SUPREMACY OF EC LAW IN THE NEW MEMBER STATES:
Bringing Parliaments into the Equation of ‘Co-operative Constitutionalism’

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1. 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 EC law is supreme over the national law of the Member States, including the fundamental norms of the national constitutions.1 At the same time, the precise scope of supremacy has been at the heart of enduring judicial and academic debates. Whilst the principle of supremacy of EC law has generally been well recognised by the Member States, certain reservations have been made by some national constitutional courts. They see supremacy as a concept rooted in the national constitutions, rather than deriving from the autonomous nature of the EC legal order.2 Based on this, the constitutional courts have retained

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for themselves the right to review whether EU institutions act within the competences conferred upon them and respect the fundamental constitutional principles and human rights. The well-known canon of relevant cases includes the *Solange* ³ and *Maastricht* ⁴ decisions of the German Constitutional Court, *Granital* ⁵ and *Frontini* ⁶ decisions of the Italian Constitutional Court, and the *Maastricht* decision ⁷ of the Danish Supreme Court.⁸ In France, it is a standard practice to subject new treaties to the Constitutional Council’s preliminary review, with the Constitution being amended prior to ratification if an incompatibility is found; this practice significantly reduces the potential of constitutional conflicts with EC law.

Debates about supremacy have recently been revived as a result of the incorporation of the supremacy clause into the Treaty Establishing a Constitution for Europe.⁹ The French Constitutional Council and the Spanish Constitutional Tribunal delivered important decisions elaborating 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 will 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 its reading, primacy of EC law is limited to the exercise of the competences that have been conferred on the EC, 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 EC legal order, which was accepted as a result

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⁵ *Granital*, Decision No. 170, 1984.
⁸ For a summary of these cases, see De Witte, *supra* n. 2 at pp. 199-205. For a comprehensive account and analysis of the relationships between the ECJ and national courts, see Claes, *supra* n. 2.
of the surrender of competences, must still remain compatible with the basic principles and values of the Constitution. These decisions represent a continuation of the long-standing practice where the national constitutional courts posit the ultimate supremacy of the national constitutions, without openly challenging the supremacy of EC law. This represents what has come to be known as ‘judicial dialogues’\(^\text{12}\) or ‘co-operative constitutionalism’\(^\text{13}\), where the national courts and the ECJ have engaged in a co-operative relationship and conversation in resolving issues pertaining to the relationship between EC and 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 EU in 2004 have performed in such ‘co-operative constitutionalism’. Questions were posed at the time of entry 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 the Central and Eastern European constitutions posit supremacy of the constitutions and accord a strong protection to the principles of sovereignty and independence.\(^\text{14}\)

Indeed, shockwaves were caused after accession first by a judgment of the Hungarian Constitutional Court, and, 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;\(^\text{15}\) we will see that the issue of sugar stocks has led to difficult cases regarding protection of constitutional rights also in the other new Member States. The Polish Constitutional Tribunal annulled national provisions implementing the European Arrest Warrant (EAW) framework decision\(^\text{16}\) due to their non-conformity with Article 55 of the Constitution, which prohibits the extradition of Polish nationals.\(^\text{17}\) This was followed by the Accession Treaty judgment, where the Tribunal held that the Constitution itself is


\(^{15}\) Decision 17/2004 (V. 25) AB.


\(^{17}\) 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 website <www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf>.
the supreme law of the land, even in cases of conflicts with EC law. 18 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 EU? It has indeed been argued that the Hungarian Court has been slow to reassess its new role in the aftermath of EU membership, and ‘the state organs of new EU members still have to learn the rules of “co-operative constitutionalism”’. 19

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. As regards the Polish EAW decision, this is demonstrated by the fact that even though the matter concerned the third pillar where supremacy does not apply, the Polish Constitutional Tribunal granted an 18-months period for the continuation of extradition, during which Parliament was to amend the Constitution. Importantly, the Polish EAW decision demonstrates that there are limits to EU-friendly interpretation. Article 55 of the Polish Constitution, which expressly prohibits extradition of the Polish nationals, had not been amended prior to the accession to the EU despite numerous calls to do so. This dovetails with the 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. 20 As accession referendums were imminent at the time, it was important to keep the constitutional revision to a low profile because a wider range of amendments could have become a dangerous tool in the hands of eurosceptic movements. After accession, such direct constitutional conflicts left some of the constitutional courts in a very difficult position. Besides alluding to the need to amend the constitutional provisions, it will be seen that some constitutional courts have additionally highlighted the obligation for the national parliaments to improve the drafting of national legislation, in order to ensure its constitutionality in the context of EU membership. Against this background, the article will show that whilst the discourse on the relationship between the ECJ and the national constitutional courts has hitherto predominantly focused on the dialogue and mutual co-operation between the courts, in an attempt to avoid destructive conflicts, there are

19 Sajó, supra n. 13 at p. 351.
20 For details, see Albi, EU Enlargement, supra n. 14, at p. 78-121.
limits to an 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 other institutions in such a ‘co-operative constitutionalism’, especially that of national parliaments, warrants further consideration.

2. ‘Co-operative constitutionalism’ in Europe: beyond ‘judicial dialogues’

The relationship between the European Court of Justice and national constitutional courts has come to be characterised as ‘judicial dialogues’\(^{21}\) or ‘co-operative constitutionalism’\(^{22}\), which has been based on structured and ongoing conversation, co-operation and mutual trust. On the one hand, national constitutional courts have sent warnings to the ECJ about the need to respect fundamental rights and to control the observance of competences by EU institutions more strictly. In doing so, a great deal of self-restraint has been shown;\(^{23}\) the courts have refrained from acting in a destructive manner, with no national court yet having declared a piece of EU secondary legislation invalid. On the other hand, the European Court of Justice has heeded these warnings; although some national decisions have been criticised for being nationalist and even hostile to the uniformity of Community law, such decisions have served as a catalyst for the development of fundamental rights jurisprudence by the ECJ, by way of protecting human rights as part of the general principles of Community law.\(^{24}\) More recently, the ECJ has shown sensitivity to the constitutional courts’ concerns about the EU institutions staying within the competences conferred upon them. By way of illustration, the ECJ found in Opinion 2/94 that the EU has no competence to accede to the ECHR without a prior Treaty amendment,\(^{25}\) it refused to extend horizontal direct effect to directives in Dori case,\(^{26}\) and repealed the infamous Tobacco Advertising Directive due to lack of competence.\(^{27}\) Against this background, it has been

\(^{21}\) Stone Sweet, *supra* n. 12, at pp. 325-326.
\(^{22}\) Sajó, *supra* n. 13, at p. 351.
\(^{23}\) See e.g. Claes, *supra* n. 2, at p. 534.
commented that ‘[t]he principle of supremacy remains essentially “two-dimensional”, it is a complex, layered reality of dialogue and persuasion.’

This kind of judicial co-operation sits well with the pluralist approaches which have recently gained popularity in explaining the relationship between the Community and national legal orders. Whilst the ECJ’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 framework and the developing process of European legal integration has increasingly been presented in pluralist terms. Despite some variations, the pluralist concepts generally regard the national and European constitutional documents as no longer being the emanation of two hierarchically positioned independent legal systems, where the sovereign state is the ultimate source and centre of authority. Instead, the relationship between the orders ‘is now horizontal rather than vertical – heterarchical rather than hierarchical.’ 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, retaining ‘interpretative competence-competence’. The focus here is on the prevention of conflicts through co-operation and interaction. If conflicts nevertheless occur, these should be solved on the basis of certain principles, taking account of the concrete constitutional context, time and practicalities; on occasions ‘some political action’ may be necessary to produce a solution.

Whilst the focus of the judicial dialogues or co-operative constitutionalism has been on the interaction between courts at different levels, the role of other actors, such as parliaments, in such a dialogue or co-operation has received negligible consideration. In a number of cases where

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29 For an overview of different schools of thought, see Kumm, *supra* n. 9, at 265ff.
33 MacCormick, *supra* n. 30, at p. 259.
a conflict between EC law and national constitutional law has narrowly been averted, the constitutional courts appear to have been left with an unduly high burden in finding a pragmatic solution. In those cases, political actors both at European and national level would often have been better placed in eliminating a potential conflict at an earlier stage. Monica Claes has astutely pointed out that the words of warning of national constitutional courts are not only aimed to the ECJ, but also to the Community institutions, and 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.\(^{36}\) These warnings imply that by transferring powers to Europe, the Member States should not be able to escape scrutiny under the national constitutions.\(^{37}\) As regards negotiating issues on the European level, Germany, for instance, has 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.\(^{38}\) Constitutional constraints now directly shape German positions in the Council, and the Länder governments and parliamentary actors have gained more say in negotiations over specific European policies.\(^{39}\) This represents what in a broader context of interaction between the legislature and the constitutional courts has been characterised as a ‘larger anticipatory effect’\(^{40}\) or a ‘prospective, indirect, and creative dimension’\(^{41}\) of the decisions of constitutional courts, making ‘legislators engage in structured deliberations of the constitutionality of legislative proposals.’\(^{42}\) We will see that such dialogues with the national parliaments, rather than open warnings to the ECJ, are a recurring thread in several EU-related cases in the new Member States from Central and Eastern Europe.

3. Some broader remarks about 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 courts, as they have made the reception of supremacy contingent on certain conditions.\(^{43}\) Unlike other courts, the

\(^{36}\) Claes, supra n. 2, at p. 650, see also 389.
\(^{37}\) Claes, supra n. 2, at p. 650.
\(^{39}\) Alter, supra n. 2, at p. 118.
\(^{41}\) Stone Sweet, Governing with Judges, supra n. 24, at p. 73.
\(^{42}\) Stone Sweet, Governing with Judges, supra n. 24, at p. 73.
\(^{43}\) Stone Sweet, ‘Constitutional Dialogues’, supra n. 12, at p. 325.
constitutional courts insist that it is the national constitutions, and not the ECJ or the EC Treaties, that mediate the relationship between EC law and national law.\footnote{Stone Sweet, ‘Constitutional Dialogues’, supra n. 12, at p. 325.} This observation is of major importance in the context of EU 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.\footnote{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) and J. Priban, P. Roberts, J. Young (eds) Systems of Justice in Transition. Central European Experiences since 1989 (Aldershot, Ashgate, 2003).} 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.’\footnote{W. Sadurski, ‘Constitutional Justice, East and West: Introduction’ in Sadurski, Constitutional Justice, supra n. 45, at p. 1.}

Three other specific concerns should be outlined, which might potentially complicate the position of the Central and Eastern European constitutional courts in 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 the Western European counterparts, and they also expressly establish the principle that the constitution is the highest legal source in the country.\footnote{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>.} 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 previous case-law that the constitutions may not be amended in a disguised way by ratification of treaties; the requirements of rule of law and legitimacy require the parliaments to respect the more stringent constitutional amendment procedures.\footnote{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>, paras. 35-38.} Although provisions were introduced in several new Member States to the effect of securing supremacy and direct effect of Community law,\footnote{For details, see Albi EU Enlargement, supra n. 14, pp. 67ff.} these provisions were, at the time of their introduction, generally regarded as not affecting the supremacy of the constitutions.

Secondly, as Zdenek Kühn has 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). 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. As a result, legal scholarship was not expected to be critical but descriptive and apologetic, and courts are reluctant to interpret laws, with law being applied as written. A tradition of textual reading of law by the judges, coupled with a weakness in applying abstract legal principles, may pose challenges to the application of EC law, which involves a large measure of teleological interpretation, with an important place being held by the general principles of law. Furthermore, given the pluralist dimension of the interaction between national and EC legal order, 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.

Thirdly, it might be worth noting that during the Communist period, the courts did not deal with application of international law (with the exception of the Polish courts to some extent). 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. However, after the regime change, constitutions were opened up to international law, and the Central and Eastern European courts have readily referred to international instruments, especially the European Convention of Human Rights and relevant case-law. The constitutions were subsequently revised

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50 Z. Kühn, ‘The Application of European Law in the New Member States: Several (Early) Predictions’ 6 GLJ (2005) p. 563. For a broader discussion, see S. Rodin ‘Discourse and Authority in European and Post-Communist Legal Culture’, 1 Croatian Yearbook of European Law (2005), p. 1, esp. at pp. 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 we take the courts of the other Member States as comparators, rather than the ECJ, the situation might be not 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.

51 Rodin, supra n. 50, at pp. 7-12.
52 Rodin, supra n. 50, at pp. 7-12.
53 Kühn, supra n. 50, at p. 576 and p. 564; see also Capeta, supra n. 50, at p. 31ff.
54 Kühn, supra n. 50, at p. 574 (references omitted).
55 See also Kühn, supra n. 50, at p. 565.
57 Stein, supra n. 56, at pp. 427-450.
in relation to EU membership. Furthermore, in the years leading to the accession to the EU, the judges in the region have undergone intensive training in EU law, in the framework of various programmes organised by the EU as well as governments of several old Member States. As a matter of fact, the extent of the training has even given ground 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.

Be that as it may, a question arises as to whether the entry of Central and Eastern European courts into the EU’s constitutional landscape might further exacerbate the tensions between EC law and national constitutions. However, contrary to what might have been expected from the somewhat pessimistic background remarks above, subsequent sections will show that the constitutional courts have displayed inventiveness in finding pragmatic solutions to avoid conflicts with EC law. The fact that they have done so despite the potential difficulties outlined above further corroborates our thesis that the Central and Eastern European courts have taken a pro-European approach.

4. Decisions of the Polish Constitutional Tribunal

4.1. The principle of EU-friendly interpretation

The Polish Constitutional Court’s stance to EC/EU law is predominantly known for the dramatic decision in the above-mentioned European Arrest Warrant case. However, this decision does not appear to adequately reflect the situation: this section will show that the Court has gone to great lengths to interpret the Polish Constitution in an EU-friendly way in its earlier decisions. In order to better understand the decisions, it is instructive to outline the relevant constitutional provisions in Poland.

Poland adopted a new Constitution in 1997, with Article 90(1) allowing the country to delegate certain competences to international organizations, and Article 91 establishing direct effect and supremacy of ratified international agreements and EC secondary law. However,
there were calls for amending the Constitution prior to EU accession, to remove certain conflicts that might arise with regard to EC/EU law. 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 per cent. Furthermore, it would have been difficult to secure the necessary political support, as constitutional amendment required the approval of two parliamentary chambers and involved the possibility of holding a referendum.

It did not take long for the Constitutional Tribunal to be seized with regard to conflicts between the above provisions and EC law. To begin with, in a case decided on 31 May 2004, a group of Sejm (lower house of Parliament) members argued that the Act on the Elections to the European Parliament 2004 was unconstitutional, for the reason that the participation of foreign nationals was in conflict with the principle of the sovereignty of the Polish people (Art. 4(1) of the Constitution), as well as with the clauses which grant the right to vote to Polish 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. 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 favorable predisposition towards the process of European integration and the cooperation between States.’ 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. Under Articles 90(1) and (3) of the Constitution, in combination with the Accession Treaty, certain


62 See in more detail Biernat, ‘The Openness of the Constitution’, supra n. 61, at 446ff.
63 Judgement 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>.
64 Para 10 of the English summary of judgement K15/04, supra n. 63.
65 Para 1 of the English summary of judgement K15/04, supra n. 63.
powers were delegated to the EU level; the review of the acts of EU bodies is a matter for EU 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 was taken in the Accession Treaty case. The claimants, who came from amongst three political groups of the Sejm that were opposed to Poland’s EU 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 concerned, \textit{inter alia}, the right of EU citizens to vote and stand in both European Parliament and municipal elections, the adoption of common currency, and the change in the principle of separation of powers.

The Tribunal dismissed all claims. As regards local elections, the Tribunal found that the above-mentioned Article 4 (on sovereignty of the Polish people) does not extend to cover local elections, and Article 62(1), which guarantees to the Polish citizens the right to elect, \textit{inter alia}, their representatives to local self-government bodies, does not mean that this right is of an exclusive character and that it could not also be accorded to the citizens of other states. The Tribunal equally rejected the applicants’ claim that the powers of the European Central Bank are 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 formulate and implement monetary policy. This claim was rejected because Article 105 of the EC Treaty, which deals with these matters, is not of a self-executing nature. Importantly for this paper, the Court said that once Poland adopts the common currency in the future, a decision may 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 potential future same-sex marriages, which has been a controversial subject 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 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

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\textsuperscript{66} Judgement in Case K 18/04, \textit{supra} n. 18.
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 might have appeared rather far-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 fully understand the Tribunal’s statements on supremacy, we will first examine the EAW 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 between Polish politicians and scholars as to what would happen if the majority of the people were to approve EU accession at the referendum, but the turnout were to remain below the required 50 per cent. The Parliament adopted a statute that allowed it to ratify the accession agreement itself if the turnout were to remain under this threshold. Some opposition members of the Sejm asked the Constitutional Tribunal to review the constitutionality of this law, but such a mechanism was found by the Court to be correct. In addition, it should be noted that the willingness to interpret national law in conformity with EC law was demonstrated by the Polish courts already in the pre-accession period. Even though noting that, at the time, EC law had no binding force in Poland, the Constitutional Tribunal emphasized that Articles 68 and Article 69 of the Polish Association Agreement mean that Poland is thereby obliged to use ‘its best endeavours to ensure that future legislation is compatible with Community legislations’; this results ‘in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility.’

4.2. European Arrest Warrant Decision: limits to interpretation

It is only against the backdrop of the above line of decisions that the Decision on the European Arrest Warrant can be properly understood. The case concerned Article 55(1) of the Polish

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67 Judgement 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>.
69 The decisions are quoted in Kühn, supra n. 50, at p. 566; see ibid. for further details.
Constitution, which provides in an explicit and unconditional manner that ‘[t]he extradition of a Polish citizen shall be forbidden.’ Polish legislature transposed the European Arrest Warrant Framework Decision by way of amending in 2004 the 1997 Penal Procedure Code, 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 a 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.

The Tribunal held that despite numerous important procedural differences between the extradition and surrender, the two procedures are very similar when it comes to substance. Thus, according to the judges, the surrender procedure is only a variation of extradition, and the prohibition enshrined in Article 55 of the Constitution is therefore 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 the third pillar legislation (Pupino decision had not yet been delivered by the ECJ), and in any event the ECJ jurisprudence has placed limitations to the principle of indirect effect, especially as regards aggravating criminal liability. 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-months transitional period to Parliament, during which the Constitution should be amended and the surrendering of Polish nationals should continue. Indeed, it said that the Polish legislature should ‘give the highest priority’ to ensuring the functioning of the EAW system.

Although this case concerns the third pillar, where EU law does not have supremacy, the judgement does seem to sit somewhat uneasily with the ECJ’s recent Pupino judgement which

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72 For information on the factual background, see Łazowski, ‘Constitutional Tribunal’, supra n. 70, at p. 573ff.
73 See Łazowski, ‘Constitutional Tribunal’, supra n. 70, at p. 574ff, esp. at p. 576-577.
74 See infra n. 77 and accompanying text.
75 See e.g. Case 80/86 Kolpinghuis Nijmegen, [1987] ECR I-3969.
76 Para. 17 of the English summary of the judgment in Case P 1/05, supra n. 17.
was delivered shortly afterwards by the ECJ.\textsuperscript{77} According to \textit{Pupino}, the obligation of loyal cooperation under Article 10 of the EC Treaty, and the principle of indirect effect, do also apply to the third pillar. However, in any event the 18-months transitional period shows that the Tribunal essentially takes an EU-friendly, pragmatic approach,\textsuperscript{78} especially if considered in the light of the Tribunal’s previous case-law. Furthermore, the Tribunal clearly had no room of 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 EC law (e.g. provisions on voting rights) or needing amendment in the more distant future (e.g. provisions on Central Bank in case of adoption of the common currency). However, Article 55(1), formulated as a rule rather than as a principle,\textsuperscript{79} left the Court’s hands tied, with an absence of any room to manoeuvre.

Indeed, the Tribunal itself also stressed that there are limits to interpretation, doing so in the above-mentioned Accession Treaty decision that followed two weeks later.\textsuperscript{80} The Tribunal 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.\textsuperscript{81} Indeed, the Tribunal developed a version of the pluralist approach to the relations between EC and national law, stating that unlike traditional dualism and monism, EC law created a new situation ‘wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative.’\textsuperscript{82} It also underscored the assumption of mutual loyalty between the EC/EU institutions and the Member creates, which creates ‘a duty for the Member States to show the highest standard of respect for Community norms’, but also ‘a duty for the ECJ to be sympathetically disposed towards the national legal systems.’\textsuperscript{83}

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.\textsuperscript{84} In certain circumstances, an

\textsuperscript{77} Case C-105/03 \textit{Criminal proceedings against Maria Pupino}, ECR [2005] I-5285. For discussion, see \Lazowski, ‘Constitutional Tribunal’, supra n. 70, at p. 578ff.
\textsuperscript{79} See on this Komárek, supra n. 78, at p. 12.
\textsuperscript{80} Judgement in Case K 18/04, supra n. 18.
\textsuperscript{81} Para. 10 of the English summary of Judgement in Case K 18/04, supra n. 18.
\textsuperscript{82} Para. 12 of the English summary of Judgement in Case K 18/04, supra n. 18.
\textsuperscript{83} Para. 16 of the English summary of Judgement in Case K 18/04, supra n. 18.
\textsuperscript{84} Para. 14 of the English summary of Judgement in Case K 18/04, supra n. 18.
irreconcilable inconsistency may emerge between a constitutional norm and a Community norm, which cannot be eliminated by means of interpretation.\textsuperscript{85} Such cases may not lead to the constitutional norm losing its binding force (e.g. as regards norms protecting fundamental rights) or applying 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 an 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.\textsuperscript{86} 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 ECJ 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 EU, 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.

Besides the issue of limits to interpretation, the Polish Constitutional Tribunal’s decision should also be viewed in the context where the constitutional courts of some other countries have also encountered controversial issues and asserted their prerogatives with regard to the third pillar, where supremacy does not apply. Indeed, the Cypriot Supreme Court annulled in November 2005 the national implementing law on the basis of a reasoning that closely followed the Polish EAW judgement.\textsuperscript{87} 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.\textsuperscript{88} 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 an EU law provision; and secondly, while the Polish Tribunal used all its powers to avoid negative consequences of such a conflict, the German Court was not quite so careful about the consequences of its judgment for

\textsuperscript{85} Para. 13 of the English summary of Judgement in Case K 18/04, \textit{supra} n. 18.

\textsuperscript{86} Para. 13 of the English summary of Judgement in Case K 18/04, \textit{supra} n. 18.


the European legal order. Cases concerning a conflict between national constitutions and obligations arising from the framework decision have also been brought before the Spanish and Czech Constitutional Courts. In addition, the ECJ has been seized with a question on the validity of the EAW 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.

Overall, the EAW decision brings us back to the discussion in the second part of this paper about the need for the other institutional actors to take their role in ‘co-operative constitutionalism’ seriously: since there were genuine limits to interpretation, the Tribunal gave 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.

Indeed, several other new Member States have amended their constitutions in order to accommodate the European Arrest Warrant system, including Slovenia and Latvia; one of the most recent countries to do so was an accession country – Bulgaria. As a matter of fact, in a follow-up to the EAW 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. We will return to the issue of the parliaments’ role in the ‘co-operative constitutionalism’ throughout the remainder of the paper.

89 Komárek, supra n. 78, at p. 5 and 14.
91 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 to force Czech citizens to leave their homeland, does not preclude a temporary surrender of Czech citizens under EAW, when interpreting the provision in conformity with EU obligations.
93 Komárek, supra n. 78, at p. 25.
94 For details, see Albi, EU Enlargement, supra n. 14, pp. 67ff.
96 Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej [Bill Amending the Constitution of Poland], Druk No. 580. The author is grateful to Adam Łazowski for this point.
5. Challenges to the mode of adjusting the constitutions for EU membership

5.1. Estonia

A similar message for the national parliament to do its job better has recently been delivered by the Constitutional Review Chamber of the Supreme Court of Estonia. As with Poland, there had been calls from various quarters to amend certain constitutional provisions 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 a low public support for accession in the years preceding the accession referendum, and the rigidity of the constitutional amendment procedures, the Constitution was, strictly speaking, not amended but ‘supplemented’ by an independently standing Act Supplementing the Constitution97 (hereinafter Supplementing Act). In a laconic wording, it authorizes Estonia’s membership of the EU (Art. 1), with the Constitution being ‘applied, taking into consideration the rights and obligations deriving from the Accession Treaty’ (Art. 2). The Act was approved by a 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 challenges were brought to the Constitutional Review Chamber of the Supreme Court, both with regard to the mode of the constitutional revision as well as concrete constitutional provisions that might conflict with EC law. As regards the mode of constitutional revision, in total nine cases were brought to the Supreme Court after the accession referendum.98 In essence, the following claims were made: (a) the Constitution only allows ‘amendment’ of its text, and not ‘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

97 RT I [Riigi Teataja – Official Gazette] 2003, 64, 429
98 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>.
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 the concrete constitutional provisions that might conflict with EC law, the Constitutional Review Chamber was seized in April 2005 with a case regarding the electoral rights of EU citizens.\(^9\) In this case, the Chancellor of Justice\(^1\) claimed that a provision of the Political Parties Act,\(^1\) 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 of the EC Treaty.\(^1\) That is because the contested provision would not, in effect, ensure equal opportunities for an EU 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 \textit{in abstracto} because of a conflict with EC law. Despite the applicant’s reference to constitutional norms, the Court found that the provision had, in essence, been contested on the basis of compatibility with EC law. In addition, the Court pointed out, with reference to the ECJ’s decision in \textit{IN.CO.GE. ’90},\(^3\) that a national act which conflicts with EC 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 ECJ on the interpretation of Article 19 EC, 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 caused considerable legal controversies.\(^4\) 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 EU possible at that time. As with the Polish European Arrest Warrant

\(^{9}\) Decision No. 3-4-1-1-05 of 19 April 2005, available at <www.nc.ee>.
\(^{1}\) Chancellor of Justice is an institution resembling an ombudsman.
\(^{1}\) Political Parties Act, RT I 1994, 40, 654; 2003, 90, 601.
\(^{1}\) Art. 19 EC provides for the right of EU citizens to vote and stand in European Parliament and municipal elections when residing in another Member State.
\(^{4}\) For details, see Albi, \textit{EU Enlargement}, supra n. 14, at p. 91.
case, the Constitutional Review Chamber sent a message to the Parliament, suggesting that the latter might wish to adopt clear legislative provisions on this matter. According to the Constitutional Review Chamber,

> 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.

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 Estonian currency. The European Commission had earlier requested the 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 confirmed this view in its opinion of 11 May 2006. 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 did indeed directly address the position of the Supplementing Act in the context of supremacy of EC law. As a matter of fact, it appears to have given unconditional supremacy to EC law, stating that the text of the Constitution should be read together with the Supplementing Act, with those parts of the Constitution that are incompatible with EC law having to be disapplied.

Finally, it should be noted that following the 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.

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

The Latvian Constitutional Court also had to deal with 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 to international institutions. In addition, a new type of referendum was introduced for EU accession: whereas a constitutional amendment referendums requires, under Article 79, a minimum turnout of 50 per cent, the new EU-referendum merely requires the participation of at least half of the number of 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, 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.

Overall, while the above cases in Estonia and Latvia appear to have been brought on the basis of legitimate national constitutional concerns, it is clear that the decisions 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.

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106 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 pp. 214-215.
107 See the summary of the decisions in Endzins, supra n. 106, at pp. 214-215.
6. The region-wide drama with bitter sugar and troubled legitimate expectations

6.1. Overview of national cases and direct actions

One issue that has made waves in a number of new Member States is the vexed situation regarding 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 EU, 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, followed in January 2004 by Commission regulation 60/2004/EC on the sugar sector. 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 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. We will address this topic by first outlining the national cases and direct actions, before making some broader remarks in the second part of this chapter.

6.1.1. Hungary

We start the overview of relevant cases with Hungary, where the Constitutional Court declared on 25 May 2004 a pertinent national act to be unconstitutional. 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 regulations. The President submitted the Act to the Constitutional Court for a preliminary constitutional review, arguing that the Surplus Act,

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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 related to 1 May, the date of the entry into force of the Accession Treaty.\footnote{111 OJ 2003 L 236/17.} In Hungary, obligations on tax-payers 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 was contrary to the requirement 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 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 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 to the pre-accession period, thereby avoiding the issue of supremacy of EC law.\footnote{112 Cf. comment in Section 6.2 of this paper.}

6.1.2. Estonia

In Estonia, there are, at the time of writing, twenty-nine cases pending in the lower courts with regard to a similar implementing act; they are likely to reach the Constitutional Review Chamber of the Supreme Court, with the possibility of a preliminary reference being sent to the European Court of Justice. The cases were prompted by the so-called Surplus Stocks Charges Act (hereinafter Surplus Stocks Act),\footnote{113 RT 2004 I, 30, 203.} which the Estonian Parliament adopted virtually at the last minute, in an attempt to implement the obligations arising from the above-mentioned Regulation. The Act was published on 27 April 2004, and took effect three days later, on 1 May 2004, the day of accession; the companies thus had effectively just three days to dispose of their sugar stocks. Under the Act, fines were subsequently imposed on those companies 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 by twenty-nine companies, on
grounds of the right to property and the principles of non-retroactive legislation, legal certainty, legitimate expectations and proportionality. The companies argued that it would be unconstitutional to be punished retroactively for sugar stocks which they obtained prior to 1 May 2004. Under the Estonian Constitution alone, these companies would have had a very strong claim. The Supreme Court of Estonia has reiterated these principles on several occasions, and it has earlier ruled that legislation changing legal obligations in a very short period of time is incompatible with the rule of law.

However, the courts of first instance that have already delivered a decision, have found against the companies, referring to supremacy of EC law under the *Internationale Handelsgesellschaft* case.\(^{114}\) All decisions are under appeal. The decisions of the courts of first instance were predominantly based on the following arguments.\(^{115}\) 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. That is because the Accession Treaty was concluded already on 16 April 2003 and published in the Estonian Official Gazette, plus Article 22 of the Act of Accession\(^{116}\) made reference to the need to eliminate surplus stocks. Undertakings were expected to familiarise themselves with the legal environment, including 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 general principles of law, given that the Act was based on a measure implementing the European Commission regulations, the validity of which can be reviewed by the European Court of Justice alone.

Furthermore, the courts referred to the *Weidacher*\(^{117}\) case, which concerned a similar situation upon Austria’s EU accession. In this case, an Austrian company that had imported olive oil from Tunisia prior to accession went bankrupt because of similar fines. A preliminary reference was made to the ECJ, asking for a review of the relevant Commission Regulation in the light of competences and the principles of proportionality and legitimate expectations. The ECJ rejected the claim, holding that the EC Commission has a wide margin of discretion within the Common Agricultural Policy, and was entitled, under the Austrian Act of Accession, to facilitate

\(^{114}\) See Case 11/70, *supra* n. 1.
\(^{115}\) We refer here to Tallinn Administrative Court Decision in *Teskatel Ltd.* (Case No. 3-2578/2004, Decision of 17 October 2005). The precise issues and reasoning varied in the large number of other decisions.
\(^{116}\) *OJ* L 236/33.
\(^{117}\) ECJ, Case C-179/00 *Weidacher v Bundesminister für Land- und Forstwirtschaft* [2002] *ECR* I-501.
the transition by adopting transitional measures. As regards legitimate expectations, the ECJ held that this principle may be invoked as against Community rules only to the extent that the Community itself has previously created a situation which could give rise to a legitimate expectation,\footnote{This formula was established e.g. in Case C-177/90 Kühn v Landwirtschaftskammer Weser-Ems [1992] ECR I-35, para 14.} 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 EU’s \textit{Official Journal}, that the Commission was specifically empowered to adopt such transitional measures, and their potential repercussions on surplus stocks built up prior to the publication of the Regulation. Based on the ECJ’s decision in the \textit{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.

\textbf{6.1.3. The Czech Republic}

Sugar was also the issue in one of the first EU membership related decisions 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 rules for determining sugar production quotas, in anticipation of the adoption of the \textit{acquis} on the Common Agricultural Policy.

However, in a post-accession decision of 8 March 2006,\footnote{Pl. ÚS 50/04, 08.03.2006; English translation is on file with the author.} the Court decided to disregard in part its previous case-law, reasoning that upon the Czech Republic’s accession to the EU, a fundamental change 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 the 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 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. In this respect, it said that the current standard within the Community for the protection of fundamental rights cannot give rise to the assumption that this standard is of a lower quality than the protection accorded in the Czech Republic. The Court did declare the relevant law invalid, but on grounds
of EC law instead of the national constitution. It found that Government had acted *ultra vires*, as it had exercised an authority which had been transferred to 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.

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 state powers were conferred to the EU 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 the 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 will be necessary to insist that these powers be returned to the Czech Republic.

6.1.4. Direct actions and WTO rules

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

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The Estonian Government brought its action in August 2005 against Commission Regulation (EC) No 832/2005\textsuperscript{122}, which lays down rules on the determination of surplus sugar quantities in the new Member States.\textsuperscript{123} Besides claiming breach of essential procedural requirements and of the principle of non-discrimination, the Estonian Government focuses especially on the dramatically large fine of approximately 55 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 about half of the total surplus sugar in the country. Ahead of EU accession, there was a major ‘sugar panic’ in Estonia, as the price of sugar was expected to increase after accession, and people bought large quantities of sugar to continue making delightful home-made jams in subsequent years. Not surprisingly, such a peculiar and indeed baffling fine has caused major resentment towards the EU amongst the population,\textsuperscript{124} especially given that the budget priorities lie with improving infrastructure, education and medicine, in a quest to catch up with the ‘old’ EU 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, right to property of private households (as well as of undertakings\textsuperscript{125}), the principle 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 further complicate the matter, the appellate body of the WTO adopted a decision in April 2005 according to which European Union’s sugar production subsidies and restrictions of import are illegal.\textsuperscript{126} This also concerns the rules under which Estonia is being fined; indeed June 2005, the EU agriculture commissioner Mariann Fischer Boel announced a sharp review of the EU’s nearly 40-year-old sugar regime.\textsuperscript{127}

6.2. Comment: between a rock and a hard place

\textsuperscript{122} 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. \textit{OJ C} 271/24.


\textsuperscript{124} 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 in the panned scale, as EU legislation does not allow distribution of home-made jam to the public.

\textsuperscript{125} This, in essence, appears to indicate the Government’s support to the claims of the companies in the above-mentioned national cases.


With the outcome of the Estonian appeals not being certain, although judicial self-restraint can most likely be expected, we will analyse here the Hungarian decision; however, a number of remarks will equally be applicable to the Estonian sugar cases.

There have been two readings of the Hungarian decision. On one reading, the Hungarian Court did not properly understand its role in the application of EC law and was unwilling to participate in the European learning process, presenting itself as the ultimate guarantor of constitutionality.\textsuperscript{128} Although the Court stated that its decision did not concern the validity or the interpretation of EC law, the Surplus Act did largely replicate the provisions of the two EC Regulations. With supremacy of EC law thus having been at stake, the Hungarian Court did have alternative options at its disposal to avoid a conflict with EC law, which it chose not to deploy.\textsuperscript{129} For instance, it would have been possible to construe the charge as not being a tax under Hungarian law, treating it instead as a ‘Community charge’ based on the Accession Treaty and hence as a new category of obligations under EC law. Alternatively, by considering the matter to be one of Community law, the Court could, by reference to \textit{Weidacher} case, have made use of the \textit{acte clair} doctrine.\textsuperscript{130}

The second reading, which appears to be better suited, is that the Constitutional Court avoided taking a stand directly on the supremacy of EC law, showing judicial deference or self-restraint in a way which is not that different from other European \textit{fora} of constitutional review, in seeking to leave EC law undisturbed to the farthest possible extent.\textsuperscript{131} The Court did so by finding that the Surplus Act was a domestic act adopted prior to EU accession, when EC law still qualified as foreign law in Hungary. The Court could disregard the EC regulations and their direct effect within the EC 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.\textsuperscript{132}

The second reading sits well with our analysis of the Polish EAW 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

\textsuperscript{128} This view is represented e.g. by Sajó, \textit{supra} n. 13, p. 351ff. See also Czuczai, \textit{supra} n. 110, at p. 351.
\textsuperscript{129} Sajó, \textit{supra} n. 13, at 362ff.
\textsuperscript{130} Sajó, \textit{supra} n. 13, at 358 and 365.
\textsuperscript{131} This view is represented by Uitz, \textit{supra} n. 110, at p. 44ff.
\textsuperscript{132} Uitz, \textit{supra} n. 110, at pp. 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 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.\textsuperscript{133}

In doing so, the Court sought to countenance the risk that ‘the government bureaucracy will 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.’\textsuperscript{134} Besides the need to improve legislation, the Court’s message implicitly also concerned the insufficiency of 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 EC law, even though Hungary follows a strong dualist tradition in its stance to international law.\textsuperscript{135} 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.\textsuperscript{136}

The sugar cases raise important issues regarding a certain degree of deterioration in the national administrative cultures and the level of protection of human rights in the process of implementing EC law. As mentioned earlier, the ECJ developed the concept of protection of fundamental rights primarily as a response to potential challenges to supremacy. However, concerns have still been voiced about the level of the protection, with individual rights rarely being given priority over common market interests.\textsuperscript{137} Perhaps the very principle of legitimate expectations itself could serve as an illustration. It appears that the overwhelming majority of claims based on the breach of the principles of legitimate expectations and non-retroactivity have been rejected by the ECJ; the Court expects a prudent and well-informed trader to foresee

\begin{footnotesize}
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\item \textsuperscript{133} See Sajó, \textit{supra} n. 13, at pp. 368-9.
\item \textsuperscript{134} Sajó, \textit{supra} n. 13, at p. 371.
\item \textsuperscript{135} Sajó, \textit{supra} n. 13, at p. 353.
\item \textsuperscript{136} Sajó, \textit{supra} n. 13, at p. 361.
\item \textsuperscript{137} For discussion of relevant literature, see Douglas-Scott, \textit{supra} n. 24, at pp. 460-461 and also 454-458.
\end{itemize}
\end{footnotesize}
changes in the law.\textsuperscript{138} Andras Sajó has commented that co-operation at EU level involves trade-offs; the concerns of uniform application and effectiveness of EC 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.’\textsuperscript{139} 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’.\textsuperscript{140}

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.\textsuperscript{141}

According to Steyger, in the Netherlands this has led to situations such as the \textit{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.\textsuperscript{142} This situation is particularly ironic in the case of 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.’\textsuperscript{143}

\textsuperscript{138} T. Tridimas, \textit{The General Principles of EC Law} (Oxford University Press, 1999), at 169 and 173. See Chapter 5 of this book for a detailed analysis of ECJ’s case-law on the principles of legal certainty, legitimate expectations and non-retroactivity.

\textsuperscript{139} Sajó, \textit{supra} n. 13, at pp. 367-8.


\textsuperscript{141} Steyger, \textit{supra} n. 140, at p. 191.

\textsuperscript{142} ECJ, Case C-183/95 \textit{Affish BV v Rijksdienst voor de keuring van Vee en Vlees [1997] ECR I-4315}; see E. Steyger, \textit{supra} n. 140, at p. 192.

\textsuperscript{143} Sajó, \textit{supra} n. 13, at p. 371.
7. Conclusions: Kumm’s ‘Pangloss scenario’, with lessons for national parliaments?

Mattias Kumm has sketched two scenarios that might evolve in a pluralist European legal order. The worst would be what he has called the ‘Cassandra scenario’, where constitutional courts frequently strike down EC legislation, based on their particular constitutional norms and values. However, he considers more likely what he terms the ‘Pangloss scenario’, under which the Member States would only very rarely strike down a piece of legislation, and do so for very good reasons. He points out that this could be constructive, and even benefit the coherence of the EC legal order in the long run. National courts in this case would be recognized as a constructive corrective force within the European polity, exerting pressure to increase the democratic quality of decision-making on the European level; they provide the ECJ an incentive to develop a sensitivity to questions of legislative jurisdiction and to become more rigorous in its fundamental rights analysis. In addition, the courts would 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. In order to secure, at the same time, the coherence of the Community legal order, the measure would have to be renegotiated on the European level either generally or by providing an exemption 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 State’ as a general jurisprudential approach. 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. 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 in the European Union and the Member States.

145 This has indeed earlier happened 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 ECJ judgements that had caused concern amongst the Member States.
It has been commented that the Polish Constitutional Tribunal did just that in its EAW decision when declaring a national implementing measure unconstitutional.\textsuperscript{149}

The cases considered in this paper demonstrate that it would be over-simplistic or indeed inadequate to explain decisions of national constitutional courts 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. The Polish EAW decision (albeit concerning the third pillar) and the Hungarian sugar stocks decision therefore illustrate that the ‘Pangloss scenario’ merits further consideration, in developing procedures and safeguards that would ensure coherence of European legal order and constructive solutions even if an outright constitutional conflict were to arise in the future. These and other cases that were considered also highlight the need for actors beyond the judiciary to engage more actively in ‘co-operative constitutionalism’, and in particular the role of national parliaments in amending the constitutions in an appropriate manner. At the EU level, a welcome development for such ‘co-operative constitutionalism’ is the early warning mechanism, envisaged in the European Constitutional Treaty, which involves national parliaments more closely in the process of monitoring competences and subsidiarity.

\textsuperscript{148} Kumm, ‘The Jurisprudence of Constitutional Conflict’, \textit{supra} n. 9, at p. 290.
\textsuperscript{149} See Komárek, \textit{supra} n. 78, at pp. 5 and 25.