Member States in accordance with their respective constitutional requirements (Art. 218.6 lit. a (ii), 218.8 TFEU). Additionally, there was a need to create an exception (i.e. make special provision) for the accession of the Union to the ECHR to which originally only members of the Council of Europe could accede (Art. 59 ECHR, Art. 4 of the Statute of the Council of Europe). This was done by Protocol No. 14, which entered into force on 1 June 2010. Pursuant to its Art. 17, a new paragraph has been inserted in Art. 59 ECHR providing that "[t]he European Union may accede to this Convention."

This amendment was not sufficient to allow for an immediate accession to the ECHR. The accession of the EU, which is neither a State nor a member of the Council of Europe and which has its own specific legal system, requires certain adaptions to the Convention system. These include: amendments to provisions of the Convention to ensure that it operates effectively with the participation of the EU; supplementary interpretative provisions; adaptations of the procedure before the ECtHR to take into account the characteristics of the legal order of the EU, in particular the specific relationship between an EU Member State's legal order and that of the EU itself; and other technical and administrative issues not directly pertaining to the text of the Convention, but for which a legal basis is required.

These recent amendments, defining the status of the European Union as a High Contracting Party to the Convention and the Protocols, were set out in the "Agreement on the Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms".[86] Accession to the Convention and the Protocols will impose on the European Union obligations with regard only to acts, measures or omissions of its institutions and bodies, offices or agencies, or of persons, acting on their behalf. Pursuant to Article 6.2 TEU it does not "require the European Union to perform an act or adopt a measure for which it has no competence under European Union law" (amendment to Art. 59.2 lit. c ECHR).

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[84]Cf. Ress (2002), p. 3.

[85]Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECJ 28 March 1996).

[86]Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16 final of 19 July 2011.

4.3.1 Relevance of External Control by the ECtHR

Only the accession of the Union to the ECHR will allow European citizens to bring before the ECtHR actions against the decisions of the authorities of the Union or against judgments of the Luxembourg Court which are not in accordance with the ECHR or with the case law of the Strasbourg Court. This will allow legal proceedings (now guaranteed by domestic law in similar situations) where an infringement of the fundamental rights enshrined in the Convention is asserted. Until now at Union level there has been no correlation between the subjection of EU citizens and their legal protection by an external judicial review – although this is demanded by the principle of *subiectio trahit protectionem*.

After the entry into force of the Charter of Fundamental Rights it would have appeared somewhat anachronistic that the EU should remain the only legal area in Europe not subject to external review by the ECtHR. Given the background of extended Union competences through the Treaty of Lisbon, in particular in the area of police and judicial cooperation ("area of freedom, security and justice" – Art. 82 et seqq., 87 et seqq. TFEU), the existence of the Charter implies that the ECJ will be confronted with far more questions having fundamental rights implications than before through request for preliminary rulings. Many issues will contain aspects on which there is yet no established case law of the Strasbourg Court. Therefore, the fourth consideration of the Agreement on the Accession of the EU to the ECHR expressly recognises the need to give the individual "the right to submit the acts, measures or ommissions of the European Union to the external control" of the ECtHR.

With accession, the Union, as did its Member States before it, recognises the necessity for the "sheet anchor of a human rights constitution" (*Ch Tomuschat*), a function which the Convention already performs at the level of the Member States. Due to the lack of specification the Union itself will determine the rank of the ECHR within its legal order. According to the rulings of the ECJ international agreements (as well as international customary law) take precedence over secondary Union law.[87] Secondary law of the Union thus cannot effectively derogate from international obligations of the Union within its legal order. In case of a violation of the Convention by secondary law the ECJ has to declare void the respective act of Union law.[88] The primacy of primary Union law over international agreements and hence also over the ECHR stems from the fact that the Union is not authorised to amend the European Treaties, i.e. the TEU and the TFEU (Art. 48 TEU, Art. 218.5 and 6 TFEU).[89] If, however, a norm of an international agreement, in this case some

[87]Case C-61/94 *Commission v Germany* (ECJ 10 September 1996) para 52; Case C-192/89 *Sevince v Staatssecretaris van Justitie* (ECJ 20 September 1990) para 9.

[88]Schneiders (2010), pp. 259 et seqq., who, regarding primary law, takes a view that differs from the position represented in this text.

[89]In this sense Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECJ 28 March 1996) para 4.

provisions within the ECHR, has the status of a provision of *ius cogens* these norms will take precedence over primary and secondary Union law. Any conflict would lead to the relevant provision of Union law being invalid (Art. 53 VCLT).[90] As a result the Strasbourg Convention thus – in parallel to its position in between constitutional and ordinary law in Germany – will take its place between secondary and primary law of the Union. This implies that even with the accession it will rank below the Charter of Fundamental Rights, which according to Art. 6.1, second clause, TEU is part of primary Union law. Nonetheless, pursuant to Art. 52.3 EUCFR, the ECHR constitutes the substantive minimum standard also for fundamental rights of the Union which will be interpreted through recourse to the ECHR and to the case law of the ECtHR. The competence of the ECtHR to asses the conformity of EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of EU law.[91]

4.3.2 Safeguarding of Substantive and Procedural Coherence

It has often been said that the accession to the ECHR would assist to avoid any risk of conflict between EU law and the ECHR as interpreted in Strasbourg, by placing fundamental rights on a single consistent foundation throughout the EU. At the same time it appears that in the light of the development of fundamental rights in the case law of the ECJ the argument of creating substantive cohesion between the protection of fundamental rights within the Union and the protection by the Strasbourg system is not as powerful as it was during the debate over the last decades on the accession favoured by the Council of Europe and many Member States. The decisions of the Strasbourg Court have become a "means of orientation"[92] for the ECJ which is reflected in the efforts of the Luxembourg Court to follow the interpretation of the ECHR by the Strasbourg Court in the development of general principles of European law. In the *Bosphorus* decision of 2005 the ECtHR confirmed that the Community enjoyed a level of protection of fundamental rights "equivalent" (i.e. comparable, not identical!) to that of the ECHR (*infra* Sect. 4.4). Accordingly it is to be assumed that a Contracting Party does not deviate from the requirements of the Convention if it merely complies with its obligations required by membership in an international organisation.[93] Such a (refutable)

[90]Cf. Schmalenbach, in Calliess and Ruffert (2011), Art. 216 para 50.

[91]Cf. Kingreen, in Calliess and Ruffert (2011), Art. 6 EUV para 27; see also DRAFT Explanatory report the Agreement on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011) 16 final of 19 July 2011, p. 11 para 5.

[92]Cf. H. Mosler, Schlussbericht, in: I. Meier, Europäischer Rechtsschutz, Schranken und Wirkungen, 1982, p. 355, cited in Ress (2002), p. 4.

[93]Case 45036/98 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Şirketi v Ireland* (ECtHR 30 June 2005) para 152 et seq.: While the Convention "does not prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organization [each]

"presumption of compliance with the Convention"[94] is given when substantive guarantees exist and judicial control mechanisms are also provided. Nonetheless, in the context of the increase in ECJ decisions with fundamental rights implications which is to be expected (*supra* Sect. 4.3.1) and given the *Bosphorus* decision, one should recall a statement by *G. Ress* in 2002 according to which it "cannot be excluded that with a lack of an institutional link (by means of accession) the interpretation and application of the ECHR (by the ECtHR and the ECJ) will grow apart without there being any (other) remedy."[95]

At least as urgent as the aspect of ensuring substantive coherence is now the need for procedural coherence between the legal order of the Union and the Strasbourg system.[96] Despite the tendencies of substantive convergence the Union could not itself be party in proceedings before the ECtHR due to its not being a Party to the ECHR. Only accession will allow EU institutions to directly present their standpoint before the Strasbourg Court in cases related to Union law (*ius standi*). At present the Member States are solely responsible for compliance with the ECHR, and also in so far as the execution or application of Union law is concerned. How paradoxical this situation is became evident in the *Matthews* case,[97] which dealt with the issue of the inhabitants of Gibraltar being denied the right to vote in the European Parliament elections. This right was expressly excluded by the terms of Annex II to the Council Decision and the Act of 1976 concerning the European Parliament election by direct universal suffrage.[98] This Act of 1976 was not an

Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."

[94]Case 45036/98 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Şirketi v Ireland* (ECtHR 30 June 2005) para 156: "[T]he presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of the Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order." Unlike the *Bundesverfassungsgericht* ("*Solange II*") the ECtHR does not a priori abstain from an evaluation of the justification and holds complaints, which claim an insufficient level of protection of fundamental rights of the Union, inadmissible pursuant to Art. 35 ECHR; cf. Haratsch (2006), p. 935.

[95]Ress (2002), p. 5 (our translation); Kingreeen, in Calliess and Ruffert (2011), Art. 6 EUV para 23 holds that divergences in case law are "not very likely anymore."

[96]See the third consideration of the Draft Agreement on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16 final of 19 July 2011, p. 2.: "Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe." Cf. also Kornobis-Romanowska, in Barcz (2009), Sect. 65 I pp. 305 et seqq.

[97]Case 24833/94 *Matthews v United Kingdom* (ECtHR 18 February 1999).

[98]Council Decision 76/787/ECSC, EEC, Euratom *relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage*, O.J. L 278/1 (1976), corr. O.J. L 326/32 (1976).

ordinary legislative act of the ECs but an international agreement supplementing the primary law of the EC and thus part of Community law. Hence, it could not be challenged before the ECJ.

The ECtHR affirmed the applicability of Art. 3 of Protocol No. 1 to the ECHR and thus a violation of the European *status activus* (i.e. the human right to free expression in the choice of the legislature). By that the Strasbourg Court assumed a continuing collective responsibility of the Member States to ensure an interpretation of transferred sovereign powers in a way that is in conformity with the Convention. However, the changes to Union law necessary in such a case could not be made solely by the State found in breach by the Court in Strasbourg. In the *Matthews* case, proceedings had been taken only against the United Kingdom, and not against all of the then Member States of the Union. Hence, the accession of the Union to the ECHR is a logical and useful supplement to the codification of the Charter of Fundamental Rights, not only for reasons of *substantive* coherence between the law of the Union and of the Convention but also to establish legal clarity and certainty.

4.4 *Jurisdictional Competition and Coherence: Normative Precautions of the Charter of Fundamental Rights*

Article 6.2 TEU contains an authorisation for the accession of the Union to the ECHR as well as a commitment of the Member States to ensure this very accession, which requires an amendment of the Convention according to the Protocol (No. 8) on the accession of the Union to the ECHR (Art. 1). In the long run the accession will contribute to a decrease of potential divergences in the case law of the Strasbourg and the Luxembourg Court. Competition among the courts has been recognised as an element with structural effects on the law in Europe.[99] It results from overlapping functions of legal protection in the European "compound of constitutions" (*Verfassungsverbund*) and leads to potential areas of conflict.[100]

Such areas of overlap are of special interest in federal and confederal (EU) multilevel governance systems. However, the relationship between the ECJ and the ECtHR is not free from conflict either. This is especially true in cases in which the ECJ established a certain interpretation of the guarantees before the ECtHR and then found itself subject to correction due to subsequent decisions by the Strasbourg Court (*Hoechst* decision). Despite the expectation that the Luxembourg Court would "revise its case law in the sense of an approach towards the Strasbourg

[99]Cf. Merli (2007); Ch. Menè, Judicial review of the relationship between the European courts and the national constitutional courts (Germany, Italy and Spain), PhD thesis 2008.

[100]Cf. Krüger and Polakiewicz (2001), p. 98; Oeter (2007).

Court" the accession of the Union to the ECHR resembles a strategy for conflict prevention. Additionally, with the Treaty of Lisbon this is all the more necessary since the inclusion of the area of freedom, security and justice in the Community method (Art. 67 TFEU) implies an increase of Union competences in areas with sensitive human rights implications (such as asylum, immigration policy and police and judicial cooperation in criminal matters) as a result of which divergences in the case law of the two courts will be more likely.

The situation of a *horizontal* competition between the Strasbourg and the Luxembourg jurisdictions regarding the protection of human rights is the *ratio legis* of Art. 52.3 EUCFR which attempts to ensure the coherence of the European protection of fundamental rights intended by Art. 6.3 TEU in the relation between the ECHR and the EUCFR. Through the transfer clause of sentence 1 of Art. 52.3 EUCFR, which also includes the case law of the ECtHR and of the ECJ, the "meaning and scope" of the rights granted by the ECHR is adopted where these rights are reflected in the Charter. In this context the judgments of the ECtHR have a prejudicial effect for the ECJ in the way of interpretation.[101] Exceptions in the scope are transferred from the law of the Convention if it cannot be inferred from the Charter that a more comprehensive protection than in the Convention is intended.[102] The guarantees of these rights and their possible restrictions are determined in the legal order of the Union by the established principles of the application of the ECHR. It also results from Art. 52.3 EUCFR that the law of the Convention covers all the sovereign action which – directly or indirectly – has a negative effect on the fundamental rights of the individual. In addition to limitations of fundamental rights this may also include a violation of a duty to protect as being in need of justification.[103] The restrictions on the limitations as they result from the ECHR influence the general provision on the restriction of limitations of Art. 52.1 EUCFR but does not replace it.[104]

Upon request the Praesidium of the Convention on Fundamental Rights in its Explanations compiled a list of those provisions of the Charter that correspond to rights of the ECHR as well as a summary of Charter provisions whose scope is wider than that of the corresponding ECHR provisions.[105] Hence, Art. 52.3 EUCFR directly binds the European institutions to the equivalent rights within the ECHR. This in effect ensures that even before the accession of the Union to the ECHR the institutions of the EU must observe the Convention.[106] In so far as Charter provisions correspond to rights granted by the ECHR they have the same meaning and scope. Sentence 2 of Art. 52.3 EUCFR ensures that the level of protection

[101]Schneiders (2010), pp. 241 et seqq.

[102]Schneiders (2010), pp. 180 et seqq.

[103]Schneiders (2010), pp. 184 et seqq.

[104]See Kingreen, in Calliess and Ruffert (2011), Art. 52 GrCh para 28, 38.

[105]Explanation on Article 52 – Scope and interpretation of rights and principles, no. 1 and 2, O.J. C 303/32 et seqq. (2007).

[106]See Callewaert (2003), p. 200; v. Danwitz, in Tettinger and Stern (2006), Art. 52 GrCh para 51.

provided by the ECHR is observed as the minimum standard. This provision also allows an independent development of protection of fundamental rights in the Union more extensive than the ECHR. This guarantees a limited but at the same time substantively continuing independence of the protection of fundamental rights in the Union from the ECHR.[107] Union law can provide further-reaching protection than the ECHR.

An important landmark judgment in the history of the relations between the two European Courts is certainly the one delivered in the *Bosphorus* case, in which the Strasbourg Court considered the protection of fundamental rights under Community law *sensu stricto* – i.e. within the former so-called first pillar – to be "equivalent" to that which the Convention provides. The Court did state that "equivalent" meant the same as "comparable", as any requirement that the organisation's protection be "identical" rather than "comparable" could run counter to the interests of international cooperation (*supra* Sect. 4.3.2).[108] This general competence of the Luxembourg Court for the review of the Union acts with regard to fundamental rights has been put under the condition of a sort of "*Solange*"-reserve competence (i.e. the reserve competence that the German Federal Constitutional Court claims for itself vis-à-vis the judiciary of the ECJ). This means that the presumption of a principally sufficient level of protection of fundamental rights within the Union may be set aside in the circumstances of a particular case if "it is considered that the protection of Convention rights was manifestly deficient."[109]

Actually there seems to be at least one essential difference between the two approaches. Whereas the German Constitutional Court requires the presumption of equivalence to be rebutted that a general or large-scale drop in the EU-standards be established, under the *Bosphorus* jurisprudence the presumption can be rebutted on a case-by-case basis.[110] Thus, the Strasbourg Court has accepted with respect to the "Convention compliance" of the national implementation of EC law mutual recognition as the rule, stricter scrutiny as the exception. In such exceptional cases it takes on a "residual competence" (*Auffangzuständigkeit*). By that the ECtHR can incidentally review the act of Union law because the Strasbourg Court, unlike the

[107]Cf. Braibant (2001), Art. 52, p. 264; v. Danwitz, in Tettinger and Stern (2006), Art. 52 GrCh para 4, 51 et seqq.

[108]Case 45036/98 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Şirketi v Ireland* (ECtHR 30 June 2005) para 155: "State action taken in compliance with legal obligations [flowing from the membership in a supranational organization] is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides." Cf. with regard to the assumption of equivalence Haratsch (2006), pp. 927 et seqq. Also Garlicki (2008), p. 509, must concede that "the manifest deficiency test may not be easy to meet and that the burden of proof seems to be placed upon an applicant [. . .]".

[109]Case 45036/98 *Bosphorus Hava Yollar Turizm ve Ticaret Anonim Şirketi v Ireland* (ECtHR 30 June 2005) para 156.

[110]Cf. Wildhaber (2005b), pp. 47 et seq.

German Federal Constitutional Court, is not restricted by the principle of primacy. With the accession of the Union to the ECHR the existing residual competence of the ECtHR will become a competence for all cases in which a violation of Art. 52.3 EUCFR either by a Union act or a domestic act of implementation is asserted, i.e. it is covered by the minimum level of protection set by the ECHR. However, the Strasbourg Court – in the light of the *Bosphorus* decision – is likely to exercise this competence in the event of an individual application (Art. 34 ECHR) brought before it against any such act only if it establishes that the level of protection of fundamental rights against such an act at domestic or at Union level is "manifestly deficient"[111] and leads – in terms of the admissibility of the application – to a "significant disadvantage" (Art. 35.3 lit. b ECHR) of the applicant.

5 The Relationship Between the National (Constitutional) Courts and the Strasbourg Court Within the Judicial Dialogue in Europe

The relationship between the German Federal Constitutional Court and the ECJ – at least until the *Mangold* decision by the ECJ – was characterised by latent judicial conflict regarding the residual competence claimed by the Karlsruhe Court.[112] Differences between the courts in Karlsruhe and Strasbourg, however, are of a substantive nature.[113] Such manifest divergence in the case law of the German Federal Constitutional Court on the one hand and the ECtHR on the other became evident in the mid-1990s in the case of the secondary school teacher *Vogt* who was dismissed from German school service because of her membership in the German Communist Party (*Deutsche Kommunistische Partei, DKP*). This case, which the German Federal Constitutional Court decided not to entertain on the grounds that the constitutional complaint had insufficient "prospects of success", led the ECtHR to criticise the disproportionate interference with freedom of expression and freedom of association since the German Federal Constitutional Court had not banned this party.[114] Nonetheless the Court found it admissible to oblige every civil servant to political loyalty to the Constitution, i.e. to protect the free democratic basic order.

[111] Similarly the expectations of Kingreeen, in Calliess and Ruffert (2011), Art. 6 EUV para 23.

[112] Cf. Frenz (2009), para 146 et seqq.

[113] Limbach (2000), p. 420.

[114] Case 17851/91 *Vogt v Germany* (ECtHR 26 September 1995), EuGRZ 1995, 590 para 60 et seq. and 66 et seqq.

5.1 The Case Görgülü Before German and European Courts

The further development of the relationship between the Strasbourg Court and the national courts can be highlighted on the basis of the *Görgülü* decision of the German *Bundesverfassungsgericht*. In this case the Court had to decide on the right of access to and custody of a father to his son who was born out of wedlock and who was given up for adoption by his mother one day after he was born. In September 2003 the Naumburg Court of Appeal dismissed the application of the biological father Görgülü to award a mandatory injunction recognising such visiting rights. Following this decision *Görgülü*, a Turkish national living in Germany, submitted an application to the ECtHR pursuant to Art. 34 ECHR. The applicant alleged in particular that a court decision refusing him access to and custody of his son violated his right to respect for his family life under Art. 8 ECHR. The Strasbourg Court ruled that the reasons relied on by the Court of Appeal to suspend the applicant's access to his child were insufficient to justify such a serious interference in the applicant's family life. There had therefore been a violation of Art. 8 ECHR. The Naumburg Court of Appeal, however, in two further decisions overturned the judgment of the Federal Constitutional Court and denied the right of access and custody of *Görgülü* to his biological son.[115] In three constitutional complaints which were lodged, the Karlsruhe Court had to rule on the legal relationship between the European Convention on Human Rights and the German Constitution.

The Court stated and reaffirmed in *Görgülü I* that, in Gemany, the Convention and its Protocols have the status of a federal statute. This implies that, in Germany, as in any other country whose domestic law does not treat the Convention as the supreme law of the land, there is a theoretical possibility of conflict between the requirements of the Convention and those of domestic law.

As the German Constitutional Court had pointed out in *Görgülü I*, a problem can arise in areas where the rights of different parties may give rise to conflict, so that any extension of the right of one party will be tantamount to a restriction of the right of another or may conflict with other provisions of the domestic constitution. In such areas, an extensive interpretation by the ECtHR of one of the rights involved may result in a conflict with domestic constitutional law in so far as this protects conflicting rights of others. The *Bundesverfassungsgericht* mentions family law as one of several examples. Giving an extensive reading to the rights of a biological father under Art. 8 ECHR may theoretically result in restricting constitutionally protected rights to family life of foster parents or of the children who live with them. It is with regard to situations of this type that the reasons of the *Görgülü* decision analyse the possibility of conflict between the Convention and domestic law, and the obligations of German courts with respect to this possibility. The Court's observations sound as if "'multipolar situations' were rare birds whereas in

[115]Cited in German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 17 (in: BVerfGE 111, 307, 312 et seq.) – *Görgülü I* (English translation available online).

real life such situations are daily reality". It is obvious that in a pronouncement of the Strasbourg Court the interests of third parties are duly taken into account. Hence it follows that the Karlsruhe judges should acknowledge that its emphasis on the peculiarity of "multipolar situations" "lacks solid foundations"; the relevant doctrine is suitable only for instances where general regimes are to be established by way of legislation, but not with respect to the execution of judgments in individual cases.[116]

As the Constitutional Court puts it, the German Basic Law has not "taken the greatest possible steps in opening itself to international-law connections."[117] The greatest possible step would have been to endow international agreements and other international laws with the status of constitutional law – or an even higher status – and thereby to reduce to a minimum or even exclude the possibility of conflict between national and international law. This step has not been taken in Germany – neither generally nor with respect to the Convention in particular. The Convention has only been given the status of an ordinary federal statute.[118]

Nevertheless, "the decision of the [ECtHR] must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they [. . .] do not follow the international-law interpretation of the law" when interpreting national law – including the fundamental rights and the guarantees.[119] The very vague legal terms "to take into account" and "to consider" are to be interpreted in the sense of a duty to (understandably) justify decisions (*Begründungspflicht*) that arise when a national court in its decision intends to disregard a guarantee of the ECHR in its interpretation by the ECtHR as this would lead to an irresolvable conflict with a norm of German constitutional law. The terminology used by the *Bundesverfassungsgericht* is meant to underline that national courts are required to embed a judgment of the Strasbourg Court into the relevant differentiated and graduated system of law.[120] The Federal Constitutional Court thus signals to the Strasbourg Court once more after the case of *Caroline* that certain balancing

[116]Cf. Tomuschat (2010), pp. 524 et seq.

[117]German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 34 (in: BVerfGE 111, 307, 318) – *Görgülü I*.

[118]Cf. Lübbe-Wolff (2006), para 8.

[119]German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 50 (in: BVerfGE 111, 307, 324 et seq.) – *Görgülü I*.

[120]Cf. Papier (2005), p. 124, who (p. 123) bases the use of the term "to take into account" and "to consider" also on Art. 46.1 ECHR; this Article, Papier argues, provides that final judgments of the Strasbourg Court are only binding on the *contracting party*, and has no universal validity or bindingness (in the meaning of Sect. 31.1 Statute of the Federal Constitutional Court – BVerfGG). Tomuschat (2010), p 523, criticises this passage of the pronouncement of the Constitutional Court as "unfortunate". In his opinion the conclusion drawn at the end of the legal grounds to the effect that the relevant domestic court "is not bound regarding the actual outcome" of the further proceedings (German Federal Constitutional Court, 2 BvR 1481/04 [Order of 14 October 2004] para 69) "fails grossly in reflecting the correct legal position".

decisions not only have to be taken at domestic level but instead are exclusively matters of the national courts. At the same time, however, the Karlsruhe Court allows for national constitutional complaints in case a German court has not taken notice of an ECtHR decision or has disregarded the domestic legal force of the respective judgment. The *Bundesverfassungsgericht* had previously held that it could act in a corrective way only if the erroneous application of Convention law also conflicted with German constitutional law, especially if it was arbitrary.[121] The German Court in its *Görgülü* decision thus shows its effort to strengthen the general concept of a "commitment to international law" (*Völkerrechtsfreundlichkeit*) of the German Basic Law and its willingness to enter into an open analysis of the arguments of the ECtHR on its grounds, which is characteristic of a dialogue of legal orders.[122]

The responsible German authorities have to regularly interpret national laws in the light of the Convention and the binding effect of the judgments of the ECtHR (Art. 46 ECHR), giving primacy to the guarantees of the Convention in the case of a conflict between the Convention and national law.[123] In the case of a violation of German constitutional law caused by the binding effect of a judgment of the Strasbourg Court, the national law, however, prevails on account of its hierarchically superior position. Accordingly, there is namely the possibility of such a contradiction between the Convention and higher-ranking domestic law, and the Federal Constitutional Court has made it clear that in the case of such a conflict, it is the Basic Law – not the conflicting international agreement – that the German courts would have to apply: "The Basic Law accords particular protection to the central stock of international human rights [. . .]. As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention. The situation is different only if observing the decision of the [ECtHR], for example, because the facts on which it is based have changed, clearly violates statute law to the contrary or German constitutional provisions [or] the fundamental

[121]German Federal Constitutional Court, 2 BvR 731/80 (Order of 17 May 1983) para 63 (in: BVerfGE 64, 135, 157) and 2 BvR 209/84 (Order of 13 January 1987) para 90 (in: BVerfGE 74, 102, 128); a limited constitutional review on the application of the Convention by the specialised courts was for the first time affirmed by the Federal Constitutional Court in the order in the case of *Pakelli*, 2 BvR 336/85 (Order of 11 November 1985) (in: NJW 1986, 1425) and then again in 2 BvR 1226/83, 101, 313/84 (Order of 12 May 1987) para 191 et seq. (in: BVerfGE 76, 1, 78) – *Family Reunification*.

[122]Cf. Schilling (2010), pp. 253 et seqq. (255).

[123]German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 47 (in: BVerfGE 111, 307, 323 et seq.) – *Görgülü I*: "[T]he binding effect of decisions of the [ECtHR] depends on the area of competence of the State bodies and the relevant law. Administrative bodies and courts may not free themselves from the constitutional system of competencies and the binding effect of statute and law by relying on a decision of the [ECtHR]. Both, a failure to consider a decision of the [ECtHR] and the 'enforcement' of such a decision in a schematic way, in violation of prior-ranking law, may therefore violate fundamental rights in conjunction with the principle of the rule of law" (Art. 20.3 GG).

rights of third parties. 'Take into account' means taking notice of the Convention provision as interpreted by the [ECtHR] and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law. In any event, the Convention provision as interpreted by the [ECtHR] must be taken into account in making a decision; the court must at least duly consider it."[124] In this context, however, the Karlsruhe Court refers only to the entirely theoretical situation in which the principal facts of a case have changed after it had already been decided by the Strasbourg Court.[125]

In the cases of *Görgülü II* and *III* the German *Bundesverfassungsgericht* held that the Naumburg Court failed in its obligation to deal with the question "how the Art. 6.2 sentence 1 of the German Basic law" [guarantee of the parents' rights] could be interpreted in a way that respects the obligations of the Federal Republic of Germany under international law."[126] In *Görgülü III* the Federal Constitutional Court reaffirmed that an applicant can by means of a constitutional complaint rely on the affected fundamental right in connection with the principle of the rule of law of the national constitution by alleging that the national authorities have disregarded or not taken into account a judgment of the ECtHR.[127]

The Italian *Corte Costituzionale* comes to a similar conclusion in its landmark decision 349/2007 in which it had to examine the compatibility of an *ordinary* domestic provision with Art. 1 of Protocol No. 1 to the ECHR on the protection of property. The Italian Court confirmed its case law according to which the ECHR ranks as an ordinary law in Italy. At the same time, however, it emphasised the obligation of the "national legislator to respect the provisions of the Convention with the consequence that an ordinary domestic norm that is incompatible with a provision of the ECHR and thus with 'international obligations' pursuant to Art. 117.1 [of the Italian Constitution][128] for those reasons violates this constitutional standard."[129] Also as regards the judges' obligation to interpret domestic law in the

[124]German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 62 (in: BVerfGE 111, 307, 329) – *Görgülü I*.

[125]Following Lübbe-Wolff (2006), para 17, "this latter possibility should normally never come to be realized, because, as the Constitutional Court has stressed, courts and other state organs are obliged to do anything legally possible to interpret German law in such a way as to avoid its realization".

[126]German Federal Constitutional Court, 1 BvR 1664/04 (Order of 5 April 2005) para 25 – *Görgülü II* (English translation available online).

[127]German Federal Constitutional Court, 1 BvR 2790/04 (Order of 10 June 2005) para 35 – *Görgülü III* (English translation available online), referring to German Federal Constitutional Court, 2 BvR 1481/04 (Order of 14 October 2004) para 30, 60 et seqq. – *Görgülü I*.

[128]Article 117 of the Italian Constitution (as of 18 October 2001) states: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations [. . .]."

[129]Cf. Italian Constitutional Court, judgment 349/2007 (22 October 2007), Legal considerations sub 6.2 (our translation): "[. . .] l'obbligo del legislatore ordinario di rispettare dette norme, con la conseguenza che la norma nazionale incompatibile con la norma della CEDU e dunque con gli

light of the ECHR there is significant equivalence (even including the wording) between the German *Bundesverfassungsgericht* and the Italian *Corte Costituzionale*. The Italian Constitutional Court regards the ordinary national courts as obliged to "take into consideration Art. 117.1 of the Italian Constitution as the relevant standard for the evaluation and to determine on a systematic basis whether the (national) norm reviewed is in compliance with Art. 1 of Protocol No. 1 to the ECHR as interpreted by the ECtHR." If the ordinary judge concludes that there is no interpretation that would be in conformity with the Convention or if he even doubts this he has to submit the question to the Constitutional Court, which examines the issue in compliance with Art. 117.1 of the Italian Constitution.[130] According to the decision which had to rule on the conformity of an ordinary law with the ECHR, it is not the guarantee of the ECHR itself which has to be "taken into consideration" but rather the national implementing norm of Art. 117.1 of the Italian Constitution which requires an interpretation of domestic law consistent with the "international obligations" of Italy. This is merely a difference of method and not of substance as regards the binding nature of the ECHR. Additionally the Italian Constitutional Court establishes "in a general line" that the guarantees of the ECHR contain "interpretative value" also for the constitutional parameters.[131]

Thus, the *Görgülü* decision series dwelt on the issue of conflict at some length and underlined at the very beginning the "national sovereignty" aspect in the case of a conflict between national law and the rights in the Convention. What aroused particular criticism in this regard is that the Court used the terms "take into account" and "consider" (rather than "abide by", "obey" or "implement") to specify the national courts' duties in dealing with ECtHR judgments, that it referred to certain reserve competences of "sovereignty", and that it seemed to disapprove of applying ECtHR judgments in a "schematic" way.[132] Nevertheless, the Federal Constitutional Court stated the ordinary judge's obligation to interpret German

'obblighi internazionali' di cui all'art. 117, primo comma, viola per ciò stesso tale parametro costituzionale."

[130]Cf. Italian Constitutional Court judgment 349/2007 (22 October 2007), Legal considerations sub 6.2 (our translation): "[. . .] che deve essere preso in considerazione e sistematicamente interpretato l'art. 117, primo comma, Cost., in quanto parametro rispetto al quale valutare la compatibilità della norma censurata con l'art. 1 del Protocollo addizionale alla CEDU, così come interpretato dalla Corte dei diritti dell'uomo di Strasburgo [. . .]. Ne consegue che al giudice comune spetta interpretare la norma interna in modo conforme alla disposizione internazionale, entro i limiti nei quali ciò sia permesso dai testi delle norme. Qualora ciò non sia possibile, ovvero dubiti della compatibilità della norma interna con la disposizione convenzionale 'interposta', egli deve investire questa Corte della relativa questione di legittimità costituzionale rispetto al parametro dell'art. 117, primo comma [. . .]".

[131]Cf. Italian Constitutional Court judgment 349/2007 (22 October 2007), Legal considerations sub 6.1.1 (our translation): "In linea generale, è stato anche riconosciuto valore interpretativo alla CEDU, in relazione sia ai parametri costituzionali che alle norme censurate [. . .]". The Court thereby refers to judgment n. 505/1995 and ordinanza n. 305/2001.

[132]Lübbe-Wolff (2006), para 9 and 3 with references to Kadelbach (2005), 480, 484, and Cremer (2004), p. 688.

constitutional law (Art. 6.2 GG) in accordance with the international obligations of Germany. While the domestic courts are under an obligation to give full effect to the judgments of the ECtHR, they have to avoid situations in which implementation of an ECtHR judgment would result in violation of constitutionally protected rights of the other parties to the original dispute. If an ordinary court fails to take due account of a decision of the ECtHR, the party concerned may take this to the Constitutional Court as a violation of the relevant constitutional right.[133] Nevertheless, on the part of the ECtHR, the Polish judge admitted in a general comment that "the Court (scil: the ECtHR) must remain particularly cautious in cases concerning private relations, where – at least to some extent – the Convention applies horizontally. The ECtHR lacks full information, here, and local courts seem much better equipped to assess what solution would be best in protecting the rights and interests of all involved parties. Such caution would apply, particularly, to cases in which the lapse of time may change the situation."[134]

As shown in the reasoning outlined above, the German *Bundesverfassungsgericht* (case *Görgülü*) and the Italian *Corte Costituzionale* (decision 349/2007), both recognise the ECHR – regardless of its status in the law of the Member States[135] – as a "constitutional instrument of European public order"[136] in the sphere of protection of human rights which the supreme courts of the States Parties to the Convention cannot escape unless they want to risk "helping" the applicant to gain a claim for *restitutio in integrum* in the sense of satisfaction if he/she successfully sues the relevant State for violation of the Convention or one of its Protocols on the domestic level (Art. 41 ECHR).[137] This process of

[133]Cf. also Papier (2006), p. 2; Dörr (2006), p. 1092; Meyer-Ladewig and Petzold (2005), p. 19; Roller (2004).

[134]Garlicki (2008), p. 521.

[135]Cf. Grabenwarter (2009a), Sect. 3; Hoffmeister (2001), pp. 357 et seqq., 364 et seqq.

[136]Case 15318/89 *Loizidou v Turkey* (ECtHR 18 December 1996) para 70, 75, 93; cf. Hoffmeister (2001), p. 353: ECHR as "fundamental rights constitution [*Grundrechtsverfassung*]"; see already Frowein (1988), p. 152, who calls the ECHR a "European partial constitution [*europäische Teilverfassung*]" which has formed a "common European area of fundamental rights [*gemeineuropäischer Grundrechtsfreiraum*]".

[137]Cf. Case 71503/01 *Assanidze v Georgia* (ECtHR 8 April 2004) para 198: "[A] judgment in which it finds a breach [of the convention] imposes on the respondent State a legal obligation to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach." In the *Görgülu* case the ECtHR awarded the applicant 15.000 € in damages: Case 74969/01 *Görgulü v Germany* (ECtHR 26 February 2004). Lübbe-Wolff (2006), para 11 et seq., has stressed – in reference to the *Görgülü I* decision of the FCC (para 34) – that "the statement that the national constitution has precedence is a statement made *from the point of view of domestic law*. [. . .] From the point of view of international law, the matter looks very different. Obviously, a national court which, in a case of conflict between the national constitution and an international agreement, gives precedence to the constitution, will, in doing so, produce a violation of international law [. . .]. In such a case, *future* conflicts of the same type can be avoided by changing the relevant law." See also Weber (2007), p. 1759, critically distancing from the *Görgülü I* decision of the German Federal Constitutional Court.

"constitutionalisation" of international human rights systems (especially the ECHR) forms the third side of a triangle, which due to the danger of an overlapping of the judiciaries at different levels that are behind the substantive regimes of fundamental rights has even been called a "Bermuda Triangle";[138] it consists of three vertices: the various national supreme or constitutional courts, the ECJ and the ECtHR.[139]

5.2 *The Case Caroline von Hannover Before German and European Courts*

In the same line is the ruling of the German Federal Constitutional Court in the last *Caroline* judgment of 26 February 2008 – part of the famous series of landmark judgments in the *Caroline von Hannover* case which have deeply influenced the relationship between the Strasbourg Court and the German *Bundesverfassungsgericht*.[140] The Strasbourg Court had considered that the German courts had not struck a fair balance between the competing interests involved, namely the respect for her private life guaranteed by Art. 8 ECHR against the freedom of expression guaranteed by Art. 10 ECHR. Accordingly the Strasbourg Court held that there had been a violation of Art. 8 ECHR and that it was not necessary to rule on the applicant's complaint relating to the respect for her family life.[141]

The Federal Constitutional Court pointed out in its final decision that the ordinary judges have to interpret the German constitutional provisions on the limits of the freedom of press in the light of the guarantees of the ECHR as they are interpreted by the ECtHR, and that they have to balance the reluctant constitutional guarantees, i.e. the freedom of press on the one hand and the protection of the private life of *Caroline* on the other, in accordance with the relevant guarantees of the ECHR. The *Caroline von Hannover* decisions confirm the thesis of an ongoing

[138] See remarks of former Advocate General at the ECJ *C. O. Lenz* to the *Gibraltar* judgment of the ECtHR, EuZW 1999, pp. 311 et seq.; critical Limbach (2000), pp. 417 et seqq.; the term is also used by Garlicki (2008), p. 512, but in the sense of "collisions [within] the triangle of cooperation [that] may degenerate into a 'Bermuda triangle' in which individual rights and liberties might simply disappear".

[139] Cf. Garlicki (2008), pp. 511 et seq.

[140] *Caroline von Hannover* had on several occasions unsuccessfully applied to the German courts for an injunction preventing any further publication of a series of photographs of herself with her children on the ground in the German magazines "Bunte", "Freizeit Revue" and "Neue Post". *Caroline* claimed that they infringed her right to protection to control the use of her image. The Federal Constitutional Court granted the applicant's injunction regarding the photographs in which she appeared with her children on the ground that their need for protection of their intimacy was greater than that of adults. However, the German Constitutional Court considered that the applicant, who was undeniably a contemporary "public figure", had to tolerate the publication of photographs of herself in a public place, even if they showed her in scenes from her daily life rather than engaged in official duties. The Constitutional Court referred in that connection to the freedom of the press and to the public's legitimate interest in knowing how such a person generally behaved in public.

[141] Cf. Case 59320/00 *Hannover v Germany* (ECtHR 24 June 2004).

constitutional discourse about the scope and limits of fundamental rights. Domestic courts and constitutional courts increasingly apply the art of distinction, well-known to common law countries, in order to avoid head-on collisions with the ECHR. This "tactic of avoidance" is deemed to represent a soft answer to the potential ambitions of the ECtHR to become *the* constitutional court of Europe.[142] Nonetheless, the *Caroline* decision of the ECtHR still raises the fundamental question if the Strasbourg Court should provide a "common European [i.e. *ius publicum europaeum*] (minimum) standard for the protection of human rights" through leading – and in structural and systematic terms corrective – decisions rather than through merely "bringing individual justice in a single case" and thereby through "balancing in the individual case".[143]

5.3 *Confirmation of Coherent Case Law in Relations Between the German Federal Constitutional Court and the ECtHR: The* Zaunegger *Case and the Cases* Schmitz v. Germany *and* Mork v. Germany

Coherence in the case law of the ECtHR and the German Federal Constitutional Court can also be found in the decision of the Karlsruhe Court in the case of *Zaunegger*, which dealt with the question of whether it is in accordance with the German Basic Law that a transfer of parental custody for children born out of wedlock (whether in joint custody or in sole custody) to the father beneath the threshold of removal of custody of Section 1666 BGB (*Bürgerliches Gesetzbuch*, German Civil Code) is not possible against the mother's will, that having regard to the relevant provisions of family law is not possible. The ECtHR when first deciding the case held that the general exclusion of a judicial review of the initial attribution of sole custody to the mother with regard to the aim pursued, i.e. the protection of the well-being of a child born out of wedlock, was disproportionate. Hence, Art. 14 in conjunction with Art. 9 ECHR was violated.[144] Subsequent to and in accordance with this decision the Federal Constitutional Court found that Section 1626a para 1 no. 1 and Section 1672 para 1 BGB in the version of the Act Reforming the Law of Parent and Child (*Gesetz zur Reform des Kindschaftsrechts*) of 16 December 1997[145] are incompatible with Art. 6.2 of the Basic Law.[146]

Given the background of this development it is far from certain whether the assumption will be confirmed that further conflicts between the Federal Constitutional

[142]Nickel (2009), pp. 337 et seq.

[143]Cf. Papier (2005), p. 126 (our translation); agreed on by Müller (2005), p. 23.

[144]Case 22028/04 *Zaunegger v Germany* (ECtHR 3 December 2009).

[145]BGBl. 1997 I, p. 2942.

[146]German Federal Constitutional Court, 1 BvR 420/09 (Order of 21 July 2010) Headnote 1.

Court and the Strasbourg Court are more likely as a stronger ECHR will develop into an independent objective legal order, which like the law of the EU would have *direct* effect within the States Parties to the Convention.[147]

As long as the Council of Europe's "living instrument" keeps growing, differences between the levels of protection of the ECHR and national constitutions can, however, appear anywhere, and anytime.[148] This is particularly true after the series of judgments of the ECtHR in the cases of *M. v. Germany*,[149] *Kallweit v. Germany*,[150] *Schmitz v. Germany*[151] and *Mork v. Germany*.[152] Until 1998, in Germany the maximum duration of the first placement in preventive detention could not exceed ten years. After the relevant provision of the Criminal Code was changed and infinite preventive detention was made possible, and German courts prolonged the detention also of detainees who had been convicted *before* 1998, the ECtHR held that this retrospective application violated the Convention. All provisions on the retrospective prolongation of preventive detention and on the retrospective order of such detention were held incompatible with the Basic Law by the *Bundesverfassungsgericht* which overruled its earlier case law. The German Court held again that "the guarantees of the ECHR have constitutional significance in that they influence the interpretation of fundamental rights and of principles of the rule of law contained in the Basic Law. [Thereby] the Bundesverfassungsgericht takes into account the decisions of the [ECtHR] even if they do not concern the same subject-matter of the dispute. This is based on the de facto function of guidance and orientation which the case law of the ECtHR in interpreting the ECHR contains, even beyond the individual case."[153] With reference to the domestic fundamental rights that "have to be understood as characteristics of human rights and which have absorbed them as minimum standards" (Art. 1.2 GG), the Court explains "the openness of the Basic Law towards international law is the expression of an understanding of 'sovereignty' that not only does not hinder integration into inter- and supranational contexts as well as their further development, but even has that as a precondition. Against this background the 'last word' of the German Constitution does not oppose a European dialogue of the Courts but instead is its normative foundation."[154]

[147]In this sense the evaluation of Voßkuhle, in: v. Mangoldt et al. (2010), Art. 93 GG para 87 et seq.

[148]Cf. Ingrid Leijten (2011)

[149]Case 19359/04 *M. v Germany* (ECtHR 17 December 2009).

[150]Case 17792/07 *Kallweit v Germany* (ECtHR 13 January 2011).

[151]Case 30493/04 *Schmitz v Germany* (ECtHR 9 June 2011).

[152]Case 31047/04 and 43386/08 *Mork v Germany* (ECtHR 9 June 2011)

[153]German Federal Constitutional Court, 2 BvR 2365/09 et al. (Judgment of 4 May 2011) para 88, 89 (our translation).

[154]German Federal Constitutional Court, 2 BvR 2365/09 et al. (Judgment of 4 May 2011) para 89 (our translation)

This is a remarkable fact of "dialogue", as indeed, the ECtHR also seems to have noticed. The Court stresses its enthusiastic appreciation of Germany's efforts to comply with the Convention by stating that "[i]t welcomes the Federal Constitutional Court's approach for interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level."[155]

6 The Relationship Between the National Supreme Courts and the Luxembourg Court

6.1 From a General Guarantee of the Unalterable Standards of Basic Rights Through Ultra Vires Review to Identity Review

This aspect is mainly focused on the quarrel between the Luxembourg Court and the German Federal Constitutional Court caused by the *Solange I* decision (1974) where the German Court reserved the competence to review mainly secondary Union law (i.e. directives, regulations and decisions) in the light of the fundamental rights enshrined in the German Constitution as far as these legal acts have to be executed by German authorities. In 1986 the German Court determined that the legal protection by the institutions of the EC, especially of the ECJ, was equivalent to the protection of fundamental rights guaranteed by the German list of constitutional rights (*supra* before Sect. 1).[156] In its decision on the Treaty of Maastricht the Federal Constitutional Court confirmed that where necessary it is willing to procedurally guarantee protection of fundamental rights if the substance of these fundamental rights is threatened by a decrease in European standards of fundamental rights.[157]

[155]Case 30493/04 *Schmitz v Germany* (ECtHR 9 June 2011) para 41; Case 31047/04 and 43386/08 *Mork v Germany* (ECtHR 9 June 2011) para 54.

[156]German Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) para 104, 107, 130 (in: BVerfGE 73, 339, 376, 378, 384) – *Solange II*: "There are no decisive factors to lead one to conclude that the standard of fundamental rights which has been achieved under Community law is not adequately consolidated and is only of a transitory nature [. . .]. Nor is it to be expected in the view of the state of European Court case law achieved at the present stage that a decline in the standards of fundamental rights under Community law might result through the legal connection of Community law with the constitutions of member states to an extent that makes it impossible on constitutional grounds to regard a reasonable protection of fundamental rights as being generally available." Cf. the comment of Rupp (1987), pp. 241 et seq.

[157]German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) paras 106, 157 (in: BVerfGE 89, 155, 188, 210) – *Maastricht* (English translation in Oppenheimer 1994, pp. 527–575): "If, for instance, European institutions or authorities were to apply or extend the Union Treaty in some way which was no longer covered by the Treaty in the form which constituted the basis of the German law approving it, the resulting legal act would not be binding

This interrelation between the national reserve competence regarding the "general guarantee of the unalterable standards of basic rights" on the one hand and the guarantee for protection of fundamental rights by the Luxembourg Court "in each individual case for the entire territory of the European Communities" on the other was coined by the Federal Constitutional Court with the term "relationship of cooperation [*Kooperationsverhältnis*]".[158] The "how" of this review, however, remained unanswered. In its decision on the *Banana Market* Regulation the German Court, however, asserted its position on the need for protection of fundamental rights by EC law, with reference to the judgments of the ECJ in relation to the Banana Market Regulation, which, "in so far as they generally safeguard the

on German sovereign territory. The German organs of State would be prevented, on constitutional grounds, from applying those legal acts in Germany. Accordingly, the Federal Constitutional Court examines whether legal acts of the European institutions and bodies keep within or exceed the limits of the sovereign rights granted to them (cf. BVerfGE 58, 1 [30f.]; 75, 223 [235, 242]). [. . .] Hitherto a dynamic extension of the existing Treaties has been based on a liberal application of Article 235 of the EEC Treaty, along the lines of a 'competence to perfect the Treaty' [i.e. the lacuna-filling competence], on the idea of the inherent competences of the European Communities ('implied powers') and on an interpretation of the Treaty as implying the fullest possible utilisation of Community powers ('effet utile') (cf. Zuleeg, in: von der Groeben, Thiesing, Ehlermann, EWG-Vertrag, 4th edition 1991, Art. 2, para 3). In future, however, when Community institutions and bodies interpret rules conferring competence, it will have to be borne in mind that the Union Treaty draws a fundamental distinction between the exercise of a sovereign power granted on a limited basis and amendment of the Treaty. Any interpretation of that Treaty must not, therefore, amount in effect to an extension of it. Such an interpretation of rules conferring competences would not give rise to any binding effect for Germany"; in its decision on the Treaty of Lisbon (German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 338 (in: BVerfGE 123, 267, 399 et seq.) – *Lisbon*) the Federal Constitutional Court underlines that it had already found in its decision on the Treaty of Maastricht "whether legal instruments of the European institutions and bodies remain within the limits of the sovereign powers conferred on them or if the Community jurisdiction interprets the treaties in an extensive manner that is tantamount to an inadmissible autonomous Treaty amendment."

[158]Cf. German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) para 70 (in: BVerfGE 89, 155, 174 et seq.) – *Maastricht*: "The Federal Constitutional Court guarantees, by virtue of its jurisdiction [. . .], that persons resident in Germany are assured in general of effective protection of basic rights, even in relation to the sovereign power of the Communities, and that this protection is essentially to be regarded as substantively equivalent to the protection of basic rights laid down as inalienable by the Basic Law, especially as the Court guarantees in general the substance of the basic rights. The Federal Constitutional Court thus also safeguards that substance vis-à-vis the sovereign power of the Community (cf. BVerfGE 37, 339 [386]). The acts of a special public authority of a supranational organization, which is separate from the State authority of the Member States, also concern those entitled to basic rights in Germany. They thus affect the guarantees contained in the Basic Law and the tasks of the Federal Constitutional Court which have as their object the protection of basic rights in Germany and, to that extent, not only in relation to German State organs [. . .]. However, the Federal Constitutional Court exercises its jurisdiction over the applicability of secondary Community law in Germany in a 'relationship of cooperation' with the European Court of Justice. The European Court of Justice guarantees the protection of basic rights in each individual case for the entire territory of the European Communities and the Federal Constitutional Court is therefore able to confine itself to providing a general guarantee of the unalterable standard of basic rights (cf. BVerfGE 73, 339 [387])."

essential content of fundamental rights", have been met, because the case law of the ECJ "generally ensure[s] effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law."[159] This is considered a confirmation of the formula used by the Federal Constitutional Court in its *Solange II* decision which then was adopted in the first sentence of Art. 23.1 GG.[160] Thus, to revive domestic protection of fundamental rights vis-à-vis acts of secondary Union law would require a – hypothetical – general decline of fundamental rights in their substantive aspects.

A new stage in the relation between German constitutional jurisdiction and the ECJ, which was established to "ensure that in the interpretation and application of the Treaties the law is observed" (Art. 19.1 TEU), could be initiated by the judgment of the Federal Constitutional Court on the Union Treaty of Lisbon.

Here the Court, in an intentionally ambiguous way, claims exclusive competence within the context of an *identity review* (*Identitätskontrolle*) for an *ultra vires review* in accordance with the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*) – and in accordance with the principle of subsidiarity (sentence 2 of Art. 5.1 and 5.3 TEU) – "where Community and Union institutions transgress the boundaries of the sovereign powers accorded to them by way of conferred power", especially "if legal protection cannot be obtained at the Union level." It, however, limits this reserve competence for a review to cases of "*obvious* transgressions".[161] On the other hand and with regard to "the [. . .] core content of the Basic Law's constitutional identity" it claims the right to review "whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, which are declared inviolable in Article 79.3 of the Basic Law, are violated."[162] This right – previously claimed by the Federal Constitutional Court in its *Maastricht* judgment – to review (1) "whether legal acts of the European institutions and bodies keep within or exceed the limits of the

[159]German Federal Constitutional Court, 2 BvL 1/97 (Order of 7 June 2000) para 61 (in: BVerfGE 102, 147, 164) – *Banana Market*; Cf. the comment of Classen (2000), pp. 1157 et seqq.

[160]Article 23.1, first sentence, GG: "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."

[161]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 240 et seq. (in: BVerfGE 123, 267, 353 et seq.) – *Lisbon*; see also para 339: "[. . .] in any case in the *clear* absence of a constitutive order to apply the law [. . .]" (emphasis added).

[162]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 240 et seq. (in: BVerfGE 123, 267, 353 et seq.) – *Lisbon*. The Court thereby refers to its judgment 2 BvR 2236/04 (18 July 2005) para 70 (in: BVerfGE 113, 273, 296) – *European Arrest Warrant*.

sovereign rights granted to them"[163] and (2) whether "a general guarantee of the unalterable standards of basic rights" is safeguarded[164] has now been supplemented by the Karlsruhe judges by a third analysis of the revival of the Federal Constitutional Courts' review power that is "rooted in constitutional law."

Referring to the German Federal Constitutional Court, the Polish Constitutional Tribunal also shares the view "that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on [...]. Therefore, constitutional identity is a concept which determines the scope of 'excluding – from the competence to confer competences – the matters which constitute [...] "the heart of the matter", i.e. are fundamental to the basis of the political system of a given state', the conferral of which would not be possible pursuant to Article 90[165] of the [Polish] Constitution."[166] Despite the expansion of the protection of fundamental rights at the international level, and the binding force of the Charter of Fundamental Rights as a means of creation of identity at the supranational level,[167] the national fundamental rights, given their different historical shape and judicial review, remain a key element in the catalogue of identity values of national constitutions[168] and thus vehicles to review the process of transferring "sovereign powers" to the Union.

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[163]German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) para 106 (in: BVerfGE 89, 155, 188) – *Maastricht*; previously in: German Federal Constitutional Court, 2 BvR 1107, 1124/77 and 195/79 (Order of 23 June 1981) para 91 et seq. (in: BVerfGE 58, 1, 30 et seq.) – *Eurocontrol I*; German Federal Constitutional Court, 2 BvR 687/85 (Order of 8 April 1987) para 43, 58 (in: BVerfGE 75, 223, 235, 242) – *Kloppenburg*.

[164]German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) para 70 (in: BVerfGE 89, 155, 175) – *Maastricht*.

[165]Article 90.1 of the Polish Constitution provides: "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."

[166]Polish Constitutional Tribunal, Decision Ref. No. K 32/09 (24 November 2010 English translation available online) pp. 22, 40, referring to K. Działocha, Commentary to Art. 8 of the Constitution of the Republic of Poland, in L. Garlicki (ed.), Konstytucja RP, Komentarz, Warszawa 2007, vol. 5, p. 14. The Polish Constitutional Court (p. 23) includes the following matters in the concept of the constitutional identity, thus prohibiting a conferral of "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."

[167]Critical with regard to the Charter of Fundamental Rights of the EU Körner (2009), p. 359 et seqq.

[168]See Polish Constitutional Tribunal, Decision Ref. No. K 32/09 (24 November 2010) p. 23: "The constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture."

6.2 *Bone of Contention and Pacifying the Fronts: The Mangold Case and the Honeywell Case*

Among the ECJ decisions that have fostered suspicions of an *ultra vires* application of law is the case of *Tanja Kreil*[169] that opened up service in the German Armed Forces to women. This decision probably met "the outermost limits of acceptable legal interpretation" and would have encountered severe criticism if it had not met a political trend.[170] An example of "[ECJ] case law transgressing the limits" of the competences conferred by the Treaty is considered to be the 2005 case of *Mangold*.[171]

6.2.1 The *Mangold* Case

Mangold had had a fixed-term employment contract, the limitation of which had been deliberately based by both parties to the contract exclusively on sentence 4 of Section 14.3 of the German "Law on Part-Time Working and Fixed-Term Contracts" (*Gesetz über Teilzeitarbeit und befristete Arbeitsverträge – Teilzeit- und Befristungsgesetz* – TzBfG), thereby intentionally triggering court proceedings. This provision – valid until 31 December 2006 – permitted a fixed term to be set for the employment relationship with an employee who had reached the age of 52 without justification other than the age of the employee and without limitation regarding duration or number of renewals. The case was referred to the ECJ for preliminary ruling by the Munich Labour Court. The ECJ held that fixed-term employment contracts pursuant to sentence 4 of Section 14.3 TzBfG introduced direct discrimination on grounds of age. Unequal treatment on grounds of age could be justified by Art 6.1 of Directive 2000/78/EC[172] – which at the time of the ECJ decision had not yet been transposed into German law – only if a legitimate aim was thereby pursued. Making age the only criterion required for setting a fixed term for the employment contract – with no consideration of the particular case of the individual employee and without "proof" of the objective necessity of the amended provision for encouraging the employment of older unemployed persons – was neither appropriate nor necessary for achieving the aim pursued.[173]

The fact that Directive 2000/78/EC, in accordance with the additional period for transposition provided for by the Directive itself (Art. 18(2) of the Directive), had not yet been implemented in Germany had been regarded immaterial by the ECJ.

[169]Case C-285/98 *Tanja Kreil v Germany* (ECJ 11 January 2000).

[170]Tomuschat (2005), p. 872 (our translation).

[171]Herzog and Gerken (2008); Bauer and Arnold (2006); Preis (2006).

[172]Council Directive 2000/78/EC *establishing a general framework for equal treatment in employment and occupation*, O.J. L 303/16 (2000).

[173]Case C-144/04 *Werner Mangold v Rüdiger Helm* (ECJ 22 November 2005) para 60 et seqq.

On the one hand, a period for transposition that had not yet expired was without significance due to the principle of advance effect (*Vorwirkung*). This principle provides that Member States must refrain from taking any measures that are seriously liable to compromise the attainment of the objective set out in a Directive. Sentence 4 of Section 14.3 TzBfG was considered by the ECJ as such a measure.[174] On the other hand, the prohibition of discrimination on grounds of age had to be regarded as a general principle of Union law that was effective unconditional of the Directive. The ECJ thus held that the principle of non-discrimination was not laid down in Directive 2000/78/EC but was rather restated by it. The prohibition of discrimination on various grounds included in the Directive (religion, belief, disability, age, sexual orientation) already originated from several international instruments and from the constitutional traditions common to the Member States.[175]

In its decision *Kücükdeveci* of 19 January 2010 the ECJ clearly emphasised the problems raised by the core statements of the *Mangold* judicature: Section 622 BGB, according to which periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period, violates the Union's fundamental rights principle of non-discrimination on grounds of age as reflected in Directive 2000/78/EC and may thus not be applied in that specific case. In contrast to the *Mangold* case, by the time of the dismissal the period for transposing the relevant anti-discrimination directive had already expired.[176]

The *Mangold* decision of the ECJ has been qualified as a "misjudgment."[177] But even those who are in favour of the result of the decision recognise significant methodical weaknesses in the reasoning of the Court. The horizontal advance effect (*Dritt-Vorwirkung*) assumed by the ECJ – in the relationship between the employer and the employee – has been regarded as a violation of Art. 288.3 TFEU and thus as a disregard of the express will of the European primary law legislator. The finding of the ECJ that there existed a general principle of Union law prohibiting discrimination on grounds of age was considered the result of an invention, a grasp into the Platonic sphere of ideals ("ein Griff in den 'platonischen Begriffshimmel'")[178] by which the Court would act as the creator of primary law – because Finland is the only Member State of the EU that now prohibits discrimination based on age (Paragraph 6.2 of the Finnish Constitution). The specific application of the principle of non-discrimination is entrusted by Art. 10 TFEU to the European legislator, not to the ECJ. Such political law-making by the Court was not envisaged by the

[174]Case C-144/04 *Werner Mangold v Rüdiger Helm* (ECJ 22 November 2005) para 67 et seqq.

[175]Case C-144/04 *Werner Mangold v Rüdiger Helm* (ECJ 22 November 2005) para 74.

[176]Case C-555/07 *Kücükdeveci v Swedex GmbH & Co. KG* (ECJ 19 January 2010) para 20, 21, 50, 51, 54.

[177]Cf. Gerken et al. (2009), p. 67.

[178]Papier (2009), p. 114 with reference to the criticism in Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* (Opinion of Advocate General *Jàn Mazák* 15 February 2007) para 79 et seqq., 87 et seqq., 138.

transfer of German sovereign power to the EU for it violates the principles of the democratic state governed by the rule of law.[179]

6.2.2 The *Honeywell* Case: Assessing the *Mangold* Judgment

After the German Federal Labour Court, applying the *Mangold* judgment in a decision of 26 April 2006[180] regarding fixed-term employment for older persons, declared that the possibility in sentence 4 of Section 14.3 TzBfG to conclude fixed-term contracts with employees aged 52 and older without giving objective reasons was "inapplicable" for reason of discrimination on grounds of age,[181] the defeated entrepreneur raised a constitutional complaint against this judgment. Some critics of the *Mangold* decision saw the Federal Constitutional Court faced with the alternatives either "to review the excessive case law of the ECJ more strictly in the future or to give up its function as a watchdog once and for all."[182]

In its judgment of 6 July 2010 the German Federal Constitutional Court has rejected the constitutional complaint as unfounded.[183] On the ultra vires review the judges of the Karlsruhe Court have taken up a "reserved" stance[184] by pointing out again that "as long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany [. . .]. Ultra vires review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences. A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their competences in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of competences is in other words sufficiently qualified [. . .]. This means that the act of the authority of the European Union must be manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law."[185]

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[179]Cf. Gerken et al. (2009), pp. VII et seq., 17 et seqq., 67 et seqq.

[180]German Federal Labour Court (Bundesarbeitsgericht), 7 AZR 500/04 (Judgment of 26 April 2006) and press release no. 27/06 – *Honeywell*.

[181]Cf. Bauer (2006).

[182]Herzog and Gerken (2008), p. 2 (our translation).

[183]Cf. German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) – *Honeywell*. *(English translation available online)*

[184]German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) para 66 – *Honeywell*.

[185]German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) para 60 et seq. – *Honeywell*.

At the same time the Federal Constitutional Court concedes to the ECJ in view of the "'uniqueness' of the Treaties and goals that are inherent to them" methodological autonomy in finding the law, which must be interpreted as a recognition of the Court of Justice's case law tradition, which is orientated in line with the *effet utile* principle. The Karlsruhe Court even admits to the Luxembourg Court a "right to tolerance of error" in individual cases as long as there are neither "considerable [shifts] in the structure of competences [nor] impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens."[186] As a result, the case law of the *Bundesverfassungsgericht* as characterised by the *Solange II* decision (*supra* Sect. 6.1) has been confirmed and the relationship of cooperation with the ECJ has not been denounced (*infra* Sect. 6.3).

Thus, the Karlsruhe Court has avoided an open conflict with the ECJ – a "clash of courts" – and proved sense of proportion. The expected clarification[187] of the requirements under which the reserve competence of the Federal Constitutional Court can be activated was achieved at least in some crucial points: When – i.e. according to which criteria – do legal instruments of the European institutions transgress the limits of the sovereign power conferred upon them? What are the content and scope of "the unalterable standard of basic rights"? Does a disregard of the limited powers of the Union in an individual case – like *Mangold* – suffice to justify an intervention by the Federal Constitutional Court or should such a course require structural defects? Does the explicit limitation of the reserve competence to the "general guarantee of the unalterable standard of basic rights" release the Federal Constitutional Court from a review of the individual case? The deciding criteria are in accordance to the *Honeywell* decision that the impugned act of the authority of the EU constitutes a "manifest" breach of the principle of conferral ("sufficiently qualified") and that it is "highly significant" in the structure of competences between the Member States and the Union.

In his dissenting opinion Justice *H. Landau* accused the Second Senate of the *Bundesverfassungsgericht* saying that "the majority one-sidedly dissolves the tension occurring here between the principle of safeguarding democratic

[186]German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) para 66 – *Honeywell*: "[. . .] the task and status of the independent suprastate case-law must be safeguarded. This means, on the one hand, respect for the Union's own methods of justice to which the Court of Justice considers itself to be bound and which do justice to the 'uniqueness' of the Treaties and goals that are inherent to them [. . .]. Secondly, the Court of Justice has a right to tolerance of error. It is hence not a matter for the Federal Constitutional Court in questions of the interpretation of Union law which with a methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own. Interpretations of the bases of the Treaties are also to be tolerated which, without a considerable shift in the structure of competences, constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens."

[187]Cf. Gerken et al. (2009), p. 58.

legitimation", which itself underlines the principle of conferral, "and the functioning of the Union in favour of functionality." From the point of view of Justice *Landau* the judgment in the case of *Honeywell* "continues to pursue a problematic tendency which is already recognisable in the previous case-law of the Federal Constitutional Court, that is of only asserting on paper the democratically founded national right to hand down a final ruling on the application of sovereign power in one's own territory and the concomitant responsibility for compliance with the competences granted to the Union, and of shying away from effectively implementing them in practice." Justice *Landau* points out that, with its judgment in the case of *Mangold*, "the Court of Justice manifestly transgressed the competences granted to it to interpret Community law with the Mangold judgment and acted *ultra vires*."[188]

This decision of the Federal Constitutional Court seems to be quite contained or even a withdrawl in comparison to its ruling on the Treaty of Lisbon. After the "proclamation" of the constitutional yardsticks for the review of secondary Union law in its pronouncement of 30 June 2009 the Karlsruhe Court in Honeywell obviously relents vis-à-vis the Luxembourg judges. Meanwhile, it would have appeared questionable to turn the *Mangold* judgment of the ECJ into a "leading case" which would be decisive for the future relationship between Luxembourg and Strasbourg. Misjudgments are not unknown to domestic case law either, as can be seen in the judgment of the Higher Regional Court (*Oberlandesgericht*) of Naumburg in the case of *Görgülü* (*supra* Sect. 5.1). *Mangold* and similar decisions should not merely lead to a breach in the relationship of cooperation but rather lead to a continuous practice of that relationship in reality. For the ECJ this means that its rulings must bear in mind the limits of the competences of the EU. The Court should thus not approach individual cases without solid reasons or by means of a general construction that applies general principles of Union law to areas for which the Union or one of its institutions is not competent. On the other hand, as regards the supreme domestic courts, the relationship of cooperation requires the recognition of the ECJ's monopoly on the interpretation of the European Treaties which they should accept – while recognising the right to a lawful judge (sentence 2 of Art. 101.1 GG) and the guarantee of effective legal protection (Art. 19.4 GG)[189] – by deciding to refer relevant cases to the ECJ but no longer regarding such proceedings as implying the risk of subordination to the integration guidelines of the Luxembourg Court.[190]

[188]German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) para 100, 104 et seq. – dissenting opinion of Justice Landau in the case of *Honeywell*.

[189]For this double foundation – though with regard to the obligation of the specialised courts to refer – cf. Papier (2009), p. 117.

[190]Schwarze (2005), pp. 47 et seq.; for basic remarks on the obligation to refer, see Mayer (2003), pp. 232 et seqq. The then President of the German Federal Constitutional Court, *H.-J. Papier*, considered "especially the national specialised courts [to be] called upon" to seize the opportunity for cooperation with the ECJ, which is necessary for effective legal protection. "Meanwhile it is not improbable that one day even the Bundesverfassungsgericht will refer to the Court a question concerning the validity of a Community legal act, namely when proceedings before a specialised

6.3 Towards a Practiced Relationship of Cooperation

Regardless of justified objections against the case law of the ECJ some consequences of the claim of the Karlsruhe Court to protect indispensable elements of the German constitutional order and thus of the national control monopoly for the "relationship of cooperation" between the ECJ and the *Bundesverfassungsgericht* in the field of fundamental rights protection remained uncertain until the *Honeywell* decision (*supra* Sect. 6.2.2). The Federal Constitutional Court in its *Lisbon* ruling with regard to the "fundamental rights [as] part of the core contents of the constitution that restrict the transfer of sovereign powers to the European Union" spelled out again the *Solange II* formula, under which it "no longer exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union cited as the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany *only for as long as*[191] the Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law".[192] Nevertheless, in one of the following paragraphs the Federal Constitutional Court pointedly underlines that "in view of the position of the Community institutions, which is derived from international treaties", it could "recognise the final character of the decisions of the Court of Justice only 'in principle'."[193] This term "in principle", which is strikingly often used throughout the entire judgment, clearly reveals that the Federal Constitutional

court have not been required or possible" (our translation) – cf. Papier (2009), p. 116 with FN 49. References for preliminary ruling pursuant to Art. 267 TFEU have already been made by the Austrian Constitutional Court (Case C-465/00 *Österreichischer Rundfunk et al*. (ECJ 20 May 2003)) as well as the Italian Constitutional Court (Sentenza No. 102 (13 December 2008) – *Tasse di Lusso Sardegna*); see also Huber (2009), p. 582.

[191]Therefore, the *Lisbon* decision could be described as the "Solange III" decision of the Federal Constitutional Court.

[192]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 191 (in: BVerfGE 123, 267, 335) – *Lisbon*, emphasis added. This principle was repeated by the German Court in its decision: German Federal Constitutional Court, 1 BvR 256/08, 1 BvR 263/08 and 1 BvR 586/08 (Judgment of 2 March 2010) para 181 – *Data Retention*: "The Federal Constitutional Court, however, generally no longer exercises its jurisdiction to decide on the applicability of Community law or now Union law cited as the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany, and no longer reviews this legislation against the standard of the fundamental rights of the Basic Law as long as the European Communities (now the European Union), especially the case law of the European Court, generally ensure effective protection of fundamental rights, which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights (cf. BVerfGE 73, 339, 387; 102, 147, 162 et seq.). These principles apply to domestic legal provisions as well which transpose mandatory requirements of a directive into German legislation. Constitutional Complaints that challenge the application of binding legislation of the European Union in this sense are generally inadmissible (cf. BVerfGE 118, 79, 95; 121, 1, 15)" (our translation).

[193]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 337 (in: BVerfGE 123, 267, 399) – *Lisbon*, referring to German

Court reserves for itself the right to deviate exceptionally from decisions of the Luxembourg Court. The Court holds that such a (limited) recognition (only "in principle") is due to the fact that "the position of the Community institutions [. . .] is derived from international agreements."[194]

The Court's remarks in the *Lisbon* judgment are further obscured[195] in that in terms of constitutional procedure it considers placing an *ultra vires* review as well as an identity review within the existing procedures, e.g. in application of the "legal concept [of the concrete review of statutes] expressed in Article 100.1 of the Basic Law",[196] i.e. a procedure which the *Bundesverfassungsgericht* since its *Solange I* decision regards applicable accordingly with regard to a review of the conformity of domestic law with Community law.[197] Nevertheless, following its *Solange II* decision the Court did not consider making any further use of it.[198]

Since secondary Union law as such is not an act of German public authority (Art. 93.1 no. 4a GG) that could be directly challenged by a constitutional complaint,[199] this procedure is not appropriate for the initiation of an *ultra vires review* or an *identity review*. These procedural obstacles have led the Federal Constitutional Court to suggest to the German legislator – in a way that disregards the Luxembourg Court's monopoly of interpretation – the possibility of the "creation [. . .] of an additional type of proceedings before the Federal Constitutional Court that is especially tailored to *ultra vires* review and identity review." By doing so it challenges the foundation of the Union as a legal community, i.e. the Union-wide consistent, uniform and effective validity of Community law.[200] The

Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) para 76 (in: BVerfGE 73, 339, 367) – *Solange II*.

[194]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 337 (in: BVerfGE 123, 267, 399) – *Lisbon*.

[195]With the same result Gärditz and Hillgruber (2009), pp. 873 seq.

[196]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 241 (in: BVerfGE 123, 267, 354 et seq.) – *Lisbon*.

[197]German Federal Constitutional Court, BvL 52/71 (Order of 29 May 1974) para 55 (BVerfGE 37, 271, 280 et seqq.) – *Solange I*; Daiber (2010), p. 29; differently Hillgruber and Goos (2006), para 598.

[198]In *Solange II* (German Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) para 132 (in: BVerfGE 73, 339, 387)) the *Bundesverfassungsgericht* dissociates itself from *Solange I* (supra footnote 5) and declares that it "will no loner exercise its jurisdiction to decide on the applicability of secondary Union law cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Bais Law"; reference pursuant to Art. 100.1 GG it holds "inadmissible".

[199]Cf. Schlaich and Korioth (2007), para 214.

[200]Correctly Pache (2009), p. 297; also Classen (2009), p. 888: "remarkable and unnecessary" as well as "contrary to European law" (our translation); characteristic of the position of Gärditz and Hillgruber (2009), p. 874, vis-à-vis this axiom of European integration is their recommendation to the legislator (both ordinary and with the power to change the constitution) to "follow this advice [of the *Bundesverfassungsgericht*]" (our translation).

supporters of a review competence for the national constitutional courts meet these objections by arguing that the European legal order would not be fragmented by such control if the ECJ took "this decision into consideration in its judgments." Only national constitutional courts could "provide protection against uncontrolled and unauthorised law-making by judges."[201] This, however, outlines a relationship of cooperation, the standards of which are set by national constitutional courts.

If with direct textual reference to these procedural considerations the Federal Constitutional Court enumerates areas of regulation with relevance to constitutional identity, which by virtue of closeness to democratic principles (Art. 23.1, 20.1 and 2 with Art. 79.3 GG) call for a special level of protection in the light of safeguarding the state sovereignty,[202] it sets constitutional limits to the process of European integration. Meanwhile within this *domaine réservé* the judicial reserve competence regarding the application of a national standard of fundamental rights can be realised: This is particularly appropriate to the "important area for fundamental rights" of the administration of criminal law,[203] but also in all emanations of democratic self-determination that rely on the possibility "to assert oneself in one's own cultural area."[204]

The reserve competence claimed by the *Bundesverfassungsgericht* can also lead to dismissal of secondary Union law, which has been adopted in these areas, and by the *ultra vires review* as well as the *identity review* because according to the Federal Constitutional Court the provisions of a secondary legal act of the Union that affect sovereignty imply "an inadmissible autonomous Treaty amendment"[205] and *at the same time* are below the standards of the fundamental rights of the Basic Law. Such a situation does not seem unrealistic since the Court, in terms of *Solange II*, recognises the final character of even the decisions of the Court of Justice with relevance to fundamental rights "only 'in principle'."[206] Meanwhile it does not feel obliged by the principle of primacy of Union law (Declaration (No. 17) concerning primacy) "if the mandatory order to apply the law is evidently lacking" or "if *within* or outside the sovereign powers conferred, these powers are exercised [. . .] in such a way that a violation of the constitutional identity [. . .] is the consequence."[207]

[201]Cf. Gerken et al. (2009), p. 58, 68 (our translation).

[202]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 244 et seqq. (in: BVerfGE 123, 267, 356) – *Lisbon*.

[203]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 253, 364 (in: BVerfGE 123, 267, 359 et seq., 413) – *Lisbon*.

[204]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 260 (in: BVerfGE 123, 267, 363) – *Lisbon*.

[205]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 338 (in: BVerfGE 123, 267, 399 et seq.) – *Lisbon,* with reference to German Federal Constitutional Court, 2 BvR 2134, 2159/92 (Judgment of 12 October 1993) para 106, 157 (in: BVerfGE 89, 155, 188, 210) – *Maastricht*.

[206]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 337 (in: BVerfGE 123, 267, 399) – *Lisbon*.

[207]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 339 (in: BVerfGE 123, 267, 400) – *Lisbon* (emphasis added).

Evidently this is to limit a dismissal of the application of legal acts of the Union by the Federal Constitutional Court to exceptions only.[208] Nonetheless, the German Court in the *Lisbon* decision claimed for itself the right to decide on the exercise of powers even in areas in which competences have clearly been conferred upon the Union. Such a course would thwart the role of national parliaments that has been granted to them procedurally by Protocol (No. 2) on the application of the principles of subsidiarity and proportionality (Art. 6 and 7 of the Protocol) for the review of draft legislative acts by the Union by the standards of the principle of subsidiarity (sentence 2 of Art. 5.1 TEU). The Federal Constitutional Court – as had been the case ever since the judgment in *Solange I*[209] – finds it necessary to first refer the case for a preliminary ruling according to Art. 267 TFEU.[210] The Court thereby recognises the judicial power granted to the ECJ by the Treaty of Lisbon for an infringement of the principle of subsidiarity by a legislative act (Art. 8 of the Protocol). Nonetheless, only the *Honeywell* decision ensures that the formula of the "relationship of cooperation", which stems from the decision on the Maastricht Treaty, does not degenerate into an idle chatter.[211]

7 Primacy of Union Law

7.1 The Significance of Primacy for the Protection of Fundamental Rights Pursuant to the Lisbon Judgment of the Federal Constitutional Court

Protection of fundamental rights by domestic courts on the one hand and the European Court on the other is closely related to the question of primacy of Union law. In the Greek legal order, for example, "the few existing areas of difficulty [...] in which actual conflicts between Union law and the Greek constitution seem to exist, [can be found] in the field of fundamental rights rather than

[208] In this sense the evaluation of Voßkuhle, in: v. Mangoldt et al. (2010), Art. 93 GG para 84a to 84c; Gerken et al. (2009), p. 69.

[209] German Federal Constitutional Court, BvL 52/71 (Order of 29 May 1974) para 55 (BVerfGE 37, 271, 280 et seqq.) – *Solange I*.

[210] German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 240 (in: BVerfGE 123, 267, 353) – *Lisbon*.

[211] See also Pache (2009), pp. 297 et seq.; Broß (2008), p. 229, prefers the term "complementary relationship [*Komplementärverhältnis*]", so that "the *Bundesverfassungsericht* [...] does not put itself in the subordinate position of an institution with a reserve competence, but rather [...] actively and strategically signals that it will always consider taking actions if, from the perspective of German constitutional law, a development at Community level gives a reason to complain" (our translation).

the field of competences, sovereignty, and democracy."[212] On the occasion of the decisions of different constitutional courts of the Member States regarding the constitutional conformity of the Treaty of Lisbon, several outstanding academic contributions have dealt with this axiom of the legal order of the Union, making it the starting point of the analysis of the "architecture of the European area of fundamental rights."[213] Rightly, it has been indicated that although Union law takes precedence it does not claim to be supreme in the sense of a subordination of the national legal orders.[214]

In a problematic section of its *Lisbon* decision the German Federal Constitutional Court explained that "[t]he *ultra vires* review as well as the identity review may result in Community law or, in future, Union law being declared inapplicable in Germany" (*supra* Sects. 6.1 and 6.3). It thereby considers different procedures in which such a challenge can be brought before the Constitutional Court, all of which pursue the aim of "not to apply in individual cases in Germany legal instruments of the European Union that transgress competences or that violate constitutional identity."[215] At the same time the Federal Constitutional Court makes the primacy of application conditional upon the case that the relevant legal act of the Union does not clearly show "absence of a constitutive order to apply the law." The order to apply the law will have legal effect only if given "by the Act Approving the Treaty of Lisbon." In the clear absence of a constitutive order to apply the law the Federal Constitutional Court claims the right to establish "the inapplicability of such a legal instrument to Germany." Such determination would also have to be made if, within or outside the sovereign powers conferred, these powers were exercised with the consequent effect on Germany of a violation of its constitutional identity, which is inviolable under Art. 79.3 GG and is also respected by European treaty law, namely Art. 4.2, first sentence, TEU.[216] The Karlsruhe judges thus claim for themselves the competence to exclude legal acts of the Union or acts of implementation by the German state authority from the primacy of application of Union law and declare them inapplicable in Germany if according to their evaluation they violate Art. 1 GG – as well as the human dignity content of any other fundamental right of the Basic Law – or Art. 20 GG.

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[212]Cf. Iliopoulos-Strangas (2007a), pp. 830 et seq. (our translation); Iliopoulos-Strangas (2007b), para 34 et seqq.

[213]Cf. Dederer (2006); Iliopoulos-Strangas (2007a), pp. 825 et seqq.; Mayer et al. (2008); Niedobitek (2008); Grabenwarter (2009b), pp. 123 et seqq. has comprehensively covered the relationship between Union law and national constitutional law in his contribution.

[214]Niedobitek (2008), p. 82; Dederer (2006), p. 582, on the other hand, speaks of "primacy" as a "rule of hierarchy" without any further explanation. Nonetheless, national constitutional law and Union law are not connected in a hierarchical relation, but rather both areas of law are to be distinguished with regard to the principle of their respective competences.

[215]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 241 (in: BVerfGE 123, 267, 354 et seq.) – *Lisbon*.

[216]Cf. German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 339 (in: BVerfGE 123, 267, 400) – *Lisbon*.

An even further-reaching view was expressed in 2008 by then Federal Constitutional Court judge *S. Broß* (Second Senate) – one of the judges in the *Lisbon* decision – that the primacy of application of Union law over contradicting national law as established by the ECJ in *Flamino Costa* (1964),[217] and over national constitutional law and fundamental rights as expressly extended in *Internationale Handelsgesellschaft* (1970),[218] and the "hierarchy of norms between Community law and domestic law" connected therewith did not "at least at that time" take into account the international law structure of the Community Treaties. The Luxembourg Court thus without due "restraint" presumed to take the role of a "constitutional court of the Community." This magisterial case law he identifies as an infringement of the principle of democracy and the principle of the rule of law, which was one of the reasons for the "slowing down of the integration process" and the failure of the Constitutional Treaty.[219]

This view, however, fails to recognise that primacy of Community law and the direct effect resulting from it are essential characteristics of the supranational structure of this organisation.[220] Anticipating those objections *St. Mangiameli* has rightly emphasised that "the ECJ in the EC had to establish a system for the protection of fundamental rights in order to ensure primacy of the Community legal order."[221] The development of Community fundamental rights in the case law of the ECJ thus is a consequence of its previously *praeter legem* established principle of the primacy of Community law, which, however, is inextricably linked to supranationality itself. Its codified outcome, the European Charter of Fundamental Rights, has been understood "as counterpart to the principle of primacy of European law",[222] providing for effective protection of the individual rights and freedoms of the citizens of the EU, whilst they cannot invoke fundamental rights of the national constitutions against "the Treaties and the law adopted by the Union."[223]

In the area of fundamental rights the principle of primacy has the effect that Union law, once in force, cannot be reviewed against national standards of fundamental rights (because of this very principle). Well before the highly controversial rulings of the

[217]Case 6/64 *Flamino Costa v E.N.E.L.* (ECJ 15 July 1964).

[218]Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECJ 17 December 1970).

[219]Broß (2008), pp. 230 et seq. (our translation).

[220]See Opinion 1/91 *European Economic Area* (ECJ 14 December 1991) para 21.

[221]Cf. Mangiameli, Impulse aus dem italienischen Verfassungsrecht für den europäischen Grundrechtsschutz, in Tettinger and Stern (2006), A VII para 35 (our translation); Broß (2008), p. 231 "replies" to this argument that "the ECJ has only been able to develop the protection of fundamental rights at Community level by claiming for itself a *Kompetenz-Kompetenz* [i.e. the power to set one's own competences] which it has actually not been entitled to" (our translation).

[222]Pernice (2008), p. 236, 239 et seq.

[223]Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (ECJ 17 December 1970).

German Federal Constitutional Court, *H.P. Ipsen*, the nestor of the German European law school, acknowledged "in principle" the priority of application of Community law to national fundamental rights, and set no limits based on Art. 79.3 GG to the effects of the priority rule in terms of its application.[224] While he still considered the Communities to be "special-purpose associations [*Zweckverbände*] for functional integration", the competences of the Union have grown remarkably since the Single European Act (1986) and the Treaty of Maastricht. The EU is sometimes said to have state-like sovereign power. Does this development require establishing the national supreme courts as "counterweights" to European jurisdiction so that they can safeguard the role of the Member States as "Masters of the Treaties", which is essential for the protection of national sovereignty?[225] Are the reserved competences of the national supreme courts even essential to control the limits imposed to national sovereignty in the course of European integration in order to protect indispensible national constitutional rights from invasion by supranational sovereign power?

This is evidently the objective of the *Bundesverfassungsgericht* in particular when it recognises "the primacy of application of Union law only [. . .] by virtue and in the context of the constitutional empowerment that continues in effect."[226] The same is true for the Italian *Corte Costituzionale*, which reserves the right to define the limits of integrational power; or the *Conseil Constitutionnel*, which ranks the French Constitution at the top of the hierarchy of norms as not affected by the Union Treaties (*infra* Sect. 7.3.3). The supreme courts of the Member States thus claim the competence to review and reject Union law – even if only in case of an "emergency" – against the standard of what they consider the essential, inviolable and founding elements of their constitutional identity and the definitive competences of the relevant national constitutional order, thereby, however, undermining the monopoly of the Court of the European Union for the interpretation of the Treaties (Art. 19.3 lit. b TEU).

As a result, the unity of the legal system of the EU is at stake, especially if the supreme courts of all Member States decided to use the *domaines réservés* of their respective constitutional orders to protect their own values against a valid legal act of the Union in order to prevent its application in the domestic sphere. With reference to the *Mangold* case it is suggested that the ECJ, frankly in unilateral diktat rather than as a result of multilateral dialogue and cooperation, "no longer appl[ies] a principle of Community law established by the Court itself that has been dismissed in one of the Member States – i.e. single-handedly – for not being covered by the national act of approval." At the same time, with regard to the monopoly of interpretation of the ECJ, the due respect called for by the ECJ for such a national act of dismissal is interpreted in a philistine way as a contribution to

[224]Ipsen (1972), p. 289, 720.

[225]Cf. Gerken et al. (2009), pp. 53 et seqq. (57).

[226]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 240 (in: BVerfGE 123, 267, 353 et seq.) – *Lisbon*.

"ensure unity of Community law."[227] Clarification of those "close and clear-cut requirements" for the breakaway of the national judiciary from the legal order of the Union is expected by its supporters to come from the Federal Constitutional Court itself.[228] Meanwhile, however, the solution for the conflict between the realisation of the aims of integration and the respect for fundamental rights at Union level can only be found through the enhanced development of the supranational protection of fundamental rights.[229]

7.2 *Codification and Significance of Primacy*

The principle, found at a prominent place in the failed TCE, according to which "[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States"[230] and thus determine the relationship between the Union and the Member States, has not been adopted in the Treaty of Lisbon due to especially British resistance. The concern about primacy – expressed by the UK Government (and others) in the context of the Constitution for the EU – was mainly based on the fact that as the Constitution was drafted it would have applied to the then Second Pillar and would have therefore called into question the ultimate independence of the Member States in the conduct of their foreign policy. The abolishment of the principle of primacy in the text of the TEU is in this view one of the big substantive improvements in Lisbon.[231] Pursuant to the "Declaration concerning primacy" (No. 17) the Conference recalls that "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law", making this rule on a conflict of laws nothing more than a declaration governing the future interpretation of the Union Treaties.[232] Nevertheless, this failed codification in the Treaty is not detrimental for it would have had

[227]Gerken et al. (2009), p. 58.

[228]Gerken et al. (2009), p. 58 (our translation).

[229]Correctly Kühling (2003), p. 585.

[230]Article I-6 TCE: "La Constitution et le droit adopté par les institutions de l'Union dans l'exercise des compétences qui lui sont attribués ont la primauté sur le droit des États membres".

[231]Cf. Denza (2004), pp. 267 et seqq.

[232]Grimm (1995), pp. 49 et seq., – as opposed to mere "constitutionality" – holds that the point of no return to a "nationalisation of the European Union [i.e. its becoming a state]" has been reached once "those elements have been included in the Treaties that so far they lack to actually call them a constitution in the proper meaning of the word." Then, "primacy of Community law over national law would no longer be the result of an order for the Member States to apply the principle contained in the Treaties but rather a constitutional order rooted in the constitution of the Community" (our translation).

merely declaratory, not constitutive, force.[233] This is confirmed by the Opinion of the Council Legal Service according to which "the existence of the principle and the existing case-law of the Court of Justice" is in no way to be altered.[234] With a correct interpretation of the Declaration, which does not impose limitations to the existing *acquis*, it can be assumed that the principle established by the ECJ of the primacy of European law over national constitutional law remains unaffected as well.[235]

The primacy of application of European law does not, as the *Bundesverfassungsgericht* has pointed out again in its *Lisbon*[236] and *Honeywell*[237] decisions, affect the validity of conflicting law in the Member States and only inhibits its application (not its validity) to the extent required by the Treaties. The primacy rule is different from the provision of the German Basic Law that federal law shall take precedence over conflicting *Land* law (Art. 31 GG). Law of a Member State that is contrary to Community and Union law is rendered inapplicable merely to the extent required by the conflicting regulatory content of Community and Union law. The principle of primacy of Union law nullifies the effect of conflicting national law and inhibits its going into effect within the area of application of the relevant Union law.[238] This interpretation of the primacy of Union law explains why, for instance, in the case of *Mangold* (*supra* Sect. 6.2) German labour law (sentence 1 and 4 of Section 14.3 TzBfG) remained inapplicable in Germany by reason of incompatibility with the Union principle of non-discrimination on grounds of age.

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[233]Cf. Niedobitek (2008), pp. 102 et seq.

[234]Doc. 1197/07.

[235]Cf. Mayer (2007), who raises the question whether this postulated primacy over the constitutional law of the Member States "is confirmed by primary law". At the same time he points out that there is no limitation by the Opinion of the Council Legal Service; cf. also Mayer (2006).

[236]German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 331, 335 (in: BVerfGE 123, 267, 396 et seq. and 398) – *Lisbon*. Previously in German Federal Constitutional Court, 2 BvR 197/83 (Order of 22 October 1986) para 103 (in: BVerfGE 73, 339, 375) – *Solange II* and 2 BvR 687/85 (Order of 8 April 1987) para 61 (in: BVefGE 75, 223, 244) – *Kloppenburg*.

[237]German Federal Constitutional Court, 2 BvR 2661/06 (Order of 6 July 2010) para 53 et seqq. – *Honeywell*.

[238]Cf. Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (ECJ 9 March 1978), Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl et al.* (ECJ 22 October 1998); for this see Niedobitek (2008), p. 80, who rightly holds that – counter to the majority's opinion – "in the end" the effect of "the primacy of application is the same as an absolute or unrestricted primacy without, however, directly questioning the formal validity of conflicting national law" (our translation). For an interpretation of Art. I-6 TCE with regard to national constitutional provisions ("Federal law shall take precedence over *Land* law") cf. di Salvatore (2006). As a result and taking into account the grammatical-lexical, the systematic and the teleological interpretation of the European Constitutional Treaty, he only assumes (p. 397) an inapplicability of the domestic provision. He thereby opposes the thesis of *E. Grabitz*, Gemeinschaftsrecht bricht nationales Recht, 1966, pp. 113 et seqq., according to which the conflicting relationship between national law and law of the Community leads to the voidness of the national provision.

Indirectly, the ECHR and the case law of the Strasbourg Court specifying its provisions are already part of the principle of primacy of Union law over national law. As a source for the interpretation of the fundamental rights of the Union, especially their scope and content, the ECJ uses the ECHR in its interpretation by the ECtHR. Although in a number of Member States the ECHR has only the status of an ordinary law,[239] it obtains primacy over constitutional law through the case law of the ECJ.[240] With the accession of the Union to the ECHR the law of the Convention will *directly* take part in the primacy of Union law over the law of the Member States. This also applies to the Protocols to the ECHR, such as Protocol No. 1, which have been ratified by all Member States. The binding to the law of the Convention integrated into Union law is limited to the scope of Union law.[241]

7.3 *The Legal Situation in the Member States of the Union and the Interpretation of Primacy at the Highest Judicial Level*

Undisputed as the primacy of Union law over ordinary national law may be today,[242] the history of its relationship to national constitutional law is controversial and complex. According to *Ch. Grabenwarter*[243] three groups of states can be distinguished: those in which Union law is attributed full primacy of application (the Netherlands and Austria); states in which Union law enjoys limited primacy (Italy, Germany, Belgium, Denmark, but also Spain, Sweden, Ireland, the United Kingdom,[244] Hungary and the Czech Republic); and those states in which national constitutional law takes precedence over Union law (France and Poland).

[239]In Germany the ECHR has the rank of a federal law (Art. 59.2, first sentence, GG) and in Italy that of a "legge ordinaria"; for the legal situation in Italy, where there is no respective constitutional provision, cf. Italian Constitutional Court, judgments n. 388/1999, n. 315/1990, n. 188/1980, n. 349/2007; ordinanza n. 464/2005.

[240]Dederer (2006), p. 591, speaks of a "'tectonic' movement between the international and national level" (our translation).

[241]Schneiders (2010), pp. 255 et seqq., who talks of a comprehensive primacy, irrespective of the reservations of a Member State and the lack of ratification of a Protocol.

[242]Primacy of Union law over ordinary law has been expressly provided for by a series of acceding states from central and eastern Europe in their national constitutions: Lithuania (Art. 2 of the constitutional act on the membership of the Republic of Lithuania in the European Union) as well as Slovakia (Art. 7 of the Slovak Constitution in the version of the constitutional act 90/2001). The constitutional situation in Malta (similar to Art. 117 of the Italian Constitution in the version of the amendment of 2001) is in need of interpretation. According to Art. 65 of the Maltese Constitution the Parliament makes laws in full accordance with inter alia "the international and regional obligations of Malta, especially those that result from the Treaty on the accession to the European Union signed in Athens on 16 April 2003."

[243]Grabenwarter (2009b), pp. 123 et seqq.

[244]House of Lords, *Factortame Ltd. v. Secretary of State*, (1991) 1AC 603.

With regard to the interpretation of primacy, the decisions of the national supreme courts of the states in groups two and three are most enlightening. Despite different starting points of the courts it can be said with regard to the safeguarding of indispensable constitutional standards (of fundamental rights) in their relationship to the EU that the majority of those courts through an interpretation that is in conformity with European law and through a method of balancing conflicting rights and principles ("practical concordance") – even when expressly placing the national constitution, not the Union legal order, at the top of the domestic legal order (French *Conseil Constitutionnel*, Polish Constitutional Tribunal) – endeavour to reconcile real conflicts which can arise between Community/Union law and the relevant domestic constitutional provisions. Additionally, relying on the national constitution they reserve the right to intervene in cases of exceptional, general violations of substantial rules,[245] which are, however, according to the description of those cases of conflict by the supreme national courts of a rather hypothetical nature.

The position of the *Bundesverfassungsgericht*, which places primacy of application of a supranational legal act under the condition of the existence of a "constitutive order to apply the law", is most widely shared among the highest courts of the Member States by the Italian *Corte Costituzionale* and the Spanish *Tribunal Constitucional*. In spite of the fact that the French *Conseil Constitutionnel* and the Polish Constitutional Tribunal place their national constitution at the top of the respective domestic legal order, it is unmistakable that there is considerable overlap between the decisions of the *Bundesverfassungsgericht* and the decisions of those two courts in the establishing of judicial claims to protect essential constitutional elements.

7.3.1 The Italian Corte Costituzionale

In Italy, primacy of Union law is based on Art. 11 of the Italian Constitution according to which "Italy agrees, on conditions of equality with other States, to such limitations of sovereignty as may be necessary to a world order ensuring peace and justice among the Nations" and that it "promotes and encourages international organisations furthering such ends." In the early 1970s the Italian *Corte Costituzionale* – while principally recognising primacy of Union law as well as the monopoly of the ECJ for the interpretation of Community law – has reserved the right to "[review] the act implementing the Treaty as regards compliance with basic principles [. . .] of the [Italian] Constitution and the inalienable rights of the person."[246] For this case the *Corte* has furthermore reserved the right to personally

[245]Cf. Everling (2005), pp. 70 et seq.

[246]Italian Constitutional Court, 170/1984 (8 June 1984) – *Granital*, in: Giurs. Cost. 1984, pp. 1222 et seqq., with reference to judgment 183/1973 (27 December 1973) – *Frontini*, in: Giur. Cost. 1973, pp. 2401 et seqq. (part 9 of the grounds); see for this Tizzano (2010) and Mangiameli (2008), pp. 15 et seqq., 30 et seqq.

examine the constitutionality "of the continuing compatibility of the Treaty with said principles" even at the risk that such an approach could call into question Italy's remaining in the Community.[247] Meanwhile the Italian Constitutional Court in a reasoning related to the protection of fundamental rights has emphasised that through an innovative interpretation it intends to clarify the contours of the fundamental rights of the Italian Constitution. In this context it has underlined Italy's obligation to contribute to the development of the EU.[248]

This is used in Italian academic literature as the foundation for the theory of *controlimiti* (counter limits – *supra* Sect. 2.3.3), which describes the limits of the power of integration.[249] It is essentially based on the thought that while the Italian legal order recognises and approves of limitations to sovereign power by Union law it also sets limits to them in order to safeguard fundamental values of the Italian legal order. Individual opinions in Italian writings regard Art. 117 of the Italian Constitution, which has been amended by a constitutional reform in 2001, as confirmation and codification of the case law of the *Corte Costituzionale* through which in consequence Union law would merely enjoy a limited primacy at the constitutional level by virtue of the theory of *controlimiti*.[250]

7.3.2 The Spanish Tribunal Constitucional

Following its decision on the Treaty of Maastricht of 1 July 1992 in which it expressly reserved the right to review the constitutionality of Community law,[251] the Spanish *Tribunal Constitucional* in its judgment on the Constitutional Treaty confirmed the compatibility of the primacy clause of the TCE with its own constitutional order. Despite this "existential requirement" of the legal order of the EU it regards the relationship between the national constitution and the law of the EU as unaffected. Supremacy of the Spanish Constitution, which "is not necessarily sustained on hierarchy" but, however, "[i]n principle [. . .] implies primacy", is conserved in that the principle of primacy of Union law in the sense of "preferential or prevalent

[247]Cf. to judgment 183/1973 (27 December 1973) – *Frontini*, Foro italiano 1974, para 9; to judgment 170/1984 (8 June 1984) – *Granital*, Foro italiano 1984 I, para 7.

[248]The *Corte* thereby referred to its judgments for giving substance to the inviolable rights of the person (Art. 2 of the Italian Constitution), the right to life (judgments no. 27/1975, no. 35/1997; 223/1996), the right to personal identity, the right of privacy (judgment no. 13/1999), the right to liberty, the right to self-determination (judgment no. 30/1962) as well as the right to information (judgments no. 84/1969 and no. 348/1990). Cf. Mangiameli (2006), p. 476, who talks about a circular process of the development of fundamental rights in the relationship between the European and the Italian legal order.

[249]Cf. Randazzo (2008) and Ruggeri (2005).

[250]Cf. the references and critical objections in Panara (2007), para 37 et seqq.

[251]Printed in *Journal des Tribunaux* 1992, p. 6670 as well as EuGRZ 1993, p. 285; see on this also Lopez Castillo and Polakiewicz (1993), p. 281; Estella de Noriega (1999), p. 279; Garcia de Enterria and Alonso Garcia (2000), p. 298.

application" is provided for in the Spanish Constitution itself (Art. 93 of the Spanish Constitution) and "it is not a primacy with a general scope."[252] Therefore, on the one hand, Art. 93 of the Spanish Constitution, which enables the transfer of competences, is understood as a "door" between the legal orders in the sense of an "opening-up of Spanish legislation."[253] On the other hand, the primacy of Union law is limited to "the scope of the exercise of the competences attributed to the European institutions." At the same time the Spanish Constitutional Tribunal postulates an – albeit hypothetical – reserve competence: "In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent through the corresponding constitutional procedures [. . .]."[254] But even in this *ultima ratio* case of a reserve competence, the reference for a preliminary ruling before the ECJ (Art. 256.3 in conjunction with Art. 267 TFEU) is considered procedurally superior to those procedures provided for by Spanish constitutional law.

7.3.3 The French Conseil Constitutionnel

In precedent cases, the French *Conseil Constitutionnel* has held that secondary Union law is not limited by national law, neither by ordinary nor by constitutional provisions, and therefore that supranational law has primacy also over Art. 88.1 of the French Constitution which provides the legal authorisation from the French nation for participation in the ECs and in the EU. The French *Conseil Constitutionnel* intends, however, to except cases where an explicit clash with the French Constitution results from the implementation of an EC directive ("qu'ainsi, la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison

[252]Cf. Spanish Constitutional Tribunal, DTC No. 1/2004 (13 December 2004) fundamentos 3 and 4, in: EuR 2005, 339, 343 et seqq. (English translation available online).

[253]Cf. Spanish Constitutional Tribunal, DTC No. 1/2004 (13 December 2004) fundamento 2; Grabenwarter (2009b), pp. 126 et seq.

[254]Spanish Constitutional Tribunal, DTC No. 1/2004 (13 December 2004) fundamento 4: "En el caso difícilmente concebible de que en la ulterior dinámica del Derecho de la Unión Europea llegase a resultar inconciliable este Derecho con la Constitución española, sin que los hipotéticos excesos del Derecho europeo respecto de la propia Constitución europea fueran remediados por los ordinarios cauces previstos en ésta, en última instancia la conservación de la soberanía del pueblo español y de la supremacía de la Constitución que éste se ha dado podrían llevar a este Tribunal a abordar los problemas que en tal caso se suscitaran, que desde la perspectiva actual se consideran inexistentes, a través de los procedimientos constitucionales pertinentes [. . .]."

d'une disposition expresse contraire de la Constitution").[255] Restating this caveat explicitly in the décisions n° 2004-497 DC of 1 July 2004,[256] n° 2004-498 DC[257] and n° 2004-499 DC[258] of 29 July 2004 with regard to dispositions which affect the identity of the French Constitution, the *Conseil Constitutionnel* then endeavoured to refine bit by bit its reserve competence by adding implicitly that the constitutional disposition has to reveal not only an express connection,

[255]French Constitutional Council, Décision n° 2004-496 (10 June 2004) consideration 7 – *Loi pour la confiance dans l'économie numérique (E-commerce)*. In the *Arcelor* case, the French *Conseil d'Etat* decided in accordance with these decisions of the *Conseil Constitutionnel* that a legal challenge of the validity of an EC directive based on the *French constitutional* right to equality should be referred instead to the ECJ so that it could examine the question in the light of the *common European* principle of equality: French *Conseil d'Etat*, Decision No. 287110 DC (8 February 2007) – *Société Arcelor Atlantique et Lorraine et autre* (EuR 2008, pp. 57 et seqq.): "La suprématie conférée par les dispositions de l'article 55 de la Constitution aux engagements internationaux ne saurait s'imposer, dans l'ordre interne, aux principes et dispositions à valeur constitutionnelle. Eu égard aux dispositions de l'article 88-1 de la Constitution, dont découle une obligation constitutionnelle de transposition des directives, le contrôle de constitutionnalité des actes réglementaires assurant directement cette transposition est appelé à s'exercer selon des modalités particulières dans le cas où sont transposées des dispositions précises et inconditionnelles. Dans ce cas, si le contrôle des règles de compétence et de procédure ne se trouve pas affecté, 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. 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. 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. 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." Once the case had reached the ECJ, the Advocate General *Poiares Maduro*, in his Opinion submitted to the Court (Case C-127/07, Opinion of Advocate General Poiares Maduro, 21 May 2008, para 15–17), praised the attitude of the French supreme administrative court and underlined the importance of a judicial dialogue between national supreme courts and the ECJ in matters of fundamental rights protection (*supra* footnote 7). The judgment of the ECJ itself (16 December 2008) did not dwell on the underlying judicial dialogue question and just addressed the substantive question, concluding that the EC directive did not violate the general principle of equality. Cf. de Witte (2009).

[256]French Constitutional Council, Décision n° 2004-497 DC (1 July 2004) consideration 18 – *Loi relative aux communications électroniques et aux services de communication audiovisuelle*.

[257]French Constitutional Council, Décision n° 2004-498 DC (29 July 2004) consideration 4 – *Loi relative à la bioéthique*.

[258]French Constitutional Council, Décision n° 2004-499 DC (29 July 2004) consideration 7 – *Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel*.

but also a specific interrelation with the principles laid down in the law of the Union.[259]

Supplementing these criteria to an increasing extent, the caveat of the conformity of secondary Union law with the French Constitution was refined in the case law of the high court which strived to define in the best way possible the constitutional framework of the relationship between national law and secondary Union law. The opportunity to clarify this case law presented itself vey quickly on the occasion of decision n° 2006-540 DC of 27 July 2006,[260] when the *Conseil Constitutionnel* consolidated its reserve competence considering 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 consents thereto."[261] This decision, which strongly marked a shift in and the stabilisation of the case law, was then taken up as a canon in the decisions n° 2006-543 DC[262] and n° 2008-564 DC,[263] the latter constituting actually the high point of the achievement of a case law consistent in its basic principles since 2004 and in its formulation since 2006.[264]

The conformity of the primacy of Union law as codified by the failed Constitutional Treaty has been recognised by the *Conseil Constitutionnel*. In its decision on the TCE and following its previous case law it has not judged this principle of primacy of Union law over domestic law of the Member States (Art. I-6, then Art. I-5 TCE) as a "revision" of the French Constitution. Only when international commitments assumed by France "contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms or affect the fundamental conditions of the exercising of national sovereignty" a revision of the Constitution would be required. This has been contradicted by the *Conseil Constitutionnel* with regard to the Constitutional Treaty for Europe which is in substantive respects identical with the Treaty of Lisbon.[265] The binding effect of

[259]See French Constitutional Council, Décision n° 2004–498 DC (29 July 2004) consideration 6, according to which the freedom of communication as set out in Art. 10 of the Declaration of 1789 is not considered specific to the national legal order since it. "estégalement protégée en tant que principe général du droit communautaire sur le fondement de l'article 10 de la Convention européenne de sauvegarder des droits de l'homme et des libertés fondamentales"

[260]French Constitutional Council' Décision n° 2006-540 DC (27 July 2006) préc. – *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information (Loi DADVSI)* (English translation available online).

[261]French Constitutional Council, Décision n° 2006-540 DC (27 July 2006) consideration 19 – *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information.*

[262]French Constitutional Council, Décision n° 2006-543 DC (30 November 2006) consideration 6 – *Loi relative au secteur de l'énergie* (English translation available online).

[263]French Constitutional Council, Décision n° 2008-564 DC (19 June 2008) consideration 44 – *Loi relative aux organismes génétiquement modifiés* (English translation available online).

[264]Cf. Zinamsgvarov (2008), pp. 5 et seq.

[265]Cf. French Constitutional Council, Décision n° 2004-505 DC (19 November 2004) considerations 7 and 13 – *Traité établissant une Constitution pour l'Europe (*English translation available online; German translation in EuR 2004, 911 et seqq. and in EuGRZ 2005, 45 et seqq.).

the European Charter of Fundamental Rights is not considered unconstitutional. The *Conseil* also refers to the case law of the ECtHR, e.g. to interpret the European fundamental right of freedom of religion in such a way that it does not interfere with the French principle of laïcité (secularity).[266]

In general, however, the *Conseil Constitutionnel* left no doubt that the naming of the international treaty it reviewed ("Constitutional Treaty") "has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order."[267]

7.3.4 The Polish Constitutional Tribunal

In its decisions of 11 May 2005 regarding Poland's membership in the EU[268] and of 24 November 2010 on the Treaty of Lisbon[269] the Polish Constitutional Tribunal ruled:

> The accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator. [. . .] [T]he validity and efficacy of the accession [of Poland to the EU] are dependent upon fulfilment of the constitutional elements of the integration procedure, including the procedure for delegating competences.
>
> [A] collision would occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union.

And the Polish Constitutional Tribunal adds:

> The principle of interpreting domestic law in a manner 'sympathetic to European law', as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event

[266]Cf. French Constitutional Council, Décision n° 2004-505 DC (19 November 2004) consideration 18 – *Traité établissant une Constitution pour l'Europe*.

[267]Cf. French Constitutional Council, Décision n° 2004-505 DC (19 November 2004) consideration 10 – *Traité établissant une Constitution pour l'Europe*.

[268]Polish Constitutional Tribunal, Decision Ref. No. K 18/04 (11 May 2005 – English translation available online).

[269]Polish Constitutional Tribunal, Decision Ref. No. K 32/09 (24 November 2010 – English translation available online).

> may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual 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.
>
> [. . .] The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative 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 precedence of Community law fails to apply with respect to such provisions. [. . .]
>
> The [ECJ] is the primary, but not the sole, depositary of powers as regards application of the Treaties within the legal system of the Communities and Union. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of mutual loyalty between the [. . .] Union institutions and the Member States. This assumption generates a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms.[270]

In its judgment on the Treaty of Lisbon the Polish Constitutional Tribunal maintained its stance presented in the statement of reasons for the judgment of 11 May 2005, pursuant to which "the Constitution remains – due to its unique status – 'the supreme law of the Republic of Poland' with regard to all international agreements which are binding for the Republic of Poland. This also concerns ratified international agreements about conferral of competences 'in relation to certain matters'. Due to the primacy of the binding force of the Constitution [. . .] the Constitution enjoys precedence as to the binding force and application in the territory of the Republic of Poland."[271]

7.3.5 The Czech Constitutional Court

In its decision of *Lisbon Treaty II* the Czech Constitutional Court reserved the right to review the Treaties for the reform of the EU which had not yet entered into force against the entire national constitution. Thereby, "the Constitutional Court acquires an opportunity to evaluate to a certain extent the constitutionality of the interpretation of already existing EU law norms by the Court of Justice, without coming into direct conflict with it."[272] Unlike the right claimed by the *Bundesverfassungsgericht* to review "in individual cases [. . .] legal instruments of the European Union that transgress competences or that violate constitutional identity [scil.:

[270]Polish Constitutional Tribunal, Decision K 18/04 (11 May 2005) No. 1 and 2 as well as 13–16.

[271]Polish Constitutional Tribunal, Decision Ref. No. K 32/09 K (24 November 2010) p. 33 et seq., 35.

[272]Cf. Czech Constitutional Court, Pl. US 29/09 (3 November 2009) para 172 et seq. – *Lisbon Treaty II* (English translation available online).

secondary legal acts]" the Czech Constitutional Court refers to the examination of primary Union law not yet in force at that time, i.e. it respects the primacy of Union law with regard to secondary legal acts of the Union. In the *European Arrest Warrant* case the Czech Constitutional Court implicitly found that a "possible inconsistency" of national law and Union law can be removed "not only by priority application of European law norms, but also through constitutional amendments".[273]

In the same decision the Czech Constitutional Court adds: "Thus, if there are several interpretations of the constitutional order, which includes the Charter of Fundamental Rights and Freedoms, and only some of them lead to fulfilling the obligation that the Czech Republic assumed in connection with its membership in the EU, that interpretation must be selected which supports fulfillment of that obligation, and not an interpretation that prevents such fulfillment."[274]

Emphasising this starting point and with reference to the *Maastricht* decision of the German *Bundesverfassungsgericht* the Czech Constitutional Court in its *Lisbon Treaty I* decision had already declared that it in the future it could "function as an *ultima ratio* and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the EU under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences."[275] By that it has also reserved the right to an identity review and an *ultra vires* review in exceptional cases.

7.3.6 The Position of an Undecided Member State: The Legal Situation in Greece

Like the constitutions of other Member States, the Greek Constitution leaves unanswered the question of primacy of Union law over national constitutional law (Art. 28.2 and 3 and an "interpretative explanation"). In a proceeding concerning the compatibility of some provisions of Greek press and media law, according to which companies that are "associated" with Greek media companies are excluded from participating in public tender procedures (Act 3021/2002), the Fourth Chamber of the Council of State (Supreme Administrative Court) in extended composition (Grand Chamber) pronounced in favour of supremacy of the Greek Constitution. According to the opinion of the judges issuing the majority judgment of this decision

[273]Czech Constitutional Court, Pl. US 66/04 (3 May 2006) – *European Arrest Warrant* (English translation available online), cited in: Czech Constitutional Court, Pl. US 19/08 (26 November 2008) para 94 – *Lisbon Treaty I* (English translation available online).

[274]Czech Constitutional Court, Pl. US 66/04 (3 May 2006) – *European Arrest Warrant*, cited in: Czech Constitutional Court, Pl. US 19/08 (26 November 2008) para 114 – *Lisbon Treaty I*.

[275]Cf. Czech Constitutional Court, Pl. US 19/08 (26 November 2008) para 120 – *Lisbon Treaty I* (emphasis in the original).

the supremacy of the Constitution applies "at least in the present stage of development of Community law and as long as a European constitutional document as superior provision has not been adopted which would bind the Member States to amend their constitutions in case of conflicts with this superior provision."[276] This formula goes far beyond the respective reserve competences which the supreme and constitutional courts of other Member States claim for themselves.[277]

In a dissenting opinion to the judgment, two judges held that the primacy of application of Community law is effective also over Greek constitutional provisions with the "only self-evident" condition that the respective applicable provision of Community law respects the principles of the protection of fundamental rights and the basis of the democratic form of government. They also expressly referred to the case law of the German *Bundesverfassungsgericht* (*Solange II*) and the Italian *Corte Costituzionale* (*Granital* and others). Nonetheless, primacy of Union law over national constitutional law must be dealt with as an issue which is still open and controversial in the Greek legal order.[278] In an earlier proceeding the Plenum of the Council of State challenged the attempt of the Sixth Chamber to explicitly recognise supremacy of the constitution over Community law.[279] It seems to trust that there will be no such conflict.

7.4 The Binding Power of Fundamental Rights for the (Supranational) Codification and the (National) Implementation of Margin of Appreciation of the Member States

National fundamental rights do not – at least from the perspective of Union law – undermine the validity of the supranational Treaties as such or their effect in the Member States. On the other hand, the Charter of Fundamental Rights in its interpretation in the light of international agreements on human rights, especially the ECHR, can influence the interpretation of domestic fundamental rights; this applies to the transposition and implementation of secondary Union law into the domestic legal order as well as to national courts and administrative authorities in their interpretation and application of provisions of secondary Union law, to the interpretation of domestic law in conformity with Union law and also to the

[276]Greek Council of State, Decision No. 3242/2004 (16 November 2004), NoB 2005, pp. 1878 et seqq. (1893) (our translation).

[277]Cf. Iliopoulos-Strangas (2007a), pp. 835 et seqq.

[278]Expressly Iliopoulos-Strangas (2007a), p. 844: "weiterhin offen"; Iliopoulos-Strangas (2007b), para 37 et seqq.; The opinion of Grabenwarter (2009b), p. 131, is thus not shared, for he classifies Greece in one group with France regarding primacy.

[279]Cf. Greek Council of State, Decision No. 3457/1998 (25 September 1998), *ToS* 1998, pp. 961 et seqq.

cumulative application of domestic provisions in the execution of secondary law. A commitment, resulting from primary law, that could bind the Member States to fundamental rights can only be considered for situations that are not exhaustively regulated by secondary law.[280] The Charter of Fundamental Rights does not, however, restrict the fundamental rights commitment of the Member States to the execution of secondary Union law. The Union fundamental rights must be observed, especially with regard to the express (e.g. Art. 36, 51, 62 TFEU) and implicit (*Cassis de Dijon*) exemptions to the market freedoms.[281]

A further-reaching domestic guarantee of fundamental rights does not apply either, if an implementing act of a Member State infringed a national fundamental right but at the same time was necessary due to Union law which is in conformity with the Charter, i.e. if the Member State has no margin of appreciation. As early as 1992 the *Conseil Constitutionnel* ruled that the protection of fundamental rights of the individual provided by the ECJ was sufficient to guarantee fundamental rights as provided for by the national constitutions.[282] Following its own Chamber decision[283] the First Senate of the *Bundesverfassungsgericht* also clarified that national provisions that are required by Union law are not reviewed against the standards of the domestic fundamental rights catalogue if and in so far as national legislative bodies have no margin of appreciation. Hence, in these cases German specialised courts are to examine requirements made by Union law only against fundamental rights of the Union and, if necessary and with regard to the guarantee of effective legal protection (Art. 19.4 GG), make a reference for preliminary ruling according to Art. 267 TFEU. Only if the ECJ then annuls the directive in question will there be room to review the national implementing act against the standards of German fundamental rights and to refer the case pursuant to Art. 100.1 GG.[284]

This case law is in most parts identical to the requirements made by the ECJ regarding the Member States' obligations to give effect to European fundamental rights.[285] In its review of the Directive on Family Reunification[286] the Court distinguishes between two intertwined legal levels: on the one hand, provisions of a directive which impose direct and precise obligations on the Member States and,

[280]In this respect Spanish Constitutional Tribunal, DTC No. 1/2004 (13 December 2004) fundamentos 5 and 6.

[281]Bleckmann (2011), pp. 15 et seqq., 82 et seqq., 131 et seqq.

[282]French Constitutional Council, Decision No. 92-308 DC (9 April 1992) – *Maastricht I* (English translation available online), *RUDH* 1992, pp. 336 et seqq.; in this respect see also French *Conseil d'État*, Decision No. 287110 DC (8 February 2007); Fromont (1995), p. 132.

[283]See German Federal Constitutional Court, 2 BvG 1/89 (Judgment of 11 April 1989) (in: BVerfGE 80, 74 and NJW 1990, 974) – *Broadcasting Directive*.

[284]Cf. German Federal Constitutional Court, 1 BvF/05 (Order of 13 March 2007) para 72 (in: BVerfGE 118, 79, 95) – *Emissions Trading I* = DVBl. 2007, pp. 821 et seqq., with reference to Art. 23.1 GG.

[285]Cf. Schmal (2008), pp. 16 et seqq.

[286]Council Directive 2003/86/EC *on the right to family reunification*, O.J. L 251/12 (2003).

on the other hand, those which leave a margin of appreciation.[287] Also, those provisions of a directive, which "afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive", are to be examined against the standards of fundamental rights of the Union.[288] This is consistent in so far as those clauses guaranteeing an individual transposal of an EU directive by a Member State ("opening clauses") are not part of national law but of Union law for which the fundamental rights of the Union are the relevant standard of evaluation.[289]

This is to be distinguished from the question if and to what extent implementing acts of Member States issued under the discretion conferred by the opening clause are to be examined against the standards of the fundamental rights of the Union or of the domestic fundamental rights order. Following the position of the ECJ – which is in accordance with the view of the *Bundesverfassungsgericht*[290] – if it is an implementing act required without any margin of appreciation, only a review based on Union fundamental rights can be considered. If, on the other hand, it is an implementing act for which the Member States may use a margin of appreciation, the ECJ holds that "the requirements flowing from the protection of general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements."[291] Since Member States are obliged by the general principles of Union law when using their margin of appreciation, they are bound by the fundamental rights of the Union in this legal sphere. In contrast, the *Bundesverfassungsgericht* limits the application of Union fundamental rights to the case that "Community law leaves no room for appreciation but imposes mandatory requirements."[292] Fundamental rights of the Union are to be binding on the Member States only if they implement mandatory requirements.[293] This is

[287]Case C-540/03 *Parliament v Council (family reunification)* (ECJ 27 June 2006) para 60 et seq.

[288]Case C-540/03 *Parliament v Council (family reunification)* (ECJ 27 June 2006) para 22.

[289]Cf. Lindner (2007), p. 72.

[290]German Federal Constitutional Court, 1 BvR 2036/05 (Order of 14 May 2007) para 8 – *Emissions Trading II*.

[291]Case C-540/03 *Parliament v Council (family reunification)* (ECJ 27 June 2006) para 104 et seq.

[292]German Federal Constitutional Court, 1 BvR 2036/05 (Order of 14 May 2007) para 8 – *Emissions Trading II* (our translation); yet even before: German Federal Administrative Court, NVwZ 2005, 1178 (1181 et seqq., 1183 et seqq.)

[293]This position had been emphasised by the then President of the Federal Constitutional Court, *Papier*, by using the misleading term "complementarity of the protection of fundamental rights" (our translation): cf. Papier (2009), pp. 113 et seqq., 116; affirmative Calliess (2009), p. 486, with reference to the "graduated bindingness [*gestufte Verbindlichkeit*]" (H. P. Ipsen) of those directives and underlining the fact that the so-called systemic decision of a directive (*Bundesverfassungsgericht*) works as a corrective; also affirmative Bleckmann (2011), pp. 150 et seqq. (164 et seqq.); critical Blanke (2009), pp. 149 et seq.

only "complementary protection of fundamental rights" in so far as either the European or the respective domestic fundamental rights order is applied; i.e. in so far as actions of either level that are not bound by fundamental rights are thus unimaginable. The divergence between the ECJ and the German Federal Constitutional Court on that matter is, however, put into context in that the *Bundesverfassungsgericht* generally regards the fundamental and systemic decision of a directive as part of the mandatory requirements.[294] A third opinion holds that when operating under a appreciation clause the national legislator is to be obliged by Art. 53 EUCFR – besides being fully bound by domestic fundamental rights – to respect the fundamental rights of the Union. Thus, the protection of fundamental rights is doubled, with the domestic fundamental rights functioning as "enhanced protection of European fundamental rights."[295] Even if Member States have a margin of appreciation, this is to be filled by safeguarding not only the national fundamental rights but also the fundamental rights of the Union due to the Member States' commitment to mandatory purposes of the Union.[296]

8 The Role of the Courts in Multilevel Constitutional Governance

European States are embedded in multiple and overlapping layers of regional and national "constitutional governance". Courts, it seems, inevitably foster a constitutionalisation of the legal order(s) of the arising transnational global society. The results are multiple legal regimes – and multiple regime-collisions of a growing complexity[297] – with courts as "gateways and interfaces".[298] Today's intensity of European integration would have never been possible if in addition to the "competition of legal orders" – most recently manifested with the Charter of Fundamental Rights – between Union law, the ECHR and domestic law, a "competition of judiciaries" between the national constitutional courts, the ECtHR and the ECJ had not developed.[299]

The "bilateral interplay" between the EU and Convention law was described as "a twofold process of 'conventionalisation' of Union law and 'unionisation' of Convention law, though with different timings and intensities."[300] This transformation

[294]In this sense the German Federal Administrative Court, NVwZ 2005, 1178 (1181 et seq.).

[295]Calliess (2009), p. 485 (our translation).

[296]Cf. Thym (2006), p. 3250; Szczekalla (2006), p. 1021; Lindner (2007), p. 73; Calliess (2009), pp. 485 et seqq.

[297]Cf. Wildhaber (2005b), p. 45.

[298]Nickel (2009), p. 338.

[299]Merli (2007), p. 397.

[300]Cf. Callewaert (2008).

from a competition of legal orders into a competition of judiciaries, as reflected by the line of the case law of the German Federal Constitutional Court (*Solange I – Solange II – Maastricht – Banana Market*), is a decisive step towards the unity of the European legal order, which in turn forms a fundamental premise of the systemic rationality of law.[301] In the wake of the structural problems of the European multilevel governance system, the rationality and the objective adequacy of law are repeatedly put to the test.[302] For this the "critical discourse" in the exchange of thesis and antithesis, the advancing of argument and counterargument between the participating courts, but not, however, the authority of "the final say" is a substantial requirement. This competition of judiciaries, it is held, excludes efforts for convergence but ensures "protection of coherence [*Kohärenzvorsorge*]" through which a significant amount of trust between the courts involved is created.[303]

An important expression of this protection of coherence vis-à-vis the national constitutional traditions can be found in the *Open door* case of the Strasbourg Court in which the scope of protection of a fundamental right had been determined by weighing a specific guarantee of the ECHR (freedom of expression pursuant to Art. 10.2 ECHR) against a domestic fundamental right of constitutional law (right to life of the unborn child according to Art. 40.3.3 of the Irish Constitution).[304] This case shows how difficult it is to avoid contradictions in the triangle of the judiciaries in Strasbourg, Luxembourg and the Member States because the result of the careful considerations by the ECtHR contrasts with the previous case law of the ECJ which had affirmed that medical termination of pregnancy constitutes a service but denied that there had been a violation of the right to free distribution of information on such services.[305] The plea that former ECtHR President, *Luzius Wildhaber*, has directed to the national courts equally

[301]Oeter (2007); Hoffmann-Riem (2002), p. 473: "A minimum of unity of the legal order, at least its systemic consistency, is a widely accepted aim, regardless of the obvious evidence of a pluralisation of values, a fragmentation of living environments and heterogeneity of interests" (our translation).

[302]Oeter (2007).

[303]Oeter (2007), who states that "without provisions of coherence the compound of judiciaries would be doomed to failure" (our translation); previously Wildhaber (2005b), pp. 45 et seq., who considers a "coherent approach in respect of the rights which are common to most of the legal systems concerned" as "essential" while observing "a clear commitment to ensure harmony between the Luxembourg and the Strasbourg jurisprudence" in the sense of coherence and coordination are to be understood the proposals made by Krüger and Polakiewicz (2001), whereas Papier (2005), p. 117, with regard to the substantive protection of fundamental rights, talks about "a steady convergence" (not coherence) "between the requirements and expectations of national constitutional law on the one hand and the effective protection of fundamental rights by Community law on the other".

[304]Case 14234/88 *Open door and Dublin Well Woman v Ireland* (ECtHR 29 October 1992).

[305]Case 159/90 *The Society for the Protection of Unborn Children Ireland v Grogan et al.* (ECJ 4 October 1991) para 21, 32.

applies to the ECJ: In order to create legal certainty and convergence the Luxembourg Court is also required as far as possible in its deliberations to respect the ECHR and its interpretation by the Strasbourg Court.[306]

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[306]Wildhaber (2005a), pp. 314, 316, 318.

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