

Supremacy of EC Law in the New Member States

Bringing Parliaments into the Equation of ‘Co-operative Constitutionalism’

Anneli Albi*

Minimal constitutional amendment at accession forced constitutional courts in new member states to make great efforts to avoid conflicts with EC and EU law – The importance of expanding the equation of ‘co-operative constitutionalism’ beyond judicial actors, by involving political institutions – Cases on constitutional amendment in Poland, Estonia and Latvia – The concern over fundamental rights protection versus EC market regulation in Hungary, Estonia and the Czech Republic – Co-operative constitutionalism beyond judicial dialogues.

INTRODUCTION

The principle of supremacy has been the cornerstone of the European Community’s legal system, ensuring the uniform application and effectiveness of Community law. It is well established in the case-law of the European Court of Justice that Community law is supreme over the national law of the member states, including the fundamental norms of their national constitutions.¹ At the same time, the basis and precise scope of supremacy have been at the heart of enduring judicial and academic debates. Whilst the principle of supremacy of Community law has generally been well recognised by the member states, certain reservations have been made by national constitutional courts. They regard supremacy as a concept rooted in the national constitutions, rather than deriving from the autonomous

* Lecturer in EU Law, University of Kent, Canterbury (UK). I am grateful to Adam Łazowski, Zdenek Kühn and the two anonymous referees for providing valuable comments on this paper. I would also like to thank the participants of the workshop ‘Integration or Absorption? Legal Discourses in the Enlarged Union’, University of Hanover, 27–29 Sept. 2006, for their comments. The usual disclaimer applies.

¹ ECJ, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, at 1134.

European Constitutional Law Review, 3: 25–67, 2007

© 2007 T.M.C.ASSER PRESS and Contributors

DOI: 10.1017/S1574019607000259

nature of the Community legal order.² Based on this, the constitutional courts have retained for themselves the right to review whether European Union institutions act within the competences conferred upon them and respect the fundamental constitutional norms and human rights. The well-known canon of relevant cases includes the *Solange I* and *II*³ and *Maastricht*⁴ decisions of the German Constitutional Court, the *Granital*⁵ and *Frontini*⁶ decisions of the Italian Constitutional Court, and the *Maastricht* decision⁷ of the Danish Supreme Court.⁸ In France, new treaties are regularly subjected to preliminary review by the Constitutional Council, with the Constitution being amended prior to ratification if an incompatibility is found; this practice significantly reduces the risk of constitutional conflicts with Community law.

Debates regarding supremacy have been revived following the incorporation of the supremacy clause in the Treaty Establishing a Constitution for Europe.⁹ The French Constitutional Council and the Spanish Constitutional Tribunal delivered important decisions on the meaning of supremacy in the context of the European Constitution. In France, the *Conseil Constitutionnel* concluded in November 2004 that the supremacy clause in the European Constitutional Treaty would not entail changes to the position of the French Constitution at the top of the French internal legal order.¹⁰ In Spain, the Constitutional Tribunal developed, in a decision of December 2004, a distinction between ‘supremacy’ and ‘primacy’.¹¹ On

² B. De Witte, ‘Direct Effect, Supremacy and the Nature of the Legal Order’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press 1999) p. 177 at p. 199; K. Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press 2001) p. 59; M. Claes, *The National Courts’ Mandate in the European Constitution* (Oxford, Hart Publishing 2006) p. 207.

³ *Solange I*, [1974] 37 BverfGE 271 et seq.; *Solange II*, 73 BverfGE 378.

⁴ *Brunner*, BVerfGE 89, 155 (1993) [1994] C.M.L.R., 57-108.

⁵ *Granital*, Decision No. 170, 1984.

⁶ *Frontini*, Decision No. 183, 1973.

⁷ *Carlsen v. Rasmussen*, Judgment of 06.04.1998 [1999] C.M.L.R., 855-862.

⁸ For a summary of these cases, see De Witte, *supra* n. 2, p. 199-205. For a comprehensive account and analysis of the relationships between the ECJ and national courts, see Claes, *supra* n. 2.

⁹ See, e.g., M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, 11 *European Law Journal* (2005) p. 262.

¹⁰ Décision No. 2004-505 DC – 19.11.2004, Traité établissant une Constitution pour l’Europe, <www.conseil-constitutionnel.fr>. For a comment, see, e.g., G. Carcassonne, ‘France *Conseil Constitutionnel* on the European Constitutional Treaty. Decision of 19 November 2004, 2004-505 DC’, 1 *EuConst* (2005) p. 293; L. Azoulai and F. Ronkes Agerbeek, ‘Conseil constitutionnel (French Constitutional Court), Decision No. 2004-505 DC of 19 Nov. 2004, on the Treaty establishing a Constitution for Europe’, 42 *CMLRev.* (2005) p. 871.

¹¹ Constitutional Court of Spain, Declaration on the consistency of the European Constitutional Treaty with the Spanish Constitution, DTC 1/2004, 13 Dec. 2004. For a comment, see, e.g., C. B. Schutte, ‘Spain. *Tribunal Constitucional* on the European Constitution. Declaration of 13

its reading, primacy of EC law is limited to the exercise of the competences that have been conferred on the Community, whereas supremacy is implicit in the Spanish Constitution, which remains the underlying source of validity. Although the Spanish Constitution no longer forms the framework for assessing the validity of the Community rules, the Community legal order, which was accepted as a result of the surrender of competences, must nonetheless remain compatible with the basic principles and values of the Constitution.¹² These decisions represent a continuation of the long-standing practice in which the national constitutional courts posit the ultimate supremacy of the national constitutions, without openly challenging the supremacy of Community law. This represents what has come to be known as ‘judicial dialogues’¹³ or ‘co-operative constitutionalism’,¹⁴ where the national courts and the Court of Justice have engaged in a co-operative relationship and conversation in resolving issues pertaining to the relationship between the Community and the national legal orders.

Against this background, it is fitting to take stock of how the constitutional courts of the new member states that joined the European Union in 2004 have performed in such ‘co-operative constitutionalism’. At the time of entry, questions were posed as to whether challenges to the delicate balance that has gradually been constructed in terms of supremacy might become more frequent, given that the Central and Eastern European countries have powerful and ‘activist’ constitutional courts, and their constitutions posit supremacy of the constitutions and accord a strong protection to the principles of sovereignty and independence.¹⁵

December 2004’, 1 *EuConst* (2005) p. 281; F. Castillo de la Torre, ‘Tribunal Constitucional, Opinión 1/2004 of 13 December 2004, on the Treaty establishing a Constitution for Europe’, 42 *CMLRev.* (2005) p. 1169; R. Alonso García, ‘The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy’, 6 *German Law Journal* (2005) p. 1001.

¹² See on this distinction and on the implicit presence of this concept in the constitutional jurisprudence of some other member states, J. Ziller, ‘Conclusions’ and M. Claes, ‘The European Constitution and the Role of National Constitutional Courts’, in A. Albi and J. Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond* (The Hague, Kluwer Law International 2007) p. 287-295 and p. 235-247 respectively.

¹³ A. Stone Sweet, ‘Constitutional Dialogues in the European Community’, in A.M. Slaughter, A. Sweet Stone and J.H.H. Weiler (eds.), *The European Court and National Courts Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Hart Publishing 1998) p. 325-326.

¹⁴ A. Sajó, ‘Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy’, 2 *Zeitschrift für Staats- und Europawissenschaften* (2004) p. 351.

¹⁵ See A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, Cambridge University Press 2005), p. 24 et seq. and p. 170-175; A. Albi, ‘“Europe” Articles in the Constitutions of the Central and Eastern European Countries’, 42 *CMLRev.* (2005) p. 399 at p. 403 et seq.

Indeed, after accession, shockwaves were caused first by a judgment of the Hungarian Constitutional Court, and then, a year later, by two judgments of the Polish Constitutional Tribunal. The Hungarian Constitutional Court found that a national law implementing EU regulations on surplus sugar stocks was against the Hungarian Constitution;¹⁶ indeed, the issue of sugar stocks has led to difficult cases regarding protection of constitutional rights in the other new member states as well. The Polish Constitutional Tribunal annulled national provisions implementing the European Arrest Warrant framework decision¹⁷ due to their non-conformity with Article 55 of the Constitution, which prohibits the extradition of Polish nationals.¹⁸ This was followed by the Accession Treaty judgment, where the Tribunal held that the Constitution itself is the supreme law of the land, even in cases of conflict with Community law.¹⁹ Do these cases signify that the constitutional courts of the new member states might be entrenched in the traditional national constitutional setting and even hostile to the European Union? Indeed, it has been argued that the Hungarian Court has been slow to reassess its new role in the aftermath of Union membership, and ‘the state organs of new EU members still have to learn the rules of “co-operative constitutionalism”’.²⁰ According to a recent EU law textbook by leading authors, the Polish Accession Treaty decision even goes as far as being the only one to represent the approach of ‘unconditional national constitutional sovereignty’,²¹ which ‘insists upon the continuing and unconditional sovereignty of the national constitutional order’.²²

However, embarking on an inquiry into the application of EC/EU law in the new member states, this article contends that the two aforementioned cases, alongside other cases across the region, show that the Central and Eastern European constitutional courts have actually gone to great lengths to avoid clashes with EC/EU law, in their quest to find pragmatic, EU-friendly solutions. With regard to the Polish European Arrest Warrant decision, this is demonstrated by the fact

¹⁶ Decision 17/2004 (V. 25) AB.

¹⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* [2002] L 190/1.

¹⁸ Judgment of 27 April 2005 in Case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05] nyr. The summary of the judgment in English is available at the Constitutional Tribunal’s website <www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf>.

¹⁹ Judgment of 11 May 2005 in Case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt. K 18/04] nyr. The summary of the judgment in English is available at the Constitutional Tribunal’s website <www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf>. See also on this judgment the case note by A. Łazowski ‘Poland. Constitutional Tribunal on Conformity of the Accession Treaty with the Polish Constitution’ in this issue of *EuConst*.

²⁰ Sajó, *supra* n. 14, p. 351.

²¹ D. Chalmers et al., *European Union Law* (Cambridge, Cambridge University Press 2006), p. 198 and 201.

²² *Ibid*, p. 199.

that, even though the matter concerned the third pillar where supremacy does not apply, the Polish Constitutional Tribunal granted an 18-month period for the continuation of extradition, during which Parliament was to amend the Constitution. Importantly, the Polish European Arrest Warrant decision demonstrates that there exist genuine limits to EU-friendly interpretation. Article 55 of the Polish Constitution, which expressly prohibits the extradition of Polish nationals, had not been amended prior to accession despite numerous calls to this effect. This dovetails with a wider trend in the region: as has been pointed out earlier, the constitutional amendments in Poland and a number of other new member states from Central and Eastern Europe remained relatively minimal, with several constitutions still containing direct conflicts with EC/EU law.²³ As accession referendums were imminent at the time, it was important to keep the constitutional revision to a low profile – a wider range of amendments could have fuelled the eurosceptics' outcries about loss of sovereignty. However, after accession, such direct constitutional conflicts left some of the constitutional courts in a vexed position indeed. Besides alluding to the need to amend the constitutional provisions, it will be seen that some constitutional courts have additionally highlighted the need for the national parliaments to improve the drafting of national legislation, in order to ensure its constitutionality in the context of Union membership.

Against this background, this article will show that whilst the discourse on the relationship between the Court of Justice and the national constitutional courts hitherto has predominantly focused on the dialogue and mutual co-operation between the *courts* in an attempt to avoid destructive conflicts, there are limits to EU-friendly interpretation of those constitutional provisions that are in a manifest conflict with EC/EU law. Therefore, the article will argue that the role of political institutions in such a 'co-operative constitutionalism', especially that of *national parliaments*, warrants further consideration. In addition, the article shows that the nascent EU-related case-law in the Central and Eastern European countries lends support to the concerns that have been voiced about the adequacy of the Union's human rights protection standards, most forcefully in the wake of the notorious *Solange* and *Banana* sagas.

'JUDICIAL DIALOGUES' IN EUROPE

The relationship between the European Court of Justice and national constitutional courts has come to be characterised as 'judicial dialogues'²⁴ or 'co-operative constitutionalism',²⁵ which has been based on a structured and ongoing 'conver-

²³ For details, see Albi, *EU Enlargement*, *supra* n. 15, p. 78-121.

²⁴ Stone Sweet, *supra* n. 13, p. 325-326.

²⁵ Sajó, *supra* n. 14, p. 351.

sation', co-operation and mutual trust. On the one hand, national constitutional courts have sent warnings to the Court of Justice about the need to respect fundamental rights and better to police the observance of the limits of European competence by the Union's institutions. In doing so, a great deal of self-restraint has been displayed;²⁶ the courts have refrained from acting in a destructive manner, with no national court yet having declared a piece of Union secondary legislation invalid. On the other hand, the European Court of Justice has heeded these warnings: even though some national decisions have been criticised as nationalist or even hostile to Community law, such decisions have served as a catalyst for the development of the fundamental rights jurisprudence by the Court of Justice, by way of protecting human rights as part of the general principles of Community law.²⁷ More recently, the Court of Justice has shown sensitivity to the constitutional courts' concerns about the Union institutions staying within the competences conferred upon them. By way of illustration, the Court found in *Opinion 2/94* that the European Union has no competence to accede to the European Convention on Human Rights without a prior Treaty amendment,²⁸ it refused to extend horizontal direct effect to directives in the *Dori* case,²⁹ and, in *Tobacco Advertising Directive*,³⁰ it for the first time repealed a Community measure of political importance on the ground of lack of competence. Against this background, it has been commented that '[t]he principle of supremacy remains essentially "two-dimensional"', it is a complex, layered reality of dialogue and persuasion.³¹

This kind of judicial co-operation sits well with the pluralist approaches that have recently gained popularity in explaining the relationship between the Community and national legal orders. Whilst the Court of Justice's case-law represents what has been characterised as an EU-centred approach to the ultimate *locus* of authority, and the national constitutional courts have taken a state-centred approach, the complex relationship between the national constitutional frameworks and the developing process of European legal integration has increasingly been

²⁶ See, e.g., Claes, *supra* n. 2, p. 534.

²⁷ For relevant cases, see, e.g., A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford, Oxford University Press 2000) p. 171-172; S. Douglas-Scott, *Constitutional Law of the European Union* (London, Pearson Education 2002) p. 437 et seq. For a discussion of German literature, see M. Herdegen, 'The Origins and Development of the General Principles of Community Law', in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer Law International 2000), p. 7 and 9-10.

²⁸ ECJ, *Opinion 2/94 on Accession by the Community to the ECHR*, [1996] ECR I-1759.

²⁹ ECJ, Case 91/92 *Dori v. Recreb Srl*, [1994] ECR I-3325.

³⁰ ECJ, Case C-376/98, *Germany v. European Parliament and Council*, [2000] ECR I-8419.

³¹ Claes, *supra* n. 2, p. 670, citing both De Witte, *supra* n. 2, p. 209 and S. Weatherhill, 'Is constitutional finality feasible or desirable? On the cases for European constitutionalism and a European Constitution', *ConWeb* 7/2002, p. 14.

presented in pluralist terms.³² Despite some variations, the pluralist concepts generally regard the national and European constitutional documents as no longer being the emanation of two independent legal orders, where the sovereign state is the ultimate source and centre of authority.³³ Instead, the relationship between the orders 'is now horizontal rather than vertical – heterarchical rather than hierarchical.'³⁴ Each highest court within a subsystem – constitutional courts, European Court of Justice, as well as other adjudicating bodies such as the European Court of Human Rights and the WTO Dispute Settlement Body – derives both authority and legitimacy from its own basic document,³⁵ retaining 'interpretative competence-competence'.³⁶ The focus here is on the prevention of conflicts through co-operation and interaction. If conflicts nonetheless occur, these should be solved on the basis of certain principles, taking account of the concrete constitutional context, time and practicalities,³⁷ on occasion 'some political action' may be necessary to produce a solution.³⁸

Whilst the focus of the judicial dialogues or co-operative constitutionalism has been on the interaction between the courts at different levels, the role of other actors, such as parliaments, in such a dialogue or co-operation has received negligible consideration. The subsequent analysis of the EU-related cases in a number of the new member states from Central and Eastern Europe highlights the importance of expanding the equation of 'co-operative constitutionalism' beyond judicial actors, by involving political institutions at both the national and the Union level into such co-operation.

SOME BROADER REMARKS ON CENTRAL AND EASTERN EUROPEAN CONSTITUTIONAL COURTS

It has been pointed out that in the history of European integration, the *Kompetenz-Kompetenz* disputes have arisen in those member states that have constitutional

³² For an overview of the different schools of thought, see Kumm, *supra* n. 9, p. 265 et seq.

³³ See, e.g., N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford, Oxford University Press 1999) p. 105; N. Walker, 'The Idea of Constitutional Pluralism', 65 *MLR* (2002) p. 317; M. Kumm, 'Who is the final arbiter of constitutionality in Europe?: three conceptions of the relationship between the German Federal Constitutional Court and the European Court of Justice', 36 *CMLRev.* (1999) p. 351; M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford, Hart Publishing 2003) p. 523-524.

³⁴ Walker, 'The Idea of Constitutional Pluralism', *supra* n. 33, p. 337.

³⁵ MacCormick, *supra* n. 33, Chapter 7; Walker, 'Late Sovereignty in the European Union' in Walker, *Sovereignty in Transition*, *supra* n. 33, p. 3-32; Kumm, *supra* n. 33, p. 375-376.

³⁶ MacCormick, *supra* n. 33, p. 259.

³⁷ E.g., Kumm, *supra* n. 33, p. 356.

³⁸ MacCormick, *supra* n. 33, p. 265.

courts, as they have rendered the reception of supremacy contingent on certain conditions.³⁹ Unlike other courts, the constitutional courts insist that it is the national constitutions, instead of the Court of Justice or the EC Treaties, that mediate the relationship between Community law and national law.⁴⁰ This observation is of major importance in the context of Union enlargement, as the constitutional courts in the new member states from Central and Eastern Europe have a powerful status and a tradition of far-reaching judicial activism in re-building the independent legal systems of these countries after the breakdown of the totalitarian regime.⁴¹ As Wojciech Sadurski has noted, '[o]ne of the most striking features of the ongoing transitions to democracy in these societies is the spectacular growth in the role and prominence of constitutional courts and tribunals in shaping the new constitutional order.'⁴²

Three other specific concerns should be outlined, which might potentially complicate the position of the Central and Eastern European constitutional courts on the landscape of 'co-operative constitutionalism'. Firstly, unlike the constitutions of the old member states, most Central and Eastern European constitutions accord a stronger protection to sovereignty than their Western European counterparts, and they also expressly establish the principle that the constitution is the highest legal source in the country.⁴³ Some also directly prohibit ratification of treaties that are in conflict with the constitution. In addition, the Constitutional Courts of Hungary and Slovenia have cautioned in their earlier case-law that the constitutions may not be amended in a disguised way by ratification of treaties; the rule of law and legitimacy require the parliaments to respect the more stringent constitutional amendment procedures.⁴⁴ Although provisions were introduced in several new member states to the effect of securing supremacy and direct effect of Community law,⁴⁵ at the time of their introduction, these provisions generally were regarded as not affecting the supremacy of the constitutions.

³⁹ Stone Sweet, *supra* n. 13, p. 325.

⁴⁰ *Ibid.*

⁴¹ On the constitutional courts of Central and Eastern Europe, see W. Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague, Kluwer Law International 2002); J. Priban et al. (eds.), *Systems of Justice in Transition. Central European Experiences since 1989* (Aldershot, Ashgate 2003).

⁴² W. Sadurski, 'Constitutional Justice, East and West: Introduction' in Sadurski, *supra* n. 41, p. 1.

⁴³ E.g., Art. 8 of the Polish Constitution; Art. 7 of the Lithuanian Constitution; Art. 77(1) of the Hungarian Constitution. For the English text of these and other constitutions, see the International Constitutional Law website <www.oefre.unibe.ch/law/icl/index.html>.

⁴⁴ E.g., Hungarian Constitutional Court Decision 30/1998 on the Europe Agreement (VI 25) AB, *Magyar Közlöny*; Slovenian Constitutional Court Decision No. RM-1/97, 05.06.1997, *Uradni list RS*, No. 40/97, on Europe Agreement, in English <www.us-rs.si/en/>, para. 35-38.

⁴⁵ For details, see Albi, *EU Enlargement*, *supra* n. 15, p. 67 et seq.

Secondly, as Zdenek Kühn and Siniša Rodin have discussed in more detail, the Central and Eastern European judges tend to take the approach of legal formalism and textual positivism (although this holds less true at the level of constitutional courts).⁴⁶ Whilst the legal landscape in the western world was shaped by rational discourse, the predominant discourse in Central and Eastern Europe during the Communist period was authoritarian, with one truth being imposed as universal and final.⁴⁷ As a result, legal scholarship was not expected to be critical but descriptive and apologetic, with courts being reluctant to depart from literal interpretations of laws.⁴⁸ A tradition of textual reading of the law by the judges, coupled with a weakness in applying abstract legal principles, may pose challenges to the application of Community law, which involves an ample measure of teleological interpretation, with an important place being held by the general principles of law.⁴⁹ Furthermore, given the pluralist dimension of the interaction between the national and the Community legal orders, challenges might be posed by the Kelsenian concept of the legal system as a pyramid, which holds a strong position in Central and Eastern Europe, as a reaction to the Communist system where the classic hierarchy of legal sources had disappeared and government decrees abounded.^{50 51}

Thirdly, it might be worth noting that during the Communist period, the courts did not deal with the application of international law (with the exception of the Polish courts to some extent).⁵² The Communist constitutions did not contain provisions on the position and applicability of international treaties; these had to be ratified and transposed by national law according to the dualist concept governing the Socialist sphere.⁵³ However, after the regime change, constitutions

⁴⁶ Z. Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', 6 *German Law Journal* (2005) p. 563; S. Rodin 'Discourse and Authority in European and Post-Communist Legal Culture', 1 *Croatian Yearbook of European Law* (2005) p. 1, esp. p. 7-8. See also T. Capeta, 'Courts, Legal Culture and EU Enlargement', 1 *Croatian Yearbook of European Law* (2005) p. 23. However, Michal Bobek has noted that if the courts of the other member states were taken as comparators, rather than the European Court of Justice, the situation might not be that much different. See M. Bobek, 'A New or a Non-existent Legal Order? Some Early Experience in the Application of EU Law in Central Europe', 2 *Croatian Yearbook of European Law and Policy* (2006), forthcoming.

⁴⁷ Rodin, *supra* n. 46, p. 7-12.

⁴⁸ *Ibid.*

⁴⁹ Kühn, *supra* n. 46, p. 576 and p. 564; see also Capeta, *supra* n. 46, p. 31 et seq.

⁵⁰ Kühn, *supra* n. 46, p. 574 (references omitted).

⁵¹ For a broader discussion of the points raised in this and the previous paragraph, see W. Weiss, 'East Enlargement and the Legal Discourse in the EU', paper presented at the workshop 'Integration or Absorption? Legal Discourses in the Enlarged Union', University of Hanover, 27-29 Sept. 2006, on file with the author.

⁵² See also Kühn, *supra* n. 46, p. 565.

⁵³ T. Schweisfurth and R. Alleweldt, 'The Position of International Law in the Central and Eastern European Countries', 40 *German Yearbook of International Law* (1997) p. 165, with refer-

were opened up to international law,⁵⁴ and the Central and Eastern European courts have readily referred to international instruments, especially the European Convention on Human Rights and relevant case-law. The constitutions were subsequently revised in relation to Union membership.⁵⁵ Furthermore, in the years leading up to the accession to the Union, the judges in the region underwent intensive training in EU law in the framework of various programmes organised by the Union as well as governments of several old member states. As a matter of fact, the extent of training has given ground even to remarks about Central and Eastern European judges perhaps having become better informed of EU law than judges from provincial areas of some older member states.

Nevertheless, a question arises as to whether the entry of Central and Eastern European courts into the Union's constitutional landscape might further exacerbate the tensions between Community law and national constitutions. Furthermore, it should be recalled that the Central and Eastern European constitutional courts have been profoundly influenced by the German Constitutional Court in the methodology and style of their judicial reasoning;⁵⁶ the German Constitutional Court, of course, has been the foremost guardian of the national constitutional limits to European integration. However, contrary to what might have been expected from these somewhat pessimistic background remarks, the subsequent sections will show that the Central and Eastern European constitutional courts have displayed inventiveness in finding pragmatic solutions to avoid conflicts with Community law. The fact that they have done so despite the potential difficulties outlined above further corroborates the thesis, which will be developed in more detail below, that the Central and Eastern European courts have taken a pro-European approach.

DECISIONS OF THE POLISH CONSTITUTIONAL TRIBUNAL

The principle of EU-friendly interpretation

The Polish Constitutional Tribunal's stance on EC/EU law is predominantly known for the dramatic decision in the above-mentioned European Arrest Warrant case.

ence to E. Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?', 88 *American Journal of International Law* (1994) p. 427 at p. 432. See also with regard to Poland W. Czaplinski, 'The Relationship between International Law and Polish Municipal Law in the Light of the 1997 Constitution and Jurisprudence', *Droit Polonais Contemporain* (1999), p. 19-20.

⁵⁴ Stein, *supra* n. 53, p. 427-450.

⁵⁵ For details, see Albi, *EU Enlargement*, *supra* n. 15, p. 67 et seq.

⁵⁶ See Z. Kühn, 'Constitutional Monologues, Constitutional Dialogues or Constitutional Cacophony? European Arrest Warrant Saga in Germany, Poland and the Czech Republic', paper presented at the workshop 'Integration or Absorption? Legal Discourses in the Enlarged Union', University of Hanover, 27-29 Sept. 2006, on file with the author.

However, this decision does not appear to reflect the situation adequately: this section will demonstrate that the Court has gone to great lengths in interpreting the Polish Constitution in an EU-friendly way in its earlier decisions. In order to understand the decisions better, it is instructive to outline the relevant constitutional provisions in Poland.

Poland adopted a new Constitution in 1997,⁵⁷ with Article 90(1) allowing the country to delegate certain competences to international organisations, and Article 91 establishing direct effect and supremacy of ratified international agreements and secondary law.⁵⁸ However, there were calls for amending the Constitution prior to accession to the European Union, to remove certain conflicts that might nonetheless arise with regard to EC/EU law.⁵⁹ The problematic provisions included the following: Article 62(1), under which voting rights in local elections are the preserve of Polish citizens; Article 227(1), which bestows the National Bank of Poland with the exclusive right to issue the Polish currency; and Articles 52(4) and 55, which prohibit the extradition of Polish citizens. However, amending the Constitution would have posed the risk of strengthening the nationalist anti-EU movements ahead of the then imminent accession referendum, given that public support for accession had been a borderline 50%. Furthermore, it would have been difficult to secure the necessary political support, as constitutional amendments required the approval of two parliamentary chambers and involved the possibility of holding a referendum.⁶⁰

It did not take long for the Constitutional Tribunal to be seized with regard to conflicts between the above provisions and Community law. To begin with, in a case decided on 31 May 2004, a group of *Sejm* (lower house of Parliament) members argued that the 2004 Act on the Elections to the European Parliament was unconstitutional, for the reason that the participation of foreign nationals was in conflict with the principle of the sovereignty of the Polish people (Article 4(1) of the Constitution), as well as with the clauses that grant the right to vote to Polish

⁵⁷ Constitution of the Republic of Poland, 1997; for an English version, see the International Constitutional Law website <www.oefre.unibe.ch/law/icl/index.html>.

⁵⁸ See in more detail, e.g., S. Biernat, 'Constitutional Aspects of Poland's Future Membership in the European Union', 36 *Archiv des Völkerrechts* (1998) p. 398; J. Barcz, 'Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997', 23 *Polish Yearbook of International Law* (1997-98) p. 21; A. Łazowski, 'Poland', in A. Ott and K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (The Hague, T.M.C. Asser Press 2002) p. 299.

⁵⁹ See K. Wojtowicz, 'Proposed Changes in the Polish Constitution of 1997 Ahead of Poland's Accession to the European Union', 25 *Polish Yearbook of International Law* (2001), p. 40-44; S. Biernat, 'The Openness of the Constitution of the Republic of Poland Towards European Integration', in G. Amato et al. (eds.), *The Constitutional Revision in Today's Europe* (Esperia Publications, London 2002) p. 439 at 445 et seq.

⁶⁰ See in more detail Biernat, *supra* n. 59, p. 446 et seq.

citizens only. According to Article 19 EC Treaty, every citizen of the Union residing in a member state of which he is not a national shall have the right to vote and stand as a candidate in municipal elections and elections to the European Parliament. The Constitutional Tribunal rejected the claim.⁶¹ It underlined the importance of the constitutional principle mandating an EU-friendly interpretation of national law. According to the Tribunal, '[w]hil[e] interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States.'⁶² According to the Tribunal, the Polish Constitution is the supreme act establishing the legal basis for the existence of the Polish State; however, it does not apply to structures other than the Polish State.⁶³ Under Articles 90(1) and (3) of the Constitution, in combination with the Accession Treaty, certain powers were delegated to the EU level; the review of the acts of Union bodies is a matter for Union law, and Polish implementing provisions and the Constitution may not be deployed for reviewing the constitutionality of political decision-making at the EU level.

A similar pragmatic approach followed in the Accession Treaty case.⁶⁴ The claimants, coming from amongst three political groups of the *Sejm* that were opposed to Poland's European Union membership, argued that a number of provisions in the Accession Treaty and EC/EU Treaties were in conflict with the Polish Constitution, especially with the constitutional principles of the sovereignty of the Polish people and the supremacy of the Constitution within the Polish legal system. The numerous alleged conflicts arose, *inter alia*, from the right of Union citizens to vote and stand in both European Parliament and municipal elections, the adoption of the common currency, and changes affecting the separation of powers.

The Tribunal dismissed all claims. As regards the municipal elections, the Tribunal found that the above-mentioned Article 4 (on the sovereignty of the Polish people) does not encompass local elections, and Article 62(1), which guarantees to the Polish citizens the right to elect, *inter alia*, their representatives to local self-government bodies, does not preclude the possibility of according the right to the citizens of other states. The Tribunal equally rejected the applicants' claim that the powers of the European Central Bank were in conflict with Article 227(1) of the Polish Constitution, which establishes the National Bank of Poland as the central bank of the State and vests therein the exclusive right to issue money and to

⁶¹ Judgment of 31.05.2004, K 15/04; an English summary of the decision can be found at <www.trybunal.gov.pl/eng/summaries/K_15_04_GB.pdf>.

⁶² Para. 10 of the English summary of judgment K15/04, *supra* n. 61.

⁶³ *Ibid.*, para. 1.

⁶⁴ Judgment in Case K 18/04, *supra* n. 19.

formulate and implement monetary policy. This claim was rejected because Article 105 EC, which deals with these matters, is not of a self-executing nature. Importantly for our purposes, the Court said that once Poland adopts the common currency in the future, a decision might be required to amend the Polish Constitution in this respect. Another interesting point to note was that the claimants also raised the issue of the constitutionality of the potential future introduction of same-sex marriages, which has generated much controversy in this strongly Catholic country. According to Article 18 of the Polish Constitution, marriage is a union between a man and woman. The Tribunal responded that Article 13 EC in the current wording does not concern the institution of marriage as such; any future change in this respect would once again require an amendment of the Polish Constitution.

In this judgment, the Tribunal also made a strong statement about the supremacy of the Polish Constitution, which has become the best-known part of the judgment. However, it is important to underline the fact that the Tribunal rejected all the above claims, which does show its efforts to interpret the national provisions in an EU-friendly way even though the interpretation of some provisions may appear rather stretched to an outside observer. The part of the decision that concerns supremacy is closely conditioned by the decision in the European Arrest Warrant case, which was decided two weeks before the Accession Treaty decision. In order to understand the Tribunal's statements on supremacy fully, we will first examine the European Arrest Warrant decision and then return to the supremacy part of the Accession Treaty decision.

Before doing so, however, the Tribunal's EU-friendly approach in the case regarding the turnout in the accession referendum also warrants a mention. Prior to accession, there had been heated debates amongst Polish politicians and scholars as to what would happen if the majority of the people were to approve EU accession at the referendum, but with the turnout below the required 50%. Parliament adopted a statute that allowed it to ratify the accession agreement itself, if the turnout remained under this threshold. Some opposition members of the *Sejm* requested the Constitutional Tribunal's review of the constitutionality of this statute; however, the Tribunal upheld the correctness of such a mechanism.⁶⁵

In addition, it should be noted that the willingness to interpret national law in conformity with Community law was demonstrated by the Polish courts already in the pre-accession period. Even though noting that, at the time, Community law had no binding force in Poland, the Constitutional Tribunal emphasized that Articles 68 and 69 of the Polish Association Agreement⁶⁶ signified Poland's obli-

⁶⁵ Judgment of 27.05.2003 in Case K11/03; an English summary of the decision can be found at <www.trybunal.gov.pl/eng/summaries/K_11_03_GB.pdf>.

⁶⁶ *OJ* [1993] L 348/1.

gation to use ‘its best endeavours to ensure that future legislation is compatible with Community legislation’; this resulted ‘in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility.’⁶⁷

The European Arrest Warrant decision and the Accession Treaty decision

It is only against the backdrop of the above line of decisions that the Decision on the European Arrest Warrant⁶⁸ can be duly understood. The case concerned Article 55(1) of the Polish Constitution, which provides in an explicit and unconditional manner that ‘[t]he extradition of a Polish citizen shall be forbidden’. The Polish legislature transposed the European Arrest Warrant Framework Decision by way of amending in 2004 the 1997 Penal Procedure Code,⁶⁹ without any accompanying amendment of the Constitution. Instead, it decided to deploy a terminological distinction between ‘extradition’ and ‘surrender’, implying that the latter is not prohibited under Article 55(1) of the Constitution. However, the Regional Court of Gdańsk initiated proceedings before the Constitutional Tribunal to review whether the surrender of a Polish citizen – Maria D. – to the Netherlands, on the basis of an arrest warrant request, was compatible with Article 55(1) of the Constitution.⁷⁰

The Tribunal held that despite numerous important procedural differences between the extradition and surrender, the two procedures were very similar in substance.⁷¹ Thus, according to the judges, the surrender procedure is only a variation of extradition, and the prohibition enshrined in Article 55 of the Constitution therefore was fully applicable to both procedures. Furthermore, the Constitutional Tribunal argued that a pro-European interpretation of this provision was not available, because the principles of supremacy and indirect effect do not apply to third pillar legislation (the *Pupino* decision had not yet been delivered by the Court of Justice⁷²), and in any event the jurisprudence of the Court of Justice has placed limitations to the principle of indirect effect, especially as regards

⁶⁷ The decisions are quoted in Kühn, *supra* n. 46, p. 566; see *ibid.* for further details.

⁶⁸ Judgment in Case P 1/05, *supra* n. 18. See A. Łazowski, ‘Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005’, 1 *EuConst* (2005) p. 569 at p. 573 et seq.; and K. Kowalik-Bańczyk, ‘Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’, 6 *German Law Journal* (2005), p. 1355.

⁶⁹ Act amending the Penal Code, Criminal Procedure Code and Minor Offences Code [Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń], *Dziennik Ustaw* [2004] No. 69 Item 626.

⁷⁰ For information on the factual background, see Łazowski, *supra* n. 68, p. 573 et seq.

⁷¹ *Ibid.*, p. 574 et seq.

⁷² See *infra* n. 74 and the accompanying text.

aggravating criminal liability.⁷³ As a consequence, the Tribunal declared the implementing provision in the Penal Procedure Act unconstitutional. However, the Tribunal did not stop extradition, granting instead an 18-month transitional period to Parliament, during which the Constitution was to be amended and the surrender of the Polish nationals was to continue.

Although this case concerns the third pillar, where EU law does not enjoy supremacy, the judgment has been regarded as sitting somewhat uneasily with the *Pupino* judgment that was delivered shortly afterwards by the European Court of Justice.⁷⁴ According to *Pupino*, the obligation of loyal co-operation under Article 10 of the EC Treaty, and the principle of indirect effect, also do apply to the third pillar; the Polish European Arrest Warrant decision had excluded indirect effect in this domain. However, these judgments could nonetheless be regarded as compatible with each other, given that the *Pupino* judgment places certain limits to indirect effect, including the rule that indirect effect should not lead to *contra legem* interpretation. Indeed, the Constitutional Tribunal was not able to interpret the Polish Constitution in the light of the Framework Decision without going *contra legem*, and it therefore appears to have been permissible to grant priority to the Polish Constitution.

In any event, the 18-month transitional period testifies that the Tribunal essentially sought to ensure an EU-friendly, pragmatic approach,⁷⁵ especially if considered in the light of the Tribunal's previous case-law. Indeed, the Tribunal emphasized that the Polish legislature should 'give the highest priority' to ensuring the functioning of the European Arrest Warrant system.⁷⁶ Furthermore, the Tribunal clearly had no room to manoeuvre, given the explicit prohibition of extradition in the Constitution. As seen above, other provisions allowed a certain measure of interpretation, and were indeed interpreted by the Tribunal either as compatible with Community law (e.g., provisions on the voting rights) or requiring amendment in a more distant future (e.g. provisions on the Central Bank in case of adoption of the common currency). However, Article 55(1), formulated as a rule rather than a principle,⁷⁷ left the Court's hands tied, with the absence of any room to manoeuvre.

The Polish decision can be further contextualised by comparing it with the decisions of the constitutional courts of some other member states, which have

⁷³ See, e.g., ECJ, Case 80/86 *Kolpinghuis Nijmegen*, [1987] ECR I-3969.

⁷⁴ Case C-105/03 *Criminal proceedings against Maria Pupino*, [2005] ECR I-5285. For discussion, see Łazowski, *supra* n. 68, p. 578 et seq.

⁷⁵ For a similar conclusion, see also Łazowski, *supra* n. 68, p. 581; Kowalik-Bańczyk, *supra* n. 68, p. 1360; J. Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', *Jean Monnet Working Paper 10/05* (2005) available at <www.jeanmonnetprogram.org>, p. 13-14; Kühn, *supra* n. 56.

⁷⁶ Para. 17 of the English summary of the judgment in Case P 1/05, *supra* n. 18.

⁷⁷ See on this Komárek, *supra* n. 75, p. 12.

faced equally controversial issues and asserted their prerogatives with regard to the third pillar. Indeed, the Cypriot Supreme Court annulled in November 2005 the national implementing law on the basis of a reasoning that closely followed the Polish European Arrest Warrant judgment.⁷⁸ In Germany, the Constitutional Court declared in July 2005 that a national law implementing the European Arrest Warrant was unconstitutional, for the reason that the law had not exhausted the margins afforded by the Framework Decision on the European Arrest Warrant, in such a way as to afford the highest possible consideration to the protection of fundamental rights.⁷⁹ Indeed, Jan Komárek has pointed out that the Polish Tribunal acted in a much more pro-European way than its German counterpart: first, the latter was not forced to decide on an explicit conflict between the German Basic Law and a provision of European Union law; and secondly, while the Polish Tribunal used all its powers to avoid the negative consequences of such a conflict, the German Court was not quite so careful about the consequences of its judgment for the European legal order.⁸⁰ Cases concerning an alleged conflict between national constitutions and obligations arising from the framework decision also have been brought before the Spanish⁸¹ and Czech Constitutional Courts.⁸² In addition, the Court of Justice has been seized with a question on the validity of the European Arrest Warrant Framework Decision itself: the Belgian *Cour d'Arbitrage* made a preliminary reference concerning the legal basis of the framework decision and the compatibility of the abolition of the dual criminality rule with fundamental rights.⁸³

Against the above background, the Polish Constitutional Tribunal went on to emphasize that there are limits to interpretation in the above-mentioned Accession Treaty decision that followed two weeks later.⁸⁴ In this decision, the Tribunal

⁷⁸ Judgment of 7.11.2005, Ap. No. 294/2005, English summary on file with the author.

⁷⁹ Judgment of 18.07.2005, 2 BvR 2236/04. For a summary in English, see Press Release No. 64/2005 of 18 July 2005, at the Court's website <www.bverfg.de/bverfg/cgi/pressemitteilungen/frames/bvg05-064e>. See also C. Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant', 2 *EuConst* (2006) p. 209-226.

⁸⁰ Komárek, *supra* n. 75, p. 5 and 14; see also Kühn, *supra* n. 56.

⁸¹ Cases No. RA 3865-2004, RA 3865-2004, RA 4760-2004, RA 3988-2005 and RA 3988-2005.

⁸² Case No. Pl. ÚS 66/04. The Czech Constitutional Court decided the case on 3 May 2006, finding that Article 14(4) of the Czech Charter of Fundamental Rights, which prohibits forcing Czech citizens to leave their homeland, does not preclude a temporary surrender of Czech citizens under the European Arrest Warrant, when interpreting the provision in conformity with European Union obligations.

⁸³ Case C-303/05 *Advocaten voor de Wereld*, OJ [2005] C 271/14, 29.10.2005.

⁸⁴ Judgment in Case K 18/04, *supra* n. 19. See also on this judgment the case note by A. Łazowski 'Poland. Constitutional Tribunal on Conformity of the Accession Treaty with the Polish Constitution' in this issue of *EuConst*.

began by first reiterating the requirement 'to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland', in line with Article 9 of the Constitution.⁸⁵ Indeed, the Tribunal developed a version of the pluralist approach to the relations between Community and national law, stating that unlike traditional dualism and monism, Community law created a new situation 'wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative.'⁸⁶ It also underscored the assumption of mutual loyalty between the EC/EU institutions and the member states, which creates 'a duty for the Member States to show the highest standard of respect for Community norms', but also 'a duty for the Court of Justice to be sympathetically disposed towards the national legal systems.'⁸⁷

However, it then continued by stating that under the explicit wording of Article 8(1) of the Polish Constitution, the Constitution remains supreme, and there are limits to interpreting the domestic law in a manner that is sympathetic to European law.⁸⁸ In certain circumstances, an irreconcilable inconsistency may emerge between a constitutional norm and a Community norm, which cannot be eliminated by means of interpretation.⁸⁹ Such cases may not lead to the constitutional norm losing its binding force (e.g., as regards norms protecting fundamental rights) or retaining its application only in areas which are outside the scope of Community law. In case of such explicit conflicts, Parliament has to decide the appropriate manner of resolving the inconsistency, with three options being at its disposal: amendment of the Constitution, renegotiation of the EU measure, or, ultimately, Poland's withdrawal from the Union.⁹⁰ As an aside, it should be noted that similarly to the constitutional decisions of some older member states, the Tribunal stated that 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. The Tribunal also warned the Court of Justice that the latter's interpretation of Community law should stay within the scope of competences delegated to the Communities by the member states. In addition, it clarified the limits to the delegation of powers to the Union, stating that Articles 90(1) and 91(3) of the Polish Constitution do not permit delegation to go as far as to bring about the inability of the Republic of Poland to continue functioning as a sovereign and democratic State.

⁸⁵ Para. 10 of the English summary of Judgment in Case K 18/04, *supra* n. 19.

⁸⁶ *Ibid.*, para. 12.

⁸⁷ *Ibid.*, para. 16.

⁸⁸ *Ibid.*, para. 14.

⁸⁹ *Ibid.*, para. 13.

⁹⁰ *Ibid.*

The European Arrest Warrant decision brings us to the issue of the importance for the other institutional actors to take their role in the 'co-operative constitutionalism' seriously: since there were genuine limits to interpretation, the Tribunal gave a clear message to Parliament to amend the Constitution. As Komárek puts it,

the question will shift from who (...) *the final arbiter* in the EU legal order is (...) to what *the limits of law* are. In other words, we will have to ask different questions: to what extent the conflict can be decided by the courts (and by their interpretation of law) and what should be left to the other constitutional discourse actors, these actors being not only politicians, but also the legal/constitutional doctrine and the public at large.⁹¹

Indeed, several other new member states had amended their constitutions in order to accommodate the European Arrest Warrant system, including Slovenia and Latvia;⁹² one of the most recent countries to do so was an accession country, Bulgaria.⁹³ In a follow-up to the European Arrest Warrant judgment, the Polish President presented a bill on revision of Article 55 of the Polish Constitution, according to which the extradition ban is maintained, subject however to exceptions set forth in international treaties; the amendment was adopted in autumn 2006. We will return to the issue of the parliaments' role in the 'co-operative constitutionalism' throughout the remainder of this article.

CASES CONTESTING THE PROCEDURE OF AMENDING THE CONSTITUTIONS FOR UNION MEMBERSHIP

Besides by the Polish Constitutional Tribunal, the adequacy of the constitutional amendments for Union membership was also addressed by the highest courts in Estonia and Latvia, where not only the substance of the constitutional provisions but also the very mode of constitutional amendment had been contested. The subsequent sub-sections show that whilst these cases appear to have been brought on the basis of legitimate national constitutional grounds, the judgments reflect pragmatic efforts of the judges of these very small member states not to 'rock the boat', given their new role as European as well as national judges. As with the Polish Constitutional Tribunal, the Supreme Court of Estonia delivered a message

⁹¹ Komárek, *supra* n. 75, p. 25.

⁹² For details, see Albi, *EU Enlargement*, *supra* n. 15, p. 67 et seq.

⁹³ See A. Łazowski and S. Yosifova, 'Bulgaria', in S. Blockmans and A. Łazowski (eds.), *The European Union and its Neighbours. A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague, T.M.C. Asser Press 2006).

to the national parliament on the need for some adjustments in the legislative activity in the context of Union membership.

Estonia

As with Poland, there had been calls from various quarters in Estonia to amend certain provisions of the national constitution prior to accession. These included Article 1 of the Constitution, which declares the eternity and inalienability of Estonia's sovereignty and independence, Article 48, which entitles only Estonian citizens to belong to political parties, and Article 111, according to which the Bank of Estonia has the exclusive right to emit Estonia's currency. However, due to low public support for accession in the years preceding the accession referendum, and the extremely arduous constitutional amendment procedure, the Constitution was, strictly speaking, not amended but 'supplemented' instead by an independently standing Act Supplementing the Constitution⁹⁴ (hereinafter the 'Supplementing Act'). In a laconic wording, it authorizes Estonia's membership of the European Union (Article 1), with the Constitution being 'applied, taking into consideration the rights and obligations deriving from the Accession Treaty' (Article 2). The Act was approved by referendum on 14 September 2003, where two referendums – on accession and on the 'supplementing' of the Constitution – were fused into one, following an amendment to the Referendum Act.

A number of constitutional complaints were brought to the Constitutional Review Chamber of the Supreme Court, both with regard to the mode of the constitutional revision as well as substantive conflicts with Community law. As regards the mode of constitutional revision, in total nine cases were brought to the Supreme Court after the accession referendum.⁹⁵ In essence, the following claims were made: (a) the Constitution only allows 'amendment' of its text, and not its 'supplementing' by an independently standing act; (b) it was impossible to retain the 'eternal and inalienable independence' (Article 1 of the Constitution), while transferring part of it to the European Union, with the referendum question hence containing two mutually exclusive parts; (c) ratification of the Accession Treaty was unconstitutional as it should have been preceded by amending Article 1 of the Constitution (which in turn requires a referendum); and (d) the new type of referendum was incompatible with the Constitution and the Referendum Act. All claims were rejected by the Constitutional Review Chamber on procedural grounds.

As regards substantive conflicts with Community law, the Constitutional Review Chamber was seized in April 2005 with a case regarding the electoral rights

⁹⁴ RT I [Riigi Teataja – Official Gazette] 2003, 64, 429.

⁹⁵ E.g., Decision No. 3-4-1-11-03 of 24.09.2003, *Vilu and Estonian Voters Union*, and Decision No. 3-4-1-12-03 of 29.09.2003, *Kulbok*, available at <www.nc.ee>.

of Union citizens.⁹⁶ In this case, the Chancellor of Justice⁹⁷ claimed that a provision of the Political Parties Act,⁹⁸ which provides that only an Estonian citizen may be a member of a political party, was unconstitutional, when reading the above-mentioned Article 48 of the Constitution together with the Supplementing Act, as well as being in conflict with Article 19 EC Treaty.⁹⁹ That is because the contested provision would not ensure, in effect, equal opportunities for a Union citizen who stands as a candidate in local elections. The petition was dismissed on procedural grounds: no legal basis existed for declaring a national law invalid *in abstracto* on the ground of a conflict with Community law. Despite the applicant's reference to constitutional norms, the Court found that the provision had, in essence, been contested on the basis of incompatibility with Community law. In addition, the Court pointed out, with reference to the Court of Justice's decision in *IN.CO.GE.'90*,¹⁰⁰ that a national act which conflicts with Community law could simply be set aside in a concrete dispute. The Supreme Court's decision was criticised in a dissenting opinion, where it was argued that the Court should have requested a preliminary ruling from the Court of Justice on the interpretation of Article 19 EC Treaty, as to whether this Article includes the right to belong to political parties. The dissenting opinion also expressed regret that the Estonian highest court had not taken the opportunity to explain the meaning and implications of the Supplementing Act, and, in doing so, failed to enhance legal certainty.

The Supreme Court's decision appears to convey uneasiness with regard to the meaning and place of the Supplementing Act in the Estonian constitutional order, which, at the time of adoption, had evoked considerable controversy amongst lawyers.¹⁰¹ It looks as if the judges intentionally refused to take a stance on the Act that had been widely perceived as a political compromise to make the accession to the European Union possible at the time. As with the Polish European Arrest Warrant case, the Constitutional Review Chamber sent a message to Parliament, suggesting that the latter might wish to adopt clear legislative provisions on this matter. According to the Constitutional Review Chamber:

⁹⁶ Decision No. 3-4-1-1-05 of 19 April 2005, available at <www.nc.ee>.

⁹⁷ The Chancellor of Justice is an institution resembling an ombudsman; it also has the right to initiate constitutional review proceedings in the Constitutional Chamber of the Supreme Court.

⁹⁸ Political Parties Act, RT I 1994, 40, 654; 2003, 90, 601.

⁹⁹ Art. 19 EC provides for the right of Union citizens to vote and stand in European Parliament and municipal elections when residing in another member state.

¹⁰⁰ ECJ, Joined Cases C-10/97 to C-22/97, *Ministero delle Finanze v. IN.CO.GE.'90 Srl* [1998] ECR I-6307.

¹⁰¹ For details, see Albi, *EU Enlargement*, *supra* n. 15, p. 91.

The legislat[ure] is competent to decide whether it wants to regulate the procedure for declaring invalid Estonian legislation which is in conflict with European Union law, just as the legislat[ure] is free to choose whether it will or will not give the Chancellor of Justice the right to review the conformity of national legislation with European Union law.¹⁰²

However, one year later, Parliament expressly requested that the Constitutional Chamber clarify the meaning of the Supplementing Act, in relation to the above-mentioned Article 111 of the Constitution, according to which the Bank of Estonia has the exclusive right to issue the Estonian currency. The European Commission had earlier called on the Estonian Government to amend the Constitution in this respect; however, the Government insisted that Article 111 does not constitute an obstacle to adopting the common currency, when read together with the Supplementing Act. The Constitutional Chamber indeed upheld this view in its opinion of 11 May 2006.¹⁰³ It found that the Draft Act Amending the Bank of Estonia Act, which made preparatory arrangements for the eventual adoption of the Euro, was compatible with the Constitution. In addition, the Court indeed directly addressed the position of the Supplementing Act in the context of supremacy of Community law: it stated that the text of the Constitution should be read together with the Supplementing Act, and those parts of the Constitution that are incompatible with Community law have to be disapplied. As a matter of fact, by virtue of this statement, the Court appears to have granted unconditional supremacy to Community law.

It should be noted that following numerous controversies that have surrounded the role of the Supplementing Act in the Estonian constitutional order, an increasing number of prominent lawyers and politicians have called for a wider EU-related amendment package to be introduced directly into the text of the Constitution, or even the adoption of a new constitution.

Latvia

The Latvian Constitutional Court equally had to address cases pertaining to the correctness of the mode in which the Constitution was amended in view of EU accession, with an equally pragmatic approach taken by the Court. As with Estonia, the Latvian Constitution requires a referendum for amending Articles 1 and 2 on sovereignty and independence. However, due to the concerns similar to those in Estonia, the Constitution was amended by parliamentary procedure in May 2003. The amended Article 68 allows Latvia to delegate a part of its competences

¹⁰² Para. 50, Decision No. 3-4-1-1-05 of 19 April 2005, available at <www.nc.ee>.

¹⁰³ Opinion No. 3-4-1-3-06 on the interpretation of Article 111, available at <www.nc.ee>.

to international institutions. In addition, a new type of referendum was introduced for EU accession: whereas a constitutional amendment referendum requires, under Article 79, a minimum turnout of 50%, the new EU-referendum merely requires the participation of at least half of the number of the voters who participated in the previous parliamentary election, with the majority having to vote in favour.

This resulted in five petitions to the Constitutional Court in November 2003,¹⁰⁴ claiming that Parliament was not authorized to adopt the amendments without a prior amendment of Articles 1 and 2 of the Constitution. The petitions contested the constitutionality of both the amendments and the accession referendum as well as of the Accession Agreement. The Constitutional Court declared the petitions inadmissible, as the applicants had failed to substantiate the violation of their fundamental rights under the Constitution. The Court also noted that it is for Parliament to choose the constitutional amendment procedure; the Court does not have the competence to assess the conformity of one norm of the Constitution with another or with the Constitution as a whole. If a norm has been incorporated into the Constitution, it is an integral part of it and has a corresponding legal force.¹⁰⁵

Towards 'constitutional amorphousness'?

The above judgments by the highest courts in Estonia and Latvia, whilst taking a favourable approach towards the countries' participation in the European Union, seem to reinforce the concerns that had been voiced earlier about a certain degree of devaluation of Central and Eastern European constitutions in the process of European integration.¹⁰⁶ Constitutions in general have been classified into two main types – 'historic' and 'revolutionary'.¹⁰⁷ The former, which include, for example, the British and Dutch Constitutions, have developed incrementally over a long-term period, being non-formalistic and at least as much political in nature as legal. By contrast, the latter group of constitutions, which include, for instance, those of Germany, Italy, France and Ireland, tend to have their origin in a political or social cataclysm, which forms the 'moving myth' that inspires the Constitu-

¹⁰⁴ The registration numbers of these cases are 119-123/2003; the decisions of inadmissibility are not available in English. The decisions are summarised in A. Endzins, 'Constitutional Court of the Republic of Latvia', in *The Position of Constitutional Courts Following Integration into the European Union, Proceedings of the Conference held in Bled, Slovenia, 30.09.-02.10.2004*, p. 208 at p. 214-215.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Albi, *EU Enlargement*, *supra* n. 15, p. 114 et seq.

¹⁰⁷ See L. Besselink, 'The Dutch Constitution, the European Constitution and the Referendum in the Netherlands', in Albi and Ziller, *supra* n. 12, p. 113 et seq.

tion; these constitutions constitute the political reality and tend to have a distinctly legal character, being enforced by constitutional courts.¹⁰⁸ The constitutions of Central and Eastern Europe belong to the second group: as a reaction to the Communist period marked by nihilism to constitutional rules, they have a distinctly legal character, are relatively lengthy and detailed, and their observance is rigorously policed by powerful constitutional courts.¹⁰⁹ In the process of accession to the European Union, the EU-amendments to a number of the constitutions, in particular those of Poland and the Baltic states, remained substantially and/or procedurally minimalist, whereas equivalent changes in domestic aspects of governance would have normally led to corresponding constitutional amendments; this prompted the question whether constitutions are still 'taken seriously' in Central and Eastern European countries.¹¹⁰ As a matter of fact, the issue of a 'European deficit'¹¹¹ has also been raised with regard to the constitutions of a number of old member states, where Union membership finds minimal or even no mention and the constitutions thus might be gradually becoming somewhat obsolete with regard to the actual exercise of powers. In Denmark, where the Constitution in 2006 still contains no explicit mention of the European Union, and the courts rarely exercise constitutional review, Hjalte Rasmussen has noted a trend towards 'waning constitutionalism' and 'constitutional amorphousness'.¹¹²

In essence, these very questions were brought to the highest courts of Estonia and Latvia in the above cases. However, whilst both the Constitutional Chamber of the Supreme Court of Estonia and the Constitutional Court of Latvia have applied rigorous standards in ensuring the constitutionality of legal measures in their previous case-law, these cases appear to indicate that in the context of Union membership, the constitutional review standards may have had to be reassessed to some extent, and several constitutional issues of fundamental importance appear to have been glossed over by the courts. Admittedly, the courts had very little, if any, room to manoeuvre.

¹⁰⁸ Ibid.

¹⁰⁹ This argument has been developed in more detail in Albi, *EU Enlargement*, *supra* n. 15, p. 22 et seq. See also E. Smith, 'The Constitution as an Instrument of Change: Introduction', in E. Smith (ed.), *The Constitution as an Instrument of Change* (Stockholm, SNS Förlag 2003), p. 15 et seq.

¹¹⁰ Albi, *EU Enlargement*, *supra* n. 15, p. 114 et seq.

¹¹¹ B. De Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?', in A. Kellermann et al. (eds.), *EU Enlargement. The Constitutional Impact at EU and National Level* (The Hague, T.M.C. Asser Press 2001) p. 73.

¹¹² H. Rasmussen, 'Denmark's Waning Constitutionalism and Article 20 of the Constitution on Transfer of Sovereignty', in Albi and Ziller, *supra* n. 12, p. 149-156.

With the hands of the courts thus being tied by the constraints of Union membership, the role of the political institutions, especially parliaments, assumes particular importance in terms of exercising self-control and extra prudence when drafting constitutional amendments and legislation. If the constitutional culture that prevailed prior to accession is to be sustained, the national political institutions need to show a higher awareness of, and responsibility to, the norms of the national constitutions. Admittedly, this is not an easy task: whereas in France and Germany political parties are almost united *vis-à-vis* European questions, amending constitutions in some Central European countries would have to surmount considerable hurdles given their polarized political scenes, which include strong eurosceptic parties.¹¹³ This discussion will be returned to, and expanded on, in the final stages of the article, after examining certain difficulties that the courts have encountered in the process of implementing Union law.

THE REGION-WIDE DRAMA WITH BITTER SUGAR AND TROUBLED LEGITIMATE EXPECTATIONS

Overview of national cases and direct actions

One issue that has made waves in a number of new member states, and which might even evoke certain parallels with the *Banana* saga,¹¹⁴ is the vexed situation regarding the protection of fundamental rights and general principles of law in the context of implementing Community rules on excess sugar and excess stocks of other foodstuffs. Prior to accession, the European Commission adopted two regulations obliging the new member states to ensure that, upon entry to the Union, their stocks would not exceed the average of the previous years. In November 2003, Commission Regulation 1972/2003/EC on transitional measures regarding trade in agricultural products was adopted,¹¹⁵ followed in January 2004 by Commission Regulation 60/2004/EC on the sugar sector.¹¹⁶ Both aimed to prevent the purchase of these foodstuffs for speculative ends, which could distort prices in the common market. Under the regulations, stocks that exceed the permissible amount were to be penalised by fines. However, the legislatures of the

¹¹³ I am grateful to Zdenek Kühn for this point; see also Kühn, *supra* n. 56

¹¹⁴ See *infra* n. 156 and the accompanying text.

¹¹⁵ Commission Regulation (EC) No. 1972/2003 of 10.11.2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, *OJ* [2003] L 293/3.

¹¹⁶ Commission Regulation (EC) No. 60/2004 of 14.01.2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, *OJ* [2004] L 9/8.

accession countries found themselves in a difficult position, having to implement the European Commission's requirements in domestic law in a way that would respect constitutional rights. This topic will be addressed by first outlining the national cases and direct actions. Subsequently, the broader issue of protection of fundamental rights in the European Union will be discussed of certain criticisms with regard to the Court of Justice granting priority to the common market interests.

Hungary

The overview begins with Hungary, where the Constitutional Court on 25 May 2004 declared a national implementing act unconstitutional.¹¹⁷ On 5 April 2004, the Hungarian Parliament had adopted a law 'On measures concerning agricultural surplus stocks' (hereinafter the Surplus Act), in order to implement the two above-mentioned regulations. The President submitted the Act to the Constitutional Court for preliminary constitutional review, arguing that the Surplus Act, with its envisaged entry into force on 25 May 2004, would have been retroactive and hence unconstitutional. Had the President signed the Surplus Act, it would have entered into force on 25 May 2004, whilst the obligations defined in the Surplus Act would have been effective as of 1 May, the date of the entry to the Union. In Hungary, obligations on taxpayers cannot be applied until 45 days after promulgation. The Government had hoped to meet this deadline by deploying an expedited parliamentary procedure; however, the target date was missed as Parliament had failed to reach the required quorum. The Constitutional Court found that the Act violated the principle of legal certainty. It referred to its long-standing tradition of observing the fundamental constitutional rule that Hungary is a state based on the rule of law, which includes the principle of non-retroactivity and the granting of a reasonable lead-in time for measures imposing taxation-related obligations. In addition, the Surplus Act delegated to the executive the adoption of rules defining the subjects who were liable to pay the charge and the method of determining the charge; this was found to contradict the constitutional requirement that fundamental rights and duties are to be determined by an act of Parliament. Importantly, the Court treated the Surplus Act as a domestic act dating

¹¹⁷ Decision 17/2004 (V.25.) AB. See in more detail Sajó, *supra* n. 14, p. 351 et seq.; R. Uitz, 'EU Law and the Hungarian Constitutional Court: Lessons of the First Post-accession Encounter', in W. Sadurski et al. (eds.), *Après Enlargement: Taking Stock of the Immediate Legal and Political Responses to the Accession of Central and Eastern European States to the EU* (Florence, European University Institute 2006) p. 41-64; J. Czuczai, 'Hungary', in A.E. Kellermann et al. (eds.), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries. Hopes and Fears* (The Hague, T.M.C. Asser Press 2006) p. 343 at p. 350-351.

from the pre-accession period, thereby avoiding the issue of supremacy of Community law.

Estonia

In Estonia, approximately thirty cases were brought to the administrative courts with regard to a similar act implementing the above-mentioned Community regulations. These cases were resolved in October 2006 by the Supreme Court in a case that, in a remarkable expression of judicial inventiveness, stopped the application of the problematic provisions whilst escaping any assessment of the constitutionality of the implementing act. The cases were prompted by the so-called Surplus Stocks Charges Act (hereinafter Surplus Stocks Act),¹¹⁸ which the Estonian Parliament adopted virtually at the last minute in an attempt to implement the obligations arising from the regulations. The Act was published on 27 April 2004, and took effect three days later, on 1 May 2004, the date of accession; the undertakings thus had effectively just three days to dispose of their sugar stocks. Under the Act, fines were imposed subsequently on those undertakings whose sugar stocks exceeded the permissible amount. The constitutionality of the Government regulations adopted under the Surplus Act, as well as the Act itself, were contested on the grounds of the right to property and the principles of non-retroactive legislation, legal certainty, legitimate expectations and proportionality. The undertakings argued that it would be unconstitutional to be punished retroactively for sugar stocks that they obtained prior to 1 May 2004. Under the Estonian Constitution alone, these undertakings would have had very strong claims. The Supreme Court of Estonia has reiterated these principles on several occasions, and it had earlier annulled legislation that changed legal obligations in a very short period of time, on the ground of incompatibility with the rule of law.

However, the courts of first instance found against the undertakings, referring to the new constitutional context resulting from Union membership and the requirement of supremacy of Community law under the *Internationale Handelsgesellschaft* case.¹¹⁹ These decisions were based predominantly on the following arguments.¹²⁰ Firstly, although acknowledging that the three-day period was neither reasonable nor sufficient for the addressees to learn about their obligations and rearrange their activities, the courts did not find the principles of legal certainty and legitimate expectations to have been violated. This was because the

¹¹⁸ RT 2004 I, 30, 203.

¹¹⁹ See Case 11/70, *supra* n. 1.

¹²⁰ We refer here to Tallinn Administrative Court Decision in *Teskatel Ltd.* (Judgment No. 3-2578/2004 of 17 Oct. 2005). The precise issues and reasoning varied in the large number of other decisions.

Accession Treaty was concluded already on 16 April 2003 and published in the Estonian Official Gazette, plus Article 22 of the Act of Accession¹²¹ referred to the need to eliminate the surplus stocks. Undertakings were expected to familiarise themselves with the legal environment, including the obligations arising under the Accession Treaty. Secondly, the courts said that they had no power to undertake a final assessment as to whether the Surplus Act violated the invoked general principles of law, given that the Act was implementing European Commission regulations, the validity of which can be reviewed by the European Court of Justice alone. Furthermore, the courts referred to the *Weidacher* case,¹²² which had addressed similar circumstances upon Austria's accession to the European Union. In *Weidacher*, an Austrian company that had imported olive oil from Tunisia prior to accession went bankrupt because of equivalent fines. A preliminary reference was made to the Court of Justice, requesting a review of the relevant Commission Regulation on the grounds of the principles of proportionality and legitimate expectations. The Court rejected the claim, holding that the Commission has a wide margin of discretion within the Common Agricultural Policy, and was entitled, under the Austrian Act of Accession, to facilitate the transition by adopting the transitional measures. As regards legitimate expectations, the Court held that this principle could be invoked as against Community rules only insofar as the Community itself had previously created a situation that could give rise to a legitimate expectation,¹²³ which had not been the case here. Any normally diligent economic operator must have known, since the publication of the Act of Accession in the European Union's *Official Journal*, that the Commission specifically was empowered to adopt such transitional measures, and that there were potential repercussions on the surplus stocks built up prior to the publication of the Regulation. Based on the Court of Justice's decision in the *Weidacher* case, the Estonian courts considered it unlikely that the European Court of Justice would take a different position with regard to analogous measures applying to the 2004 accession states.

The decisions of the courts of first instance were subsequently appealed, with some reaching the Supreme Court of Estonia. On 5 October 2006, in an appeal in the *Hadleri* case,¹²⁴ the circumstances of which were broadly similar to the case outlined in the previous paragraph, the Administrative Chamber of the Supreme

¹²¹ OJ [2003] L 236/33.

¹²² ECJ, Case C-179/00 *Weidacher v. Bundesminister für Land- und Forstwirtschaft* [2002] ECR I-501.

¹²³ This formula was established, e.g., in Case C-177/90 *Kühn v. Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, para. 14.

¹²⁴ Judgment No. 3-3-1-33-06 of 5 Oct. 2006, *Hadleri Toidulisandite AS*, in Estonian at <www.nc.ee>.

Court delivered a judgment which, in a surprising move, relieved the undertakings from their financial burden, but did so on the grounds of Community law rather than on the basis of the national constitution. The Supreme Court began by noting that the Surplus Act indeed was adopted with delay and entered into force in a hurry, and deemed it incorrect to impose tax obligations by an act immediately entering into force upon being adopted and published. Referring to an earlier decision from 2004,¹²⁵ the Court reaffirmed that the principle of legal certainty requires that a reasonable time pass between the adoption of important legislative changes and their entry into force, to provide the addressees with sufficient time to rearrange their activities. However, the Supreme Court continued by stating that since the accession process has taken place over several years, a reasonable undertaking should have been able to foresee the forthcoming change in the legal situation arising from accession and, after Estonia's signature to the Accession Treaty in 2003, the undertaking should have become informed about the EC's 2003 Regulation on surplus stocks. In an interesting twist, the Supreme Court then stated that although the fines based on the surplus stocks were, in general, foreseeable, the undertakings were not able to foresee the specific rules established by the Surplus Act. The specific rules regarding the methodology for calculating the fine had not, according to the Court, made use of the margin of discretion afforded to the member states under Article 4(2) of the 2003 Regulation, in that the single coefficient used for determining the surplus sugar stock, applicable to all undertakings, did not take into account the specific circumstances of the emergence of the surplus stocks in individual undertakings. This coefficient was not fair and just, and it was thus disproportionately onerous for the undertakings. In reaching this conclusion, the Supreme Court noted that no need arose to request a preliminary ruling from the Court of Justice, the provision of the Regulation being sufficiently clear and unambiguous (*acte clair*). As a consequence, the Supreme Court declared the relevant provisions of the Surplus Stocks Act, and the Government regulations adopted under this Act, *inapplicable* due to their incompatibility with Community law. Importantly, the Court drew the legislature's attention to the latter's power to amend the Surplus Act, by enacting retroactively provisions which would hold rules that would be more flexible and advantageous for the undertakings. Finally, since the relevant provisions of the Surplus Act were found inapplicable due to their incompatibility with Community law, the Court eschewed any review of their compatibility with the Constitution of Estonia. As a result of this judgment, the other pending cases were discontinued.

It is by no means clear, though, that the story will end here. As will be seen below, direct actions have been brought against the relevant EC regulations by the Estonian, Polish and Cypriot Governments. Indeed, the Supreme Court in the

¹²⁵ Judgment No. 3-4-1-20-04 of 2 Dec. 2004, in Estonian at <www.nc.ee>.

above-mentioned decision noted the existence of these actions, but did not address their significance, as this issue had not been raised by the appellant. Further, should the Estonian legislature follow up the Supreme Court's decision and retroactively establish a coefficient that is more favourable to the undertakings, it is conceivable that the latter nonetheless might bring new court proceedings, resubmitting the arguments concerning the (un)constitutionality of the Surplus Act. There is also a possibility of a preliminary reference to the Court of Justice on the validity of the relevant EC regulations; indeed, it is striking that none of the lower courts did so in the above-mentioned cases.

The Czech Republic

Sugar was also the issue in one of the first decisions relating to European Union membership of the Czech Constitutional Court, albeit concerning production quotas instead of surplus stocks. During the pre-accession period, the Czech Constitutional Court had, on several occasions, declared unconstitutional successive Government regulations, which were issued to establish the rules for determining sugar production quotas, in anticipation of the adoption of the *acquis* on the Common Agricultural Policy.

However, in a post-accession decision of 8 March 2006,¹²⁶ the Court decided to disregard in part its previous case-law, reasoning that upon the Czech Republic's accession to the European Union, a fundamental change had occurred within the Czech legal order. Although the norms of the Czech Republic's constitutional order continued to be the Constitutional Court's referential framework even after accession on 1 May 2004, the Court said that it cannot overlook the impact of Community law on the formation, application, and interpretation of national law. The Court explicitly mentioned the principle of constitutional self-restraint, and that it now interprets constitutional law in a way that takes into account the principles arising from Community law.

Interestingly, it noted that the current standard within the Community for the protection of fundamental rights could not give rise to the assumption that this standard is lower than the protection accorded in the Czech Republic. The Court did declare the relevant law invalid, but – as with the above Estonian case – on the grounds of Community law instead of the national Constitution.¹²⁷ It found that the Government had acted *ultra vires*, as it had exercised an authority which had been transferred to the Community bodies; due to the direct applicability of the relevant EC regulation, the Czech Government was no longer entitled to adopt the national implementing act.

¹²⁶ Pl. ÚS 50/04, 08.03.2006; English translation on file with the author.

¹²⁷ On the ground of *acte clair*, it was not considered necessary to request a preliminary reference from the European Court of Justice.

In this decision, the Czech Constitutional Court also articulated its view on supremacy. It started by referring to the relevant decisions of the constitutional courts of Germany, Italy and other member states, mentioning that they have never entirely acquiesced to the doctrine of absolute precedence of Community law. In the Czech Republic, a part of the state's powers were conferred on the European Union under Article 10a of the Czech Constitution. This Article operates in a twofold way: it forms the normative basis for the transfer of powers, and simultaneously opens up the national legal order to the operation of Community law within the Czech legal order. However, the conferral of powers is conditional: the Czech Republic remains the original bearer of sovereignty under Article 1 of the Constitution, according to which the Czech Republic is a sovereign, unitary and democratic state governed by the rule of law, founded on respect for fundamental rights and freedoms. The delegation of a part of the powers of national bodies may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty and does not threaten the very essence of the substantive law-based state. Should one of these conditions cease to be met, the Constitutional Court would be called upon to protect constitutionalism, and it would be necessary to insist that these powers be returned to the Czech Republic. Thus, the Czech Constitutional Court effectively rephrased the famous *Solange II* decision.¹²⁸

Direct actions and WTO rules

In the meantime, the Polish, Cypriot and Estonian Governments have brought direct actions to the Court of First Instance in a series of separate cases. In June 2004, Poland submitted two actions against the European Commission for annulment of Commission Regulations 1972/2003/EC¹²⁹ and 60/2004/EC.¹³⁰ The grounds of the Polish actions included breach of the principle of free movement of goods, lack of competence to adopt the regulations, abuse of powers by the European Commission, and infringement of the principles of non-discrimination and protection of legitimate expectations.

The Estonian Government brought an action in August 2005 against Commission Regulation (EC) No. 832/2005,¹³¹ which lays down the rules on the

¹²⁸ Kühn, *supra* n. 56.

¹²⁹ Action brought on 28.06.2004, *Poland v. EC Commission* (Case T-257/04), *OJ* [2004] C 251/20.

¹³⁰ Action brought on 28.06.2004, *Poland v. EC Commission* (Case T-258/04), *OJ* [2004] C 251/21.

¹³¹ Regulation (EC) No. 832/2005 of 31.05.2005 on the determination of surplus quantities of sugar, isoglucose and fructose for the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. *OJ* [2005] L 138/3.

determination of surplus sugar quantities in the new member states.¹³² Besides claiming the breach of essential procedural requirements and of the principle of non-discrimination, the Estonian Government focused especially on the dramatically large fine of approximately 45 million Euros that the European Commission is expected to impose upon Estonia. The fine would include the sugar accumulated by private households, which amounts to approximately half of the total surplus sugar in the country. Ahead of accession, there was a 'sugar panic' in Estonia, as the price of sugar was expected to increase after accession, and people accumulated large quantities of sugar to continue making delightful home-made jams in the forthcoming years. Not surprisingly, such a peculiar and indeed baffling fine has caused major resentment towards the European Union amongst the population,¹³³ especially given that the state budget priorities lie in improving infrastructure, education and health services, in a quest to rectify the damage inflicted on the country by the Soviet occupation and catch up with the old member states. According to the Estonian Government's arguments in the direct action, imposing a fine on the sugar accumulated by private households goes against sound administration, the right to property of private households (as well as of undertakings),¹³⁴ and the principles of proportionality and legitimate expectations.

One wonders whether the sugar drama might acquire the dimensions comparable to the *Banana* saga in the 1990s. Indeed, to complicate the matter further, the appellate body of the WTO adopted a decision in April 2005 according to which the European Union's sugar production subsidies and restrictions on imports are illegal.¹³⁵ This also concerns the rules under which Estonia is being fined; indeed, in June 2005, the agriculture commissioner Mariann Fischer Boel announced a sharp review of the Union's nearly 40-year-old sugar regime.¹³⁶

Comment: Between a rock and a hard place

The Hungarian decision, which was outlined above and in which a national implementing act was declared unconstitutional, has sparked considerable controversy, and will be the main basis for our analysis below. Whilst the Estonian and Czech

¹³² Action brought on 25.08.2005, *Estonia v. EC Commission* (Case T-324/05), *OJ* [2005] C 271/24.

¹³³ As a matter of fact, a nationwide campaign was organised to bring thousands of jars of home-made jam to Brussels, but this did not succeed on the planned scale, as EU legislation does not allow distribution of home-made jam to the public.

¹³⁴ This, in essence, appears to indicate the Government's support to the claims of the companies in the above-mentioned national cases.

¹³⁵ 'EU loses battle in WTO over sugar support', *Eubusiness*, 28.04.2005, <www.eubusiness.com>.

¹³⁶ 'EU announces overhaul of sugar subsidies', *Euobserver*, 22.06.2005, <www.euobserver.com>.

highest courts demonstrated judicial self-restraint and resourcefulness, escaping the assessment of constitutionality by annulling the problematic provisions on the ground of Community law instead, a number of remarks are equally relevant to the broader issues raised by these cases.

There have been two readings of the Hungarian decision. On the first reading, the Hungarian Court failed to understand properly its role in the application of Community law and was unwilling to participate in the European learning process, presenting itself as the ultimate guarantor of constitutionality.¹³⁷ Although the Court stated that its decision did not concern the validity or the interpretation of Community law, the Surplus Act did largely replicate the provisions of the two EC regulations. With supremacy of Community law thus having been at stake, the Hungarian Court did have alternative options at its disposal to avoid a conflict with Community law, which it chose not to deploy.¹³⁸ For instance, it could have construed the charge as not being a tax under Hungarian law, but as a 'Community charge' based on the Accession Treaty and hence a new category of obligations under Community law. Alternatively, by considering the matter to be one of Community law, the Court could have made use of the *acte clair* doctrine by reference to the *Weidacher* case.¹³⁹

The second reading, which appears to be better suited, is that the Constitutional Court avoided taking a stand directly on the supremacy of Community law, showing judicial deference or self-restraint in a way which is not that different from other European *fora* of constitutional review, in seeking to leave Community law undisturbed to the farthest possible extent.¹⁴⁰ The Court did so by finding that the Surplus Act was a domestic act adopted prior to EU accession, when Community law still qualified as foreign law in Hungary. The Court could disregard the Community regulations and their direct effect within the Community legal system simply because this was a legal realm which did not apply to Hungary at the time when the material facts of the case occurred. This is in line with Hungary's dualist stance to international law.¹⁴¹

The second reading sits well with our analysis of the Polish European Arrest Warrant decision, in that the Hungarian Court equally appears to have sent a message to the national parliament. Andras Sajó has pointed out that, on this second reading, the Constitutional Court:

¹³⁷ This view is represented, e.g., by Sajó, *supra* n. 14, p. 351 et seq. See also Czuczai, *supra* n. 117, p. 351.

¹³⁸ Sajó, *supra* n. 14, p. 362 et seq.

¹³⁹ Sajó, *supra* n. 14, p. 358 and 365.

¹⁴⁰ This view is represented by Uitz, *supra* n. 117, p. 44 et seq.

¹⁴¹ *Ibid.*, p. 48-50.

sent a strong message to the political branch about the needs of a new attitude towards law-making and legislation. The message indicates that law-making should be fully responsive to the new requirements of European [Union] membership and European law should be moved out of ordinary politics. This means that government bureaucracies should be much more diligent and the opposition much more co-operative.¹⁴²

In other words, if necessary for the purposes of European Union law, parliamentarians may have to display extra unity and willingness to compromise in areas that concern Union law, such as imposing relevant tax obligations, in order to ensure that the acts implementing Union law are adopted in a manner that is compatible with the national constitutional requirements. In sending such a message, the Court sought to countenance the risk that 'the government bureaucracy [would] use the pressures of accession and [EC] law supremacy to deprive Hungarian citizens of the protection against bureaucratic sloppiness and the resulting disregard of the rule of law.'¹⁴³ Besides the need to improve legislation, the Court's message implicitly also concerned the insufficiency of the constitutional amendments. Although Hungary adopted a more extensive package of EU-amendments than several other Central and Eastern accession countries, the amendments failed to take a position on the supremacy of Community law, even though Hungary follows a strong dualist tradition in its stance on international law.¹⁴⁴ In addition, although the Government had been aware of the difficulty of transplanting Community law, it did not command, at the time, the necessary super-majority required to introduce a constitutional amendment that would modify, for EU-related matters, the current rules according to which Parliament has an exclusive regulatory competence in matters that affect fundamental rights and obligations.¹⁴⁵

The sugar cases raise important issues regarding a certain degree of downward adjustment in the national administrative cultures and in the level of protection of fundamental rights in the process of implementing Union law. Although all three courts avoided any assessment of Community rules on the ground of the fundamental rights contained in the national constitutions – doing so either by regarding the implementing measure as a pre-accession measure (Hungarian Constitutional Court) or annulling/disapplying it on the ground of Community law itself (Estonian Supreme Court and the Czech Constitutional Court) – the cases indicate that had such avenues not been available, the previous level of protection would have had to be downgraded to some extent to ensure supremacy of Com-

¹⁴² Sajó, *supra* n. 14, p. 368-369.

¹⁴³ *Ibid.*, p. 371.

¹⁴⁴ *Ibid.*, p. 353.

¹⁴⁵ *Ibid.*, p. 361.

munity law. Indeed, the Estonian courts and, to some extent, the Czech Constitutional Court acknowledged that as regards the protection of fundamental rights, the novel context of Union membership requires a revision of their previous approach with its somewhat higher level of protection. As Andras Sajó has commented, co-operation at Union level involves trade-offs; the concerns of uniform application and effectiveness of Community law 'seem to have forced certain countries to give up elements of their rule of law, e.g. legal certainty in administrative procedure, and even national versions of fundamental rights'.¹⁴⁶

Such concerns have also surfaced in older member states. Elies Steyger has noted that the obligation of loyal implementation, which applies even if the governments are in doubt about the validity of an EU decision concerned and even where it would be against the principles of proper administration or procedural rules, has sometimes put the national administrations in 'a nasty position':¹⁴⁷

On the one hand, they have to implement Community decisions, which may violate every principle of proper administration they traditionally value and are used to adhere to, even if they legitimately question the validity of the decision concerned. On the other hand, they are not able to save their relationship with the individual concerned, by applying their national principles of good administration once they in their turn impose the obligations [... under the EU] decision onto individuals.¹⁴⁸

According to Steyger, in the Netherlands, this has led to situations such as the *Affish* case where the Dutch Government did not defend the decision issued on the basis of a Commission decision, and effectively invited the applicant to request a preliminary ruling.¹⁴⁹ In Finland, as Tuomas Ojanen has pointed out, constitutional rights to some extent qualify the primacy of Community law over Finnish law, and the Constitutional Law Committee of the Finnish Parliament has stressed that the domestic implementation of European Union law may not weaken the level of national protection of constitutional rights.¹⁵⁰ Although, in most cases, the Committee has found a way to blunt the edge of any open conflict between constitutional rights and European Union law, occasionally, however, the constitutional premise not to compromise the domestic standard of protec-

¹⁴⁶ Ibid., p. 367-368.

¹⁴⁷ E. Steyger, *National Traditions and European Community Law: Margarine and Marriage* (Aldershot, Ashgate 1997) p. 190 et seq.

¹⁴⁸ Ibid., p. 191.

¹⁴⁹ ECJ, Case C-183/95 *Affish BV v. Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I-4315; see E. Steyger, *supra* n. 147, p. 192.

¹⁵⁰ T. Ojanen, 'The Impact of EU Membership on Finnish Constitutional Law', 10 *European Public Law* (2004) p. 542.

tion of constitutional rights in the implementation of Union law has compromised the maximum implementation of Union law.¹⁵¹

As mentioned earlier, the Court of Justice developed the concept of protection of fundamental rights primarily as a response to national challenges to supremacy. However, concerns continue being voiced about the level of the protection, with individual rights rarely being given priority over common market interests.¹⁵² In 1992, Coppel and O'Neill argued in a well-known article that the Court's high rhetoric of human rights protection has merely been instrumental for the Court's expansion of the scope and impact of European law, with fundamental rights not being taken seriously.¹⁵³ Furthermore, a more lenient standard of review appears to be applied for assessing the Community acts in comparison with that applied to the member states.¹⁵⁴ At the time, this argument was vehemently rejected by leading EU lawyers.¹⁵⁵ However, such concerns resurfaced in the course of the *Banana* saga, where German courts voiced their open distrust with regard to the Community institutions and the protection of fundamental rights offered by the Court of Justice to individuals¹⁵⁶ (the German Constitutional Court, however, ultimately declared an appeal inadmissible on the ground that no deterioration had occurred in the general standards of protection in the European Union). The European Court of Justice's decision in the *Banana* case¹⁵⁷ was widely considered to prove the deficiency of the Court's fundamental rights review, which falls short of the level of protection mandated by the European Convention on Human Rights and the constitutions of the member states, in being too lenient with regard to Community measures.¹⁵⁸ In an authoritative criticism, a former judge in the Court of Justice, Ulrich Everling, expressing his 'perplexity' at the Court's

¹⁵¹ *Ibid.*, p. 545.

¹⁵² For discussion of relevant literature, see Douglas-Scott, *supra* n. 27, p. 460-461 and 454-458; Herdegen, *supra* n. 27, p. 10-12.

¹⁵³ J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', 29 *CMLRev.* (1992) p. 670 et seq. and 692.

¹⁵⁴ *Ibid.*, p. 684.

¹⁵⁵ E.g., J. Weiler and N. Lockhart, "'Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence', 32 *CMLRev.* (1995) p. 51 and 579.

¹⁵⁶ See, e.g., U. Everling, 'Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts', 33 *CMLRev.* (1996) p. 401; N. Reich, 'Judge-made Europe à la Carte: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation', *European Journal of International Law* (1996) p. 103; Herdegen, *supra* n. 27, p. 11.

¹⁵⁷ ECJ, Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

¹⁵⁸ Herdegen, *supra* n. 27, p. 11 and 21; B. De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.), *The EU and Human Rights* (Oxford, Oxford University Press 1999), at p. 878-879.

judgment, which in his view granted Community institutions *carte blanche* and reduced judicial control to a minimum,¹⁵⁹ restated Coppel and O'Neill's question of whether the Court takes fundamental rights seriously.¹⁶⁰

Besides the priority being granted to common market interests, the divergence in human rights protection at national and EU levels has a number of additional facets.¹⁶¹ To begin with, the fundamental rights involved are not protected directly as such, but only indirectly as unwritten general principles. Whilst rights can be defined very precisely, principles are relatively vague and uncertain in scope, and the courts thus cannot grant to these the same protection.¹⁶² A general principle must inherently suffer exceptions, whereas a well-defined fundamental right may be restricted only under specified circumstances.¹⁶³ To bring a concrete example from a national constitutional context, it is argued that in Finland the standard of protection of constitutional rights is higher than the fundamental rights standard under European Union law, for the reason that the criteria for the limitations on constitutional rights are nuanced and refined more than those for the limitations on European Union fundamental rights.¹⁶⁴ Indeed the domestic test for the limitations on constitutional rights consists of seven distinct criteria which must be simultaneously fulfilled: (i) the limitation must be based on an Act of Parliament; (ii) the limitation must be precise and defined in sufficient detail; (iii) the grounds for the limitation must be legitimate in the context of the system of constitutional rights and the limitation must be necessary for the achievement of this legitimate aim; (iv) a limitation going into the core of a constitutional right cannot be laid down by an ordinary Act of Parliament; (v) the limitation must adhere to the principle of proportionality; (vi) due protection under the law must be arranged when a constitutional right is being limited; and (vii) the limitation must be in accordance with the international human rights obligations.¹⁶⁵

Another aspect of the divergence lies in the fact that the rights identified as being part of the unwritten European catalogue do not include all the rights protected at national constitutional level.¹⁶⁶ To bring another example from Finland, the country's constitution sets out a range of economic, social and cultural rights, in addition to the more traditional civil and political rights, and most rights are

¹⁵⁹ Everling, *supra* n. 156, p. 413 and 419.

¹⁶⁰ *Ibid.*, p. 419.

¹⁶¹ See L. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *CMLRev.* (1998), p. 634 et seq.; De Witte, *supra* n. 158, p. 879.

¹⁶² Besselink, *supra* n. 161, p. 634 et seq.

¹⁶³ *Ibid.*

¹⁶⁴ Ojanen, *supra* n. 150, p. 543-544, with references to Finnish literature.

¹⁶⁵ *Ibid.*

¹⁶⁶ Besselink, *supra* n. 161, p. 634 et seq.; De Witte, *supra* n. 158, p. 879.

granted to everyone.¹⁶⁷ In addition, the Finnish level of protection of social rights tends to be higher than in the rest of Europe.¹⁶⁸

A further weakness in the European Union's human rights protection is that overall few human rights cases reach the Court of Justice in the first place.¹⁶⁹ The reasons appear to be that many potential litigants are discouraged by the lack of sympathy displayed by the Court of Justice towards arguments based on fundamental rights, by the lack of visibility of Community fundamental rights due to their unwritten state as general principles of law, and by the narrow standing rules for individual complaints under Article 230 EC Treaty.¹⁷⁰

Indeed, it appears that the cases where the Court of Justice found that the Community breached fundamental rights are rare.¹⁷¹ Perhaps the very principle of legitimate expectations, which is central to some of the case-law discussed above, could serve as an illustration of the level of review by the Court. It appears that the overwhelming majority of claims based on the breach of the principle of legitimate expectations has been rejected by the Court; the Court expects a prudent and well-informed trader to foresee changes in the law.¹⁷² As regards the principle of proportionality, it has been commented that the Court of Justice and the Court of First Instance appear to continue their earlier approach of being broadly protective of general Community legislative policy, whilst, on the other hand, they are somewhat readier to declare disproportionate a member state's legislation that infringes the Treaty's economic freedoms.¹⁷³ As regards the right to property or the freedom to trade, in no case so far has the Court found a violation of this right.¹⁷⁴ Overall, the Court appears to take a hands-off approach in matters of economic regulation, and allows the institutions to enjoy considerable discretion; it finds a Community measure to be invalid only where the Community has made a manifest error and the institutions clearly exceeded the bounds of their discretion.

¹⁶⁷ Ojanen, *supra* n. 150, p. 543.

¹⁶⁸ *Ibid.*

¹⁶⁹ De Witte, *supra* n. 158, p. 882-883.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, p. 869.

¹⁷² T. Tridimas, *The General Principles of EC Law* (Oxford, Oxford University Press 1999), p. 169 and 173. For a detailed analysis of the ECJ's case-law on the principles of legal certainty and legitimate expectations, see Chapter 6 of the new edition of this book (T. Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press 2006)) and J. Raitio, *The Principle of Legal Certainty in EC Law* (Dordrecht, Kluwer 2003), Chapter 6.

¹⁷³ G. De Burca, 'Proportionality and Subsidiarity as General Principles of Law', in Bernitz and Nergelius, *supra* n. 27, p. 98-99.

¹⁷⁴ Tridimas (2006) *supra* n. 172, p. 315.

Such a state of play in the protection of fundamental rights in the European Union is particularly ironic as regards the new member states from Central and Eastern Europe who have accorded a strong protection to constitutional rights as a reaction to the Communist period governed by legal nihilism and systematic trampling of human rights. As Andras Sajó astutely puts it, '[i]t is ironic that in the Hungarian case[,] the learning [of "co-operative constitutionalism"] is made difficult by a historically determined serious commitment to [...] fundamental rights.'¹⁷⁵ Another aspect of the irony lies, of course, in the marked contrast between these post-accession developments and the high rhetoric of human rights that marked the pre-accession conditions, which were based on the Copenhagen Criteria and led to a careful monitoring exercise by the European Commission in its annual reports prior to accession.¹⁷⁶ Yet another, and rather more serious, element of the irony is that under the recent case-law of the European Court of Human Rights in Strasbourg (*Matthews*,¹⁷⁷ *Bosphorus*¹⁷⁸), the member states of the European Union may be held jointly liable for human rights violations committed by the European Union.

Europe did not 'slip on bananas',¹⁷⁹ but might it slip on sugar or indeed another element of the Common Agricultural Policy? The mostly neo-liberally oriented new member states, who in the past decade underwent painful shock reforms in liberalising their economies, and who have engaged in minimising regulatory and tax burdens on undertakings, are certainly likely to face uncomfortable issues when implementing Common Agricultural Policy measures. This holds especially true when it involves sacrificing the fundamental rights of individuals for the sake of what is broadly regarded as an utterly bizarre, anachronistic policy.

'CO-OPERATIVE CONSTITUTIONALISM' IN EUROPE: BEYOND 'JUDICIAL DIALOGUES'

The cases considered above demonstrate that it would be over-simplistic or indeed inadequate to explain the decisions of the national constitutional courts of Central and Eastern European countries as pro- or anti-European. The picture is much more complex than that, and the cases show that there are genuine limits to EU-friendly interpretation. Therefore, this article will conclude by suggesting that two elements should be added to the equation of 'co-operative constitutionalism',

¹⁷⁵ Sajó, *supra* n. 14, p. 371.

¹⁷⁶ For a broader analysis of the incoherence in the human rights protection in the European Union's internal and in external policy, see A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford, Oxford University Press 2004) p. 6 et seq. and especially Chapter 3, p. 53 et seq.

¹⁷⁷ *Matthews v. UK* (1999) 28 EHRR 361.

¹⁷⁸ *Bosphorus v. Ireland*, 45036/98 [2005] ECHR 440.

¹⁷⁹ To borrow the terminology used by Everling, *supra* n. 156.

the first concerning the judicial dialogues, the second the role of political institutions.

Firstly, as regards the judicial dimension of 'co-operative constitutionalism', the Polish European Arrest Warrant decision (albeit concerning the third pillar) and the Hungarian sugar stocks decision lend support to the need to consider further what Mattias Kumm has termed the 'Pangloss scenario'. In analysing the potential future developments in a pluralist European legal order,¹⁸⁰ Kumm sketched two scenarios that might evolve: firstly, the 'Cassandra scenario', where constitutional courts frequently strike down Community legislation on the basis of their particular constitutional norms and values; and, secondly, the 'Pangloss scenario', in which the member states would only very rarely strike down a piece of legislation, and do so for very good reasons. He considers the latter scenario more likely and points out that, contrary to the usual fears about the end of the uniform application of Community law, such a scenario could be constructive, and even benefit the coherence of the Community legal order in the long-term. National courts in this case would be recognized as a constructive corrective force within the European polity, exerting pressure to enhance the democratic quality of decision-making on the European level; they provide the Court of Justice with an incentive to develop a sensitivity to the questions of legislative jurisdiction and to become more rigorous in its fundamental rights analysis.¹⁸¹ In order to secure, at the same time, the coherence of the Community legal order, the defeated measure would have to be renegotiated on the European level either generally¹⁸² or an exemption would have to be provided for that member state, or the national constitution ought to be amended. For deciding difficult cases, Kumm offers a set of conflict rules, which proceed from the frame of 'Constitutionalism Beyond the State' as a general jurisprudential approach.¹⁸³ According to these rules, national constitutional courts ought to give precedence to their specific constitutional provisions only if those provisions are clear and specific and if they reflect an essential constitutional commitment.¹⁸⁴ The national judge ought to seek guidance from both national and European law, be contextually sensitive, and strike a balance between competing principles, taking account of present-day political conditions

¹⁸⁰ Kumm, *supra* n. 9, p. 291 et seq.

¹⁸¹ *Ibid.*, p. 292.

¹⁸² This has indeed earlier occurred with regard to ECJ cases C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan* [1991] ECR I-4685, case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051 and case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, where declarations or treaty amendments were introduced in response to the ECJ judgments that had evoked concern amongst the member states.

¹⁸³ Kumm, *supra* n. 9, p. 288.

¹⁸⁴ *Ibid.*, p. 297 et seq.

in the European Union and the member states.¹⁸⁵ In fact, it has been suggested that the Polish Constitutional Tribunal did just that in its European Arrest Warrant decision when declaring a national implementing measure unconstitutional.¹⁸⁶ Indeed, the pragmatic approach of Central and Eastern European constitutional courts becomes even more evident in the light of the remarks made earlier about the activist stance of these constitutional courts and the supremacy and prominence of national constitutions in these countries.

At the same time, whilst the Court of Justice has rightly been acclaimed for having responded to the national concerns in its more recent case-law, there appears to be ample room for such engagement on the part of the Court to go further in making the judicial 'dialogues' a genuine bi-directional exchange rather than unilateral self-restraint by the national constitutional courts. The previous section demonstrated that serious questions persist about the level of fundamental rights protection by the Court of Justice. Furthermore, it has been suggested that references by the Court to specific national legal systems are perfunctory and haphazard, and, perhaps tellingly, no national constitutional court judgment has ever been cited in a Court of Justice judgment.¹⁸⁷ Overall, as Everling has noted in his comment on the *Banana* decision, the Court may need to 'reconsider its attitude':¹⁸⁸

The role of the Court is no longer, as it perhaps was in the past, in the first place to strengthen the Community and its supranational elements as a sort of 'integration motor'. As a real Constitutional Court, it has to ensure a balanced equilibrium between the competences, rights and functions of the institutions, Member States and citizens.¹⁸⁹

As regards the protection of fundamental rights, perhaps one way to proceed – if the Constitutional Treaty will be ratified or the Charter of Fundamental Rights will enter into effect by other means – might lie in making use of the avenues offered under Article 53 of the Charter, which provides that the rights set out in the Charter will be interpreted in accordance with the member states' constitutions. Whilst this has been regarded as a general political statement without any consequences to supremacy of European Union law,¹⁹⁰ and whilst the idea of

¹⁸⁵ *Ibid.*, p. 290.

¹⁸⁶ See Komárek, *supra* n. 75, p. 5 and 25.

¹⁸⁷ De Witte, *supra* n. 158, p. 878.

¹⁸⁸ Everling, *supra* n. 156, p. 435.

¹⁸⁹ *Ibid.*, Everling, *supra* n. 156, p. 436.

¹⁹⁰ J.B. Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law', 38 *CMLRev.* (2001) p. 1198.

'maximum protection' has met objections on a variety of grounds,¹⁹¹ the shortcomings in the fundamental rights protection discussed above seem to warrant giving at least some consideration to the possibility of deploying this Article as a ground for introducing a somewhat higher degree of sensitivity to the national constitutions.

The second remark concerns the role of political institutions in the equation of 'co-operative constitutionalism'. The issue of limits as to what judges can do highlights the need for actors beyond the judiciary to engage more actively in the 'co-operative constitutionalism', both at the national as well as at the European level. Whilst the focus of co-operative constitutionalism has been on the interaction between courts at different levels, the role of political institutions in such co-operation has received negligible consideration. In a number of cases where a conflict between Community law and national constitutional law has narrowly been averted, the constitutional courts appear to have been left with an unduly high burden in finding pragmatic solutions. In those cases, political actors, both at the national and the European levels, would have often been better placed to eliminate a potential conflict at an earlier stage. Indeed, when commenting on the *Banana* saga, Everling underscored that, whilst both the German courts and the Court of Justice need to adopt a co-operative approach, the responsibility of ensuring the right equilibrium lies, first and foremost, with the Commission; he posed the question why the Commission did not initiate fair compromises and take measures to eliminate the unacceptable effects of the Banana Regulation.¹⁹²

Monica Claes has astutely pointed out that the words of warning of national constitutional courts are not aimed only to the Court of Justice, but also to the Community institutions, and to the institutions of the member states whether acting in the capacity as the 'Masters of the Treaties' at the European level or as constitution-makers at the national level.¹⁹³ These warnings imply that by transferring powers to Europe, the member states should not be able to escape scrutiny under the national constitutions.¹⁹⁴ As regards negotiating on the European level, Germany, for instance, has indeed come to be known to 'play the constitutional card' when the German Constitutional Court signals that a particular politically unwelcome piece of legislation may be unconstitutional.¹⁹⁵ Constitutional constraints now directly shape German positions in the Council, and the *Länder* governments and parliamentary actors have gained more say in negotiations over

¹⁹¹ For the 'maximum protection' approach, see Besselink, *supra* n. 161, p. 670 et seq.; for objections, see, e.g., De Witte, *supra* n. 158, p. 881.

¹⁹² Everling, *supra* n. 156, p. 473.

¹⁹³ Claes, *supra* n. 2, p. 650, see also p. 389.

¹⁹⁴ *Ibid.*, p. 650.

¹⁹⁵ Kumm, *supra* n. 9, p. 281.

specific European policies.¹⁹⁶ This represents what in a broader context of the interaction between the legislature and the constitutional courts has been characterised as a ‘larger anticipatory effect’¹⁹⁷ or a ‘prospective, indirect, and creative dimension’¹⁹⁸ of the decisions of constitutional courts, making ‘legislators engage in structured deliberations of the constitutionality of legislative proposals.’¹⁹⁹ Against this background, the European Constitutional Treaty – should it ever enter into effect – envisages several welcome reforms, such as the incorporation of the Charter of Fundamental Rights, the clarification of competences, the introduction of the early warning mechanism whereby national parliaments would be involved more closely in monitoring the observance of the principle of subsidiarity, the expected reduction in recourse to what is currently Article 308 EC Treaty, and the facilitation of the standing rules. Another welcome development is the Commission’s unilateral commitment since 2001 to conduct a review of compatibility of its legislative proposals with the Charter of Fundamental Rights.

As regards the national level, Matthias Kumm has pointed out that the courts play a significant role as contributors to democratic deliberations in the member states over how the European Union should develop, and act as catalysts for amending national constitutions to keep them up with successive steps towards an ever closer Union.²⁰⁰ The analysis of Central and Eastern European case-law in the previous sections indeed demonstrates that national political institutions need to show an elevated level of flexibility and co-operation in domestic implementation of European Union obligations. In fact, a dialogue with national parliaments rather than open warnings to the Court of Justice figured as a recurring thread in a number of EU-related cases in the new member states. In particular, the legislatures need to eliminate manifest conflicts with European Union law from the national constitutions, draft the acts implementing European Union obligations in a way that exhausts the margin of discretion left for the protection of fundamental rights, and the parliamentary groups need to display more flexibility to ensure a timely adoption of legal acts, especially those pertaining to tax obligations.

Last, but not least, the national political institutions generally need to show a higher awareness of, and responsibility to, the norms of the national constitutions, given that the hands of the constitutional courts are rather tied due to the

¹⁹⁶ Alter, *supra* n. 2, p. 118.

¹⁹⁷ E. Blankenburg, ‘Changes in Political Regimes and Continuity of the Rule of Law in Germany’, in H. Jacob et al. (eds.), *Courts, Law and Politics in Comparative Perspective* (New Haven, Conn., Yale University Press 1996) p. 249-316 at p. 309, cited in Alter, *supra* n. 2, p. 118.

¹⁹⁸ Stone Sweet, *supra* n. 27, p. 73.

¹⁹⁹ *Ibid.*

²⁰⁰ Kumm, *supra* n. 9, p. 292.

supremacy of Community law. Such a role for the parliaments may become particularly important in Central and Eastern Europe, where the new post-communist constitutions have a distinctly legal character and have been 'taken seriously' in the domestic context of governance. That is, unless, by virtue of accession to the European Union, a move towards a greater 'constitutional amorphousness' has been tacitly accepted.

