COURT OF JUSTICE
OF THE EUROPEAN UNION

CONSTITUTIONAL COURT
OF THE REPUBLIC OF BULGARIA

EUnited in Diversity
The Role of Constitutional Justice in the EU Common Legal Order

International Conference – Sofia, Bulgaria
3 – 5 September 2025

CONFERENCE PROCEEDINGS

EUnited in Diversity III
The Role of Constitutional Justice in the EU Common Legal Order

International Conference
Sofia, Bulgaria

3 – 5 September 2025

Conference proceedings

UniE dans la diversité III
Le rôle de la justice constitutionnelle dans l'ordre juridique commun de l'Union européenne

Conférence internationale
Sofia, Bulgarie

3 – 5 septembre 2025

Actes de la conférence

COURT OF JUSTICE
OF THE EUROPEAN UNION

CONSTITUTIONAL COURT
OF THE REPUBLIC OF BULGARIA

PROGRAMME

Thursday, 4 September

10:00 **Opening of the conference**

10:05 – 10:30 Introductory speeches

- Mr **Koen Lenaerts**, President of the Court of Justice of the European Union
- Ms **Pavlina Panova**, President of the Constitutional Court of the Republic of Bulgaria
- Ms **Diana Kovatcheva**, Judge of the European Court of Human Rights on behalf of the President of European Court of Human Rights

10:30 – 12:15 **The allocation of competences between the Member States and the EU**

1st panel Speakers

- Mr **Constantinos Lycourgos**, President of the Third Chamber of the Court of Justice of the European Union
- Mr **Zdeněk Kühn**, Judge of the Constitutional Court of the Czech Republic
- Mr **Yanaki Stoilov**, Judge of the Constitutional Court of the Republic of Bulgaria
- Mr **Cándido Conde-Pumpido Tourón**, President of the Constitutional Court of Spain
- Moderator/Chair: Ms **Véronique Malbec**, Member of the Constitutional Council of France

Time for plenary discussion

14:30 – 16:30 **Identity of the EU and EU constitutionalism in times of crisis: Constitutional Courts and the Court of Justice**

2nd panel Speakers

- Mr **Maciej Szpunar**, First Advocate General, Court of Justice of the European Union
- Mr **Giovanni Amoroso**, President of the Constitutional Court of Italy
- Mr **Vytautas Mizaras**, Judge of the Constitutional Court of the Republic of Lithuania
- Mr **Luc Lavrysen**, President of the Constitutional Court of Belgium (Dutch linguistic group)
- Moderator/Chair: Ms **Nevin Feti**, Judge of the Constitutional Court of the Republic of Bulgaria

Time for plenary discussion

Friday, 5 September

10:00 – 12:00 **Different national constitutional law constellations relevant for EU law**

3rd panel

Speakers

- Mr **Thomas von Danwitz**, Vice-President, Court of Justice of the European Union
- Mr **Elias Georgiou**, Judge of the Supreme Constitutional Court of Cyprus
- Mr **José João Abrantes**, President of the Constitutional Court of Portugal
- Ms **Irēna Kucina**, President of the Constitutional Court of the Republic of Latvia
- Moderator/Chair: Mr **Sasho Penov**, Judge of the Constitutional Court of the Republic of Bulgaria

Time for plenary discussion

14:00 – 16:30 **Application and interpretation of EU law: Constitutional Courts and the Court of Justice**

4th panel

Speakers

- Ms **Ineta Ziemele**, Judge, Court of Justice of the European Union
- Mr **Lawrence Mintoff,** Judge of the Constitutional Court of Malta
- Mr **Thierry Hoscheit**, President of the Constitutional Court of Luxembourg
- Mr **Atanas Semov,** Judge of the Constitutional Court of the Republic of Bulgaria
- Moderator/Chair: Ms **Helena Jäderblom,** President of the Supreme Administrative Court of Sweden

Time for plenary discussion

16:30 **Closing of the conference**

Concluding remarks

- Mr **Koen Lenaerts**, President of the Court of Justice of the European Union
- Ms **Pavlina Panova**, President of the Constitutional Court of the Republic of Bulgaria


EUnited in Diversity III
INTERNATIONAL CONFERENCE
THE ROLE OF CONSTITUTIONA
IN THE EU COMMON LEGAL
3-5 September 2025
Sofia, Bulgaria
CONSTITUTIONAL COURT
OF THE REPUBLIC OF BULGARIA


L JUSTICE
ORDER
T OF JUSTICE
E EUROPEAN UNION

Table of Contents

Concept Paper : Exploring the role of constitutional justice within the EU common legal order 13

Opening speech: Constitutional dialogue in changing times
Koen Lenaerts, President of the Court of Justice of the European Union 25

Opening speech
Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria 37

Introductory speech
Diana Kovatcheva, Judge at the European Court of Human Rights 45

1st panel
The allocation of competences between the Member States and the EU 51

The allocation of competences between the Member States and the European Union - relevant case-law of the Court of Justice
Constantinos Lycourgos, President of the Third Chamber of the Court of Justice of the European Union 53

On the relationship between the Czech Constitution and EU Law
Zdeněk Kühn, Judge at the Constitutional Court of the Czech Republic 63

Allocation of competences between the Member States and the European Union. Relationship between the Court of Justice of the European Union and the national constitutional jurisdictions
Yanaki Stoilov, Judge at the Constitutional Court of the Republic of Bulgaria 75

The allocation of competences between the Member States and the European Union
Cándido Conde-Pumpido Tourón, President of the Constitutional Court of the Kingdom of Spain 89

2nd panel
Identity of the EU and EU constitutionalism in times of crisis: Constitutional Courts and the Court of Justice 99

Preserving the common legal order in times of crisis. Introductory remarks on judicial review before the Court of Justice
Maciej Szpunar, First Advocate General of the Court of Justice of the European Union 101

European and national identity, public powers in situations of urgency and necessity, and constitutional case-law in times of crisis
Giovanni Amoroso, President of the Constitutional Court of the Italian Republic 109

The interests of national security and human rights in the face of threats to the democratic order
Vytautas Mizaras, Judge at the Constitutional Court of the Republic of Lithuania 117

The Belgian Constitutional Court in times of crisis and the (EU) rule of law
Luc Lavrysen, President of the Belgian Constitutional Court 129

3rd panel
Different national constitutional law constellations relevant for EU law 149

How to identify discretion under EU law - On the merits of direct dialogue and the duty to refer
Thomas von Danwitz, Vice-President of the Court of Justice of the European Union 151

Different national constitutional law constellations relevant for EU law – The case of Cyprus
Elias Georgiou, Judge at the Supreme Constitutional Court of Cyprus 167

Different national constitutional law constellations relevant for EU Law
José João Abrantes, President of the Constitutional Court of Portugal 173

The duty of loyalty towards EU law in the constellation of protection of individual fundamental rights
Irēna Kucina, President of the Constitutional Court of the Republic of Latvia 179

4th panel
Application and interpretation of EU law: Constitutional Courts and the Court of Justice 185

Interpretation methods of the Court of Justice and Constitutional Courts
Ineta Ziemele, Judge at the Court of Justice of the European Union 187

The primacy of EU Law and the supremacy of the Constitution of Malta
Lawrence Mintoff, Judge at the Court of Appeal and at the First Hall of the Civil Court of Malta 199

L'expérience de la Cour constitutionnelle du Grand-Duché de Luxembourg
Thierry Hoscheit, Président de la Cour constitutionnelle du Grand-Duché de Luxembourg 209

Le dialogue est-il vivant ?
Atanas Semov, Juge à la Cour constitutionnelle de la République de Bulgarie 227

Concluding remarks
Koen Lenaerts, President of the Court of Justice of the European Union 251

Concluding remarks
Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria 259

Mr Koen Lenaerts, President of the CJEU and
Ms Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria

Ms Ineta Ziemele, Judge at the CJEU and Mr Koen Lenaerts, President of the CJEU

Concept Paper : Exploring the role of constitutional justice within the EU common legal order

Constitutional justice within the EU common legal order is a complex and multi-layered notion that covers both structural and substantive aspects of EU constitutionalism, such as the principles governing the allocation of competences and the separation of powers, the values of respect for fundamental rights, democracy and the rule of law, as well as the shared responsibility of the CJEU and the constitutional – or equivalent – courts of the Member States in upholding those values, which together form the very identity of the EU as a common legal order. Exploring the role of constitutional justice within the EU common legal order is the purpose of the third edition of the EUnited in Diversity conference.

The conference shall feature four panels as follows.

Panel 1: The allocation of competences between the Member States and the EU

The purpose of this panel is to explore the vertical allocation of powers between the EU and the Member States. In light of Article 4(1) and Article 5(1) and (2) TEU, the European Union is governed by the principle of conferral. This means, in essence, that 'competences not conferred upon the Union in the Treaties remain with the Member States' and that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. As the EU is a union based on the rule of law, the exercise of powers by the EU institutions must be grounded in a legal basis set out in the Treaties.

As the definitive interpreter of EU law, [1] it is for the Court of Justice of the European Union – and for that institution alone – to determine whether the EU institutions have acted within the limits of the competences conferred upon them by the EU Treaties.

1| See, to that effect, judgment of 2 September 2021, *Republic of Moldova,* C-741/19, ECLI:EU:C:2021:655, paragraph 45.

This monitoring takes place where a Member State brings an action for annulment against an act adopted by the EU institutions.[2] However, the case-law shows that direct actions are not the whole story when it comes to that monitoring. As a matter of fact, it is often through the preliminary reference mechanism that the Court of Justice draws the line between EU and national competences. This is the case where a national court asks the Court of Justice to examine the validity of an act adopted by the EU institutions.[3] In addition, as the principle of conferral permeates the entire body of EU law, that principle also affects the way in which the Court interprets EU law. For example, in interpreting a directive or a regulation, the Court is often called upon to determine the scope of application of that directive or regulation,[4] the level of harmonisation it effects,[5] the margin of appreciation left to the Member States,[6] and whether national fundamental rights standards are applicable.[7] In answering those questions, the Court gives concrete expression to the principle of conferral.

Moreover, even in areas where the EU does not enjoy competence, such as the organisation of the judiciary or family law, the Member States must, when exercising their competences, respect EU law.[8] For example, when organising their judiciaries, the Member States may not call into question the principle of judicial independence.[9] When regulating matters pertaining to family law, the Member States may not restrict

2| See, for example, judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97; of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98; of 3 December 2019, Czech *Republic* v *Parliament and Council*, C-482/17, ECLI:EU:C:2019:1035; and of 5 December 2017, *Germany* v *Council*, C-600/14, ECLI:EU:C:2017:935.

3| See, for example, judgment of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000.

4| See, for example, judgment of 7 March 2017, *X and X*, C-638/16 PPU, ECLI:EU:C:2017:173.

5| See, for example, judgment of 19 November 2019, *TSN and AKT*, C-609/17 and C-610/17, ECLI:EU:C:2019:981.

6| See, for example, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, ECLI:EU:C:2020:1031.

7| See, for example, judgments of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107; and *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.

8| See, for example, Lenaerts, K., "Federalism and the Rule of Law: Perspectives from the European Court of Justice", *Fordham International Law Journal*, Vol. 33, No 5, 2011, p. 1338.

9| See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531, paragraph 52; and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, paragraph 216.

the free movement rights of same-sex couples. [10] This is known in French legal literature as *le principe de l'encadrement des compétences*, which may be translated into English as 'the framing of powers principle'.

It follows from the foregoing that a complete and in-depth study of the principle of conferral must not be limited to cases involving the judicial review of secondary EU legislation, but must also look at the way in which the Court of Justice interprets EU law. The purpose of the first panel is therefore to examine the principle of conferral from a broad perspective. [11]

Panel 2: Identity of the EU and EU constitutionalism in times of crisis: Constitutional Courts and the Court of Justice

The purpose of this panel is to offer some reflections on the way in which constitutional courts [12] and the Court of Justice protect the core values of EU constitutionalism when confronted with different crises. In recent years, Europe has faced a number of crises (financial crisis, refugee crisis, security crisis, pandemic crisis) which have put its core values to the test. The populist and nationalist movements that sometimes arise during or in the aftermath of such crises may favour the adoption of illiberal policies that undermine the stability of the EU values enshrined in Article 2 TEU, which are at the heart of the EU's identity. In light of that fact and given that Member States often adopt 'emergency' measures in such circumstances that are sometimes quite draconian in nature, such crises can adversely affect the very foundations of the EU legal order and question the legitimacy of the EU project as a whole. [13]

10| Judgments of 5 June 2018, *Coman and Others*, C-673/16, ECLI:EU:C:2018:385, paragraphs 37 and 38; and of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008, paragraph 52.

11| Lenaerts, K., "The broadening of EU competences through the case-law of the Court of Justice: myth or reality?", *ERA Forum*, Vol. 24, 2023. Available at: https://doi.org/10.1007/s12027-023-00775-4.

12| The expression 'Constitutional Courts' is to be understood broadly, including not only Constitutional Courts *strictu sensu*, but also Supreme Courts exercising constitutional jurisdiction.

13| Delhomme, V. and Hervey, T., "The European Union's response to the Covid-19 crisis and (the legitimacy of) the Union's legal order", *Yearbook of European Law,* Vol. 41, 2022, p. 50. Available at: https://doi.org/10.1093/yel/yeac011.

In resolving those crises, the EU must uphold the constitutional framework set out in the EU Treaties, which is based on protecting and promoting common values, whilst respecting national identity. In that regard, the Court of Justice has held that 'Article 2 TEU is not merely a statement of policy guidelines or intentions but contains values which … are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States'. [14] This identity is the basis on which 'the process of creating an ever closer union among the peoples of Europe' is founded. [15] Judges play a vital role in upholding the values enshrined in Article 2 TEU which derive from the common constitutional traditions of the Member States. The Court of Justice has held that respect for these values 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'. [16] The Court of Justice has also observed that the EU has its own constitutional structure that includes the EU institutional design, which enables it to uphold the values on which it is founded and to attain the objectives set out in the Treaties. This constitutional structure also includes a 'network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'. [17]

Moreover, whilst upholding common values, the EU constitutional framework in no way excludes national diversity. As the Court of Justice has already pointed out, 'neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences …'. [18]

14| Judgments of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraph 232, and *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, paragraph 264.

15| Preamble to the Treaty on European Union.

16| Judgments of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, ECLI:EU:C:2022:97, paragraph 126, and *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98, paragraph 144.

17| Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, paragraph 167. Lenaerts, K. and Gutiérrez-Fons, J.A., "A Constitutional Perspective" in Tridimas, T. and Schütze, R., (eds.), *Oxford Principles of European Union Law, Vol. 1, The European Union Legal Order,* Oxford University Press, Oxford, 2018.

18| Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, ECLI:EU:C:2021:1034, paragraph 229.

On the contrary, the protection of national identity is enshrined in Article 4(2) TEU, which expressly states that the EU shall respect the identities of the Member States, 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

This means, in essence, that the EU constitutional framework does not impose a particular constitutional model but limits itself to drawing 'red lines' that neither the EU institutions nor the Member States may cross.

When confronted with a crisis, the question that arises is whether those red lines are truly 'set in stone' or whether they are up for negotiation, and thus whether political institutions may or may not disregard the system of checks and balances established respectively in the Treaties and in national constitutions. It should be noted that the need to overcome those crises has led both the EU and the Member States to take measures that imposed limitations on the exercise of a number of fundamental rights. Horizontally, such crises may affect the allocation of powers between the different branches of government, generally to the benefit of the executive. Vertically, those crises may require a common and coordinated solution that can only take place at EU level, as the COVID-19 pandemic showed.

More generally, the purpose of this panel is to examine the way in which the EU constitutional framework operates in times of crisis. Is that framework flexible enough to provide effective solutions to deal with crises? Is it open to new forms of integration? How are values and, in particular, fundamental rights protected in times of emergency? Is there more leeway for national diversity? Does a state of crisis allow national courts – in cooperation with the Court of Justice – to interpret and to apply EU law differently?

At national level, constitutional courts have been confronted with similar questions within their own national legal orders. However, their approach has not been uniform. Some courts have seemed to consider that a crisis could justify a derogation from the usual rules, whilst others have demonstrated their commitment to defending rights and freedoms whatever the circumstances by displaying a willingness to scrutinise strictly the decisions taken by the political branches of government. In this context, dialogue between national constitutional courts and the Court of Justice, which have decided cases that have a similar subject matter, is important. The panel may also address the question whether a strict necessity test has been applied in such cases. In particular, it will

examine whether there are common constitutional traditions that guide European courts in assessing limitations on the exercise of fundamental rights in times of crisis.

Panel 3: Different national constitutional law constellations relevant for EU law

The aim of this panel is to identify the legal issues where national constitutional law meets EU law. Put simply, it is to examine the circumstances in which national constitutional courts encounter legal issues involving the interpretation and/or application of EU law. One of the questions this panel will set out to answer is whether, and on what grounds, constitutional courts use EU law as a basis for constitutional review. *Substantively*, a good example is respect for national constitutional identity; [19] another is the protection of fundamental rights, [20] and the obligation to make a reference as guaranteed by the national constitution. [21] In this context, the obligation for national judges to interpret national law in the light of EU law is of particular importance. Within the multi-level system of fundamental rights protection in Europe and pursuant to the well-established case-law of the Court of Justice, national courts must interpret, 'as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law'. [22]

In that regard, it should be pointed out that the duty of interpretation of domestic law in conformity with EU law, by virtue of which the national courts are obliged, to the greatest extent possible, to interpret national law in a manner that is consistent with the requirements of EU law, is inherent in the system of the EU Treaties, since it enables the national court to ensure, within the limits of its jurisdiction, the full

19| Judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:638.

20| Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936.

21| See, in this regard, Court of Justice, "Application of the *Cilfit* case-law by national courts or tribunals against whose decisions there is no judicial remedy under national law", at p. 62 et seq., available at: https://curia.europa.eu/site/upload/docs/application/pdf/2024-04/ndr_application_de_la_jurisprudence_cilfit_par_les_juridictions_nationales_dont_les_decisions_ne_sont_pas_susceptibles_dun_r.pdf.

22| Judgment of 11 November 2015, *Klausner Holz Niedersachsen,* C-505/14, ECLI:EU:C:2015:742, paragraph 31 and the case-law cited.

effectiveness of EU law when it determines the dispute before it. [23] While, to that end, national courts must use all the possible means provided in the given domestic legal system for that purpose, that obligation has certain limits according to the Court's settled case-law: it is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem.* [24] While the method of consistent interpretation aims at ensuring the full effectiveness of EU law, [25] its use and identification of its limits are necessarily left in the hands of the national courts, based on the guidance that the Court of Justice may provide, where possible, on the basis of the information made available to it, including the file in the main proceedings. [26]

Procedurally, this panel will also look at the forms of action by means of which EU law cases come before national constitutional courts. Are direct actions brought by the national executive or the legislature an effective means of ensuring compliance with EU law? [27] What about constitutional complaints, [28] or references made by ordinary courts to the national constitutional court? [29] Moreover, it can also be the case that ordinary courts make a reference to the Court of Justice asking it, in essence, to examine the compatibility of the case-law of a national constitutional court with EU law. [30] In such cases, an 'indirect dialogue' takes place between the national constitutional court and the Court of Justice. What attitude should constitutional courts adopt in such situations?

23| Judgments of 19 December 2013, *Koushkaki*, C-84/12, ECLI:EU:C:2013:862, paragraphs 75 and 76; of 8 November 2016, *Ognyanov,* C-554/14, ECLI:EU:C:2016:835, paragraph 59; of 29 June 2017, *Popławski,* C-579/15, ECLI:EU:C:2017:503, paragraph 31; and of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, paragraph 55.

24| Judgments of 11 November 2015, *Klausner Holz Niedersachse*n, C-505/14, ECLI:EU:C:2015:742, paragraph 32; and of 24 June 2019, *Popławski II,* C-573/17, ECLI:EU:C:2019:530, paragraph 76.

25| Judgment of 24 June 2019, *Popławski II,* C-573/17, ECLI:EU:C:2019:530, paragraph 55 and the case-law cited.

26| See, for example, judgment of 24 June 2019, *Popławski II,* C-573/17, ECLI:EU:C:2019:530, paragraph 87.

27| Judgment of 7 September 2022, *Cilevičs and Others,* C-391/20, ECLI:EU:C:2022:638.

28| Judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others,* C-236/09, ECLI:EU:C:2011:100.

29| Judgment of 5 June 2018, *Coman and Others*, C-673/16, ECLI:EU:C:2018:385.

30| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99.

Also of interest to this panel is the way in which national legal systems reconcile, on the one hand, the obligation of ordinary courts to set aside national law that conflicts with directly effective provisions of EU law and, on the other hand, the obligation to refer cases to the constitutional courts when doubts arise as to the compatibility of a rule of domestic law with the Constitution.[31] The ordinary courts' jurisdiction to raise a question of constitutionality overlaps with their duty to uphold the primacy of EU law when a domestic legal norm also infringes EU law. What are the requirements that a reference to a constitutional court must fulfil in order to safeguard the effectiveness of EU law and protect the dialogue between the Court of Justice and national courts? How have constitutional courts reacted to the relevant case-law of the Court of Justice?[32]

Panel 4: Application and interpretation of EU law: Constitutional Courts and the Court of Justice

It is for the Court of Justice to provide the definitive interpretation of EU law, whilst it is for national courts to apply that law to the case at hand. This allocation of competences determines the scope of application of the *acte clair* doctrine,[33] according to which the national court of last instance must make a reference to the Court of Justice, unless there is no reasonable doubt as to the *interpretation* of the EU law provision in question.

In order to determine the existence or absence of any reasonable doubt, the national court of last resort must be acquainted with the way in which the Court of Justice interprets EU law. In that regard, in the light of its case-law, it is safe to say that the Court of Justice uses the following methods of interpretation: when interpreting the terms of a provision, which are not specifically defined in EU law, the Court of Justice looks at the letter of the law, by reference to the usual and literal meaning in everyday language

31| Judgment of 11 September 2014, *A,* C-112/13, ECLI:EU:C:2014:2195.

32| See, for example, judgments of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, ECLI:EU:C:2010:363; and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99.

33| Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi,* C-561/19, ECLI:EU:C:2021:799.

of the words used.[34] However, since the EU has 24 official languages, the Court must look at the usual meaning of the terms in question in a multi-linguistic environment. It is bound by the principle of linguistic equality, according to which 'one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions'.[35] Where linguistic divergences exist, the Court cannot limit itself to the literal interpretation of the EU law provision in question, but must also look at the context in which the provision being interpreted is set and the objectives that it pursues.

Moreover, where international law imposes obligations on the EU, the Court of Justice seeks to interpret EU law in light of those international obligations. However, there is a caveat to this. International obligations may not be incorporated into EU law if they call into question the very values and principles on which the EU is founded, such as its system of fundamental rights protection,[36] and the dialogue between the Court of Justice and national courts by means of the preliminary reference mechanism.[37]

Furthermore, the Court of Justice relies on the comparative law method in order to interpret concepts laid down in secondary EU legislation but which pertain to areas that fall within the competences of the Member States (e.g. the meaning of the word 'spouse'). In the US, this is known as 'federal common law'.[38] In that regard, finding consensus amongst the laws of the Member States is of paramount importance, since a lack thereof compels the Court to act with caution when interpreting those concepts. Last, but not least, unlike the Treaties, the final Title of the Charter (Title VII) contains a series of binding guidelines for its interpretation and application. The case-law shows

34| See, generally, Lenaerts, K. and Gutiérrez Fons, J.A., "To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice", *Columbia Journal of European Law*, Vol. 20, 2013, p. 4, and *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, Brussels, 2020. This book is also accessible in Spanish (ES), Latvian (LV), Hungarian (HU) and Polish (PL).

35| Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799, paragraph 43.

36| Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

37| Opinion 1/09 of 8 March 2011, *Agreement creating a Unified Patent Litigation System*, ECLI:EU:C:2011:123.

38| Lenaerts, K. and Gutman, K., "'Federal Common Law' in the European Union: A Comparative Perspective from the United States", *American Journal of Comparative Law*, Vol. 54, No 1, 2006.

that the Court of Justice takes those guidelines very seriously when, for example, determining the scope of application of the Charter, the limitations that may be imposed on the exercise of a fundamental right, the relevance of the case-law of the European Court of Human Rights and that of the constitutional traditions common to the Member States.

Against this backdrop, the purpose of this panel is to engage in a comparative study of the methods of interpretation used by the Court of Justice and those relied upon by national constitutional courts. Do the latter courts use the same methods of interpretation? If so, do they give the same weight to them? Likewise, another question that could be examined by this panel is whether the Court of Justice interprets primary EU law in the same way as secondary EU law. The same question could be asked in respect of national constitutional courts when they interpret provisions of constitutional law. What are the key elements that distinguish the interpretation of primary EU law and constitutional law from statutory law?

Mr Constantinos Lycourgos, President of the Third Chamber of the CJEU, Ms Ineta Ziemele, Judge at the CJEU, Mr Thomas von Danwitz, Vice-President of the CJEU and Mr Koen Lenaerts, President of the CJEU

Mr Koen Lenaerts
President of the Court of Justice
of the European Union

Opening speech: Constitutional dialogue in changing times

Koen Lenaerts, President of the Court of Justice of the European Union

President Panova,

Dear Colleagues,

Ladies and Gentlemen,

Welcome to this conference 'EUnited in Diversity III: the Role of Constitutional Justice in the EU Common Legal Order', co-organised by the Constitutional Court of Bulgaria and the Court of Justice of the European Union ('the Court of Justice').

This is the third edition of this conference series. The first took place in Riga in 2021, on the initiative of my colleague and friend, Ineta Ziemele,[1] and the second in The Hague in 2023, as a collaborative effort between the Dutch *Hoge Raad*, the Belgian Constitutional Court and the Luxembourg Constitutional Court.[2]

Today, thanks to the tireless efforts of President Panova and her team, we gather here in the beautiful city of Sofia to discuss four topics over the next two days. The focus of those topics is, to some extent, different from those discussed previously in Riga and in The Hague. That is the result of a deliberate choice by the organisers, who aimed to highlight the fact that the dialogue between the Court of Justice and the constitutional – or equivalent – courts of the 27 Member States is not confined to issues relating to fundamental rights.

1| Conference proceedings, "EUnited in Diversity: between common constitutional traditions and national identities", *EUnited in Diversity*, Vol. 1, Luxembourg, Court of Justice of the European Union – Publications and Electronic Media Unit, 2021.

2| Conference proceedings, "EUnited in diversity II: The Rule of Law and Constitutional Diversity", *EUnited in Diversity*, Vol. 2, Luxembourg, Court of Justice of the European Union – Publications and Electronic Media Unit, 2023.

While fundamental rights are an essential component of that dialogue, they do not provide the full picture of constitutional justice in the EU common legal order. Structural aspects also constitute key components of that dialogue.

In democratic societies, national constitutions lay down a system of checks and balances which seeks to promote and protect the values of respect for liberty, equality, democracy and the rule of law. It is for national constitutional courts to uphold that system, by preserving the horizontal and vertical allocation of powers provided for in the constitution. In the EU legal order, the Court of Justice fulfils a similar task, in so far as it also strives to protect the system of checks and balances laid down in the Treaties, which seek to protect and promote the same values. [3]

As James Madison wrote in the *Federalist Papers* No. 51, [4] the principle of separation of powers and that of conferral (attribution) aim to ensure a 'double security' to protect individual liberty. The EU legal order also embraces that approach. Horizontally, the EU institutions must act within the scope of their powers, without upsetting the principle of institutional balance. Vertically, the balance of power between the EU and the Member States as provided for by the Treaties must be safeguarded.

As will be discussed in the first panel, the principle of conferral (attribution) is a means of preserving that balance. [5] Each level of governance – European and national – must operate within its own sphere of competences, without one encroaching upon the policy choices incumbent upon the other. That principle also serves to draw the dividing line between the jurisdiction of the Court of Justice and that of constitutional courts.

3| Lenaerts, K. and Gutiérrez-Fons, J.A., "The European Union: A Constitutional Perspective", in Schütze, R. and Tridimas, T., (eds.), *Oxford Principles of European Union Law*, Vol. 1, Oxford University Press, Oxford, 2018.

4| See Madison, J., "The Federalist No 51", in Hamilton, A., Madison. J and Jay, J., *The Federalist Papers*, Oxford University Press, Oxford, 2008, p. 256 (observing that those two principles give rise to a 'double security' to the rights of individuals, because '[t]he different governments will control each other [i.e. federalism], at the same time that each will be controlled by itself [i.e., separation of powers]').

5| Article 5 TUE. See also Lenaerts, K., "Constitutionalism and the Many Faces of Federalism", *The American Journal of Comparative Law*, Vol. 38, 1990, pp. 205-263.

Yet the EU and the 27 national systems of checks and balances, which constitute the EU's common legal order, do not function in isolation. The different crises faced by the EU and the 27 Member States have demonstrated that they must work together in order to overcome them. In so doing, the EU and the Member States must remain faithful to the values on which their democracies are founded.[6] As will be discussed in the second panel, it is in times of crisis that our common commitment to those values is truly tested.

Similarly, the European integration process is becoming more complex with EU law and national law interacting in novel ways. This point is illustrated by the emergence of composite administrative procedures,[7] in which acts of national law may operate as preparatory acts under EU law. Within the framework of the Banking Union, for example, a national central bank may propose that the European Central Bank (ECB) should object to the acquisition of a bank by another institution whose reputation is questionable. The issue then arises as to which law applies to determine the validity of the national central bank's proposal and which courts have jurisdiction to rule on that point. In the judgment in *Berlusconi and Fininvest*,[8] the Court of Justice held that it is for the EU Courts to examine any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of the ECB's decision, provided that the ECB exercises alone the final decision-making power.

More recently, in the judgment in *ECB and Commission* v *Corneli*,[9] the Court of Justice was confronted with a similar issue. In that case, the ECB decided to place an Italian bank under temporary administration on the ground that the situation of that bank was deteriorating significantly, thereby dissolving its administration and supervisory bodies and replacing them by three temporary directors. In adopting that decision, the ECB exercised its prudential supervision powers. This meant that it had to apply

6| See, in this regard, Sarmiento, D., "General Report: Topic I – Emergency Law", in Pacuła, K., (ed.), *EU Emergency Law – XXXI FIDE Congress |Katowice 2025 Congress*, Vol. 1, University of Silesia Press, Silesia, 2025.

7| Brito Bastos, F., *Judging Composite Decision-Making*, Hart Publishing, Oxford, 2024.

8| Judgment of 19 December 2018, *Berlusconi and Fininvest*, C-219/17, ECLI:EU:C:2018:1023.

9| Judgment of 15 July 2025, *ECB and Commission* v *Corneli,* C-777/22 P and C-789/22 P, ECLI:EU:C:2025:580.

the relevant EU regulations and directives as well as the Italian law implementing those directives. The problem was that, unlike the relevant EU directive, [10] Italian law did not expressly provide for such a ground for action. The key question in the judgment in *Corneli* was whether the ECB's interpretation of Italian law was *contra legem*.

It should be recalled that, where national courts are bound by the duty of consistent interpretation, the question whether the limit of *contra legem* is crossed is ultimately to be determined by the national courts themselves, in compliance with the relevant case-law of the Court of Justice. [11] However, in the judgment in *Corneli*, it was held that since the relevant duty was imposed on an EU institution, namely the ECB, the EU Courts enjoy jurisdiction to make that determination themselves.

At first instance, the General Court came to the conclusion that the limit of *contra legem* was infringed, [12] as Italian law contained no provision allowing a bank to be placed under temporary administration in the event of a significant deterioration of its situation. As a result, the General Court held that the ECB's decision ran counter to Italian law and thus annulled it.

On appeal, the Court of Justice took a different view. [13] It observed that under Italian law, a bank may be placed under temporary administration 'if serious financial losses are expected'. The Court of Justice considered the expressions 'significant deterioration' and 'serious financial losses' to be closely related, meaning, in essence, that when one occurs, so does the other. Accordingly, in finding that the ECB decision was indeed consistent with Italian law, the Court of Justice set aside the judgment of the General Court.

10| See Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

11| See, in this regard, judgment of 24 June 2019, *Popławski*, C-573/17, ECLI:EU:C:2019:530, paragraph 76 and the case-law cited.

12| Judgment of 12 October 2022, *Corneli* v *ECB*, T-502/19, ECLI:EU:T:2022:627, paragraphs 107 and 108.

13| Judgment of 15 July 2025, *ECB and Commission* v *Corneli*, C-777/22 P and C-789/22 P, ECLI:EU:C:2025:580, paragraph 158.

These judgments serve to illustrate the fact that EU law and national law are becoming increasingly interconnected and their relationship is becoming more complex. Since the EU and the Member States operate within a shared public space, they must cooperate on the basis of mutual trust. On the one hand, that mutual trust means that the 27 constitutional – or equivalent – courts must trust that the Court of Justice upholds the founding values and principles on which the EU is founded when interpreting provisions of EU law. On the other hand, the Court of Justice must trust that national constitutional courts will faithfully apply EU law and will not interfere in the dialogue between the Court of Justice and ordinary courts. [14]

In particular, constitutional courts should trust the Court of Justice's firm commitment to the principle of conferral (attribution). The Court of Justice will not hesitate to annul or declare invalid an EU legislative act that is *ultra vires* because the EU lacks the competence to adopt it, [15] or because, although it enjoys such competence, the EU has failed to exercise it in a manner that complies with the principles of subsidiarity and proportionality, [16]

14| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99.

15| See, for example, judgment of 5 October 2000, *Germany* v *Parliament and Council*, C-376/98, ECLI:EU:C:2000:544. On the question of whether the EU has the competence to conclude an international agreement, see, for example, Opinion 2/94 of 28 March 1996, *Accession of the Community to the ECHR*, ECLI:EU:C:1996:140. The same question of competence arises where an EU administrative measure covers subject matter that is excluded by the EU legislature. See, for example, judgment of 30 May 2006, *Parliament* v *Council and Commission*, C-317/04 and C-318/04, ECLI:EU:C:2006:346. The principle of conferral (attribution) is also upheld where the Court of Justice finds that the EU lacks exclusive competences to act in the realm of external relations. See, in this regard, Opinion 2/15 of 16 May 2017, *Free Trade Agreement with Singapore* ECLI:EU:C:2017:376; and judgment of 20 November 2018, *Commission* v *Council (Antarctic MPAs)*, C-626/15 and C-659/16, ECLI:EU:C:2018:925.

16| In the context of fundamental rights protection, the principle of proportionality has led the Court of Justice to declare certain EU measures invalid. See, for example, judgments of 9 November 2010, *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, ECLI:EU:C:2010:662; of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, ECLI:EU:C:2014:238; and of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559. See also Opinion 1/15 of 26 July 2017, *EU-Canada PNR Agreement,* ECLI:EU:C:2017:592.

or else because it was not adopted under the correct legal basis.[17] Moreover, the Court of Justice not only checks whether the EU legislature has overstepped the limits of its discretion but also applies a strict version of process-oriented review, according to which the EU legislature must do its 'homework' before acting.[18] For example, in the judgment on the *Mobility Package*,[19] decided last October, the Court of Justice annulled a provision laying down the obligation that required lorries to return to the operational centre of the transport undertaking every eight weeks. In that regard, the Court observed that the EU legislature did not produce, nor did it set out clearly and unequivocally, the basic facts on which the proportionality of the measure was based.[20]

Mutual trust must not be confused with blind trust. That is why, for example, the Court of Justice has ruled that only independent constitutional courts may issue judgments that are binding upon ordinary national courts.[21]

17| See, for example, judgment of 21 March 2024, *Landeshauptstadt Wiesbaden*, C-61/22, ECLI:EU:C:2024:251. In that case, the Court of Justice ruled that Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement was invalid, on the ground that it was adopted under the wrong legal basis. The Court of Justice reasoned that such a regulation should have been adopted under Article 77(3) TFEU (requiring unanimity in the Council), and not under Article 21(2) TFEU (requiring a qualified majority in the Council). In that regard, the Court found that the purpose of that regulation – i.e. to strengthen the security standards applicable to identity cards issued by Member States to their nationals and to residence documents issued by Member States to Union citizens and their family members when exercising their right to free movement – fell within the specific scope of Article 77(3) TFEU. In the aftermath of the judgment in Landeshauptstadt Wiesbaden, the EU legislature adopted a new regulation reproducing, in essence, the content of Regulation 2019/1157 but, this time, with Article 77(3) TFEU as legal basis. See Council Regulation (EU) 2025/1208 of 12 June 2025 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ L, 20.6.2025).

18| See, in this regard, Lenaerts, K., "The European Court of Justice and Process-Oriented Review", *Yearbook of European Law*, Vol. 31, No 1, 2012, pp. 3-16. See, generally, Groussot, X. and Harvey, D., (eds.), *Process-Oriented Federalism in EU Law*, EU Law Live Press, Granada, 2024.

19| Judgment of 4 October 2024, *Lithuania and Others* v *Parliament and Council (Mobility package)*, C-541/20 to C-555/20, ECLI:EU:C:2024:818.

20| Ibid., paragraph 737.

21| Judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, paragraph 232 (holding that 'EU law does not preclude the establishment of a constitutional court the decisions of which are binding on the ordinary courts, provided that that court complies with the requirements of independence [under Article 19 TEU]').

That is also why constitutional courts, which do not agree with a given judgment of the Court of Justice or wish to raise awareness about a fundamental aspect of their national identity, should engage in a dialogue with the Court of Justice, by means of the preliminary ruling procedure. That is the path followed by the Italian Constitutional Court in the context of the *Taricco* saga. [22] That is also the path followed by the Latvian Constitutional Court in the judgment in *Cilevičs*, which stressed the importance of the Latvian language as an integral part of that Member State's constitutional identity. [23]

As communication is key, I invite all constitutional – or equivalent – courts to enter into or, as the case may be, to continue that dialogue.

It is worth noting that so far, 23 out of the 27 constitutional – or equivalent – courts of the Member States have made a preliminary reference to the Court of Justice. [24]

22| Judgments of 8 September 2015, *Taricco and Others,* C-105/14, ECLI:EU:C:2015:555, and of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936. See also Order of the Italian Constitutional Court, No. 24/2017. See, in this regard, Bonelli, M., "The *Taricco* saga and *the consolidation of judicial dialogue in the European Union",* Maastricht Journal of European and Comparative Law, Vol. 25, No 3, 2018, pp. 357-373.

23| Judgment of 7 September 2022, Cilevičs and Others, C-391/20, ECLI:EU:C:2022:638. See also judgment of the Latvian Constitutional Court of 9 February 2023, No. 2020-33-01, 2020-33-01_Judgment.pdf.

24| BE, judgment of 29 July 2024, *Belgian Association of Tax Lawyers and Others*, C-623/22, ECLI:EU:C:2024:639; BG (to date, no reference made); CZ (to date, no reference made); DK, judgment of 19 April 2016, *DI*, C-441/14, ECLI:EU:C:2016:278; DE, judgment of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000; EE, judgment of 15 July 2021, *Tartu Vangla*, C-795/19, ECLI:EU:C:2021:606; IE, judgment of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756; EL, judgment of 16 December 2008, *Michaniki*, C-213/07, ECLI:EU:C:2008:731; ES, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107; FR, judgment of 30 May 2013, *F.*, C-168/13 PPU, ECLI:EU:C:2013:358; HR, judgment of 16 January 2025, *Ministarstvo financija (Erasmus+ grant)*, C-277/23, ECLI:EU:C:2025:18; IT, judgment of 6 June 2023, *O. G. (European arrest warrant issued against a third-country national)*, C-700/21, ECLI:EU:C:2023:444; CY (established in 2023); LV, judgment of 4 October 2024, *1Dream and Others*, C-767/22, C-49/23 and C-161/23, ECLI:EU:C:2024:823; LT, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, ECLI:EU:C:2019:962; LU, judgment of 8 March 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, ECLI:EU:C:2017:179; HU (to date, no reference made); MT, judgment of 20 April 2021, *Repubblika*, C-896/19, ECLI:EU:C:2021:311; NL, judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid (Ex officio review of detention)*, C-704/20 and C-39/21, ECLI:EU:C:2022:858; AT, judgment of 8 May 2003, *Wählergruppe Gemeinsam*, C-171/01, ECLI:EU:C:2003:260; PL, judgment of 7 March 2017, *RPO*, C-390/15, ECLI:EU:C:2017:174; PT, order of the President of the Court of 26 October 2021, *VectorImpacto – Automóveis Unipessoal*, C-136/21, not published, ECLI:EU:C:2021:925; RO, judgment of 5 June 2018, *Coman and Others*, C-673/16, ECLI:EU:C:2018:385; SL, judgment of 27 February 2025, *AEON NEPREMIČNINE and Others*, C-674/23, ECLI:EU:C:2025:113; SK, judgment of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462; FI, judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, ECLI:EU:C:2018:551; SE, judgment of 26 October 2021, *PL Holdings*, C-109/20, ECLI:EU:C:2021:875.

Moreover, as will be discussed in the third panel, it often happens that the case-law of a constitutional court is examined in the light of EU law when ordinary courts engage in a dialogue with the Court of Justice. That is the case not only of lower national courts but also of national supreme courts where they are separate from constitutional courts.

I understand that some constitutional courts may feel side-lined, particularly when the crux of a case pending before the Court of Justice concerns their own case-law, which is being subjected to external scrutiny. This sense of exclusion is heightened when the order for reference misrepresents or inaccurately reflects that case-law.

That is why I must stress the fact that when confronted with complex and unexplored questions of EU law, constitutional courts should themselves engage in a dialogue with the Court of Justice. Otherwise, they run the risk of other courts doing it instead of them.

As a second-best alternative, it is worth noting that EU law does not prevent a Member State from establishing internal mechanisms that would enable its own constitutional court to make comments or remarks about the way in which its own case-law is described in an order for reference. Those internal mechanisms may then compel the government of such a Member State to include those comments in its observations before the Court of Justice. For example, in the judgment in *Melki*,[25] the French Government drew the attention of the Court to the fact that the French *Conseil d'État and Conseil constitutionnel* had followed an interpretation of the relevant legislation on the *contrôle prioritaire de constitutionnalité*, which was different from that put forward by the referring court, the French *Cour de cassation*. The Court of Justice took into account those observations in its judgment.[26]

Such internal mechanisms have the advantage of preserving the integrity of the dialogue between the Court of Justice and the national court making the preliminary reference, while guaranteeing an accurate description of the case-law of the constitutional court concerned.

25| Judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, ECLI:EU:C:2010:363.

26| Ibid., paragraphs 48 to 50.

Moreover, the fact that a lower or supreme court calls into question the case-law of its own constitutional court certainly does not mean that the Court of Justice will follow suit. Take, for example, the seminal judgment of the Court in *KUBERA*, [27] which will be examined in the fourth and last panel of this conference.

The case involved a reference by the Slovenian Supreme Court, whose case-law on the relevant point had been reversed by the Slovenian Constitutional Court. [28] In that case, the Court of Justice was asked to examine the compatibility with the preliminary ruling procedure of a 'filtering' system for bringing matters before the Slovenian Supreme Court (that is to say, a leave-to-appeal system). The Court of Justice ruled that, while EU law does not preclude the Member States from establishing 'filtering' systems for bringing matters before the national supreme courts, those systems must meet the requirements deriving from that law and, in particular, the preliminary ruling procedure. [29] In *KUBERA*, that was not the case, since the Slovenian Supreme Court did not examine whether it was, as a court of last instance, under the obligation to make a reference to the Court of Justice. That being said, the Court observed that it was possible for the Slovenian Supreme Court to change its case-law, by having recourse to the duty of consistent interpretation. It came to that finding after noting that the Slovenian Constitutional Court had held that the provision of national law at issue in the main proceedings could be interpreted in a way that enabled the Slovenian Supreme Court to fulfil its obligations under the preliminary ruling mechanism. [30] It is worth noting that, after the Court of Justice delivered its judgment, the Slovenian Supreme Court changed its case-law accordingly. [31]

27| Judgment of 15 October 2024, *KUBERA*, C-144/23, ECLI:EU:C:2024:881.

28| Ibid., paragraph 24 et seq.

29| Ibid., paragraph 32.

30| Ibid., paragraph 54.

31| Judgment of the Slovenian Supreme Court of 29 January 2025, Dossier QP/13082-P1.

President Panova,

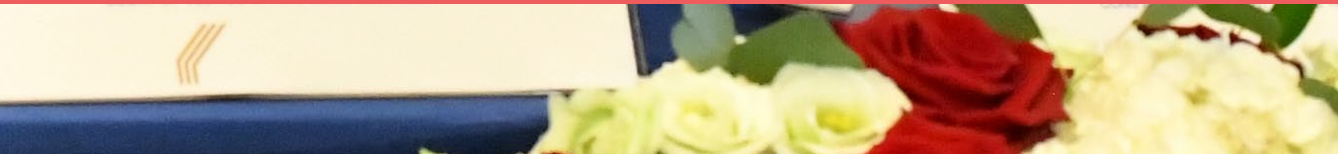
Dear Colleagues,

Ladies and Gentlemen,

The European Union, understood as a common legal order, is founded on the preservation and promotion of common values and structures. To that end, the Court of Justice of the European Union and the constitutional – or equivalent – courts of the Member States must work closely together and must trust each other. Only through such cooperation can the EU and the 27 national constitutional orders create the necessary synergies to strengthen democracies, safeguard fundamental rights, and uphold the rule of law across Europe.

Thank you very much.

Ms Pavlina Panova
President of the Constitutional Court
of the Republic of Bulgaria



Opening speech

Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria

Esteemed President of the Court of Justice of the European Union,

Esteemed Presidents of constitutional and supreme courts,

Esteemed Judges,

Dear guests,

I am exceptionally honoured and proud, as host of the third edition of the conference 'EUnited in Diversity', to welcome all of you, the representatives of the institutions most directly entrusted with the role of guardians of constitutionalism and the rule of law in the European Union, here in Sofia.

We, as constitutional judges, judges of supreme courts, and judges of the Court of Justice of the European Union, are not merely representatives of the highest judicial institutions – we are called upon to be the voice of the collective self-awareness of the rule of law in Europe, because it is us that the peoples of Europe have entrusted with the responsibility of being ultimate guardians of the law, human rights, and the very foundations of constitutional democracy.

The fact that the conference 'EUnited in Diversity' is becoming a biennial tradition is further proof that the truly great strength of the European Union lies in dialogue, in mutual respect, in the shared interpretation of the fundamental values that bind us together, or in other words, in the constant search for ways to reach out to one another.

This conference is much more than a ceremony; it is a forum for a fundamental discussion, in which we all take part not so much as representatives of individual courts, but as like-minded people united in a common cause – strengthening the democratic rule of law and protecting human dignity and human rights in the European Union.

In the complex historical moment in which the nations of the world and the global community find themselves, expectations for Europe to reaffirm its traditional role as leader of the democratic world are greater than ever. Inevitably, the heaviest responsibility falls on us, the judges of the constitutional and supreme courts. We have been given the difficult task of constantly seeking, through our judicial activity, a balance between rights and limits, between freedom and security, between diversity and unity, while at the same time proving daily and unwaveringly to the citizens, whose interests we are called upon to defend, that constitutional justice is vigilant and immune to external interference.

As President Lenaerts rightly noted in his introductory speech to the first conference 'EUnited in diversity: between common constitutional traditions and national identities', organised together with the Court of Justice of the European Union and the Constitutional Court of the Republic of Latvia, which took place in Riga in 2021, 'the recent years have shown that the full respect of the founding values of the European Union, such as pluralism, non-discrimination and the rule of law, is not self-evident'.[1]

The years that have passed since those words were spoken only confirm the conclusion voiced therein.

The European Union is a common legal order, because the values enshrined in Article 2 of the Treaty on European Union, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, are an aspect of our European heritage, which also shapes our identity.[2] As the Court of Justice of the European Union noted in Opinion 2/13, the legal structure of the European Union 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the [European Union] is founded, as stated in Article 2 [of the Treaty on European Union]. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the [European

1| Conference proceedings, ˝EUnited in Diversity: between common constitutional traditions and national identities", *EUnited in Diversity*, Vol. 1, Luxembourg, Court of Justice of the European Union - Publications and Electronic Media Unit, 2021.

2| Preamble to the Treaty on European Union.

Union] that implements them will be respected.'[3] The safeguarding of those enduring European values is the basis for the existence of the constitutional courts. In other words, one of the main roles of constitutional justice in the common European legal order is to safeguard the principles of democracy, the rule of law and fundamental rights, which we once, especially after the fall of totalitarian regimes in Europe, perceived as self-evident. We are currently witnessing a crisis in attitudes towards the fundamental values that unite us, which could prove problematic for our community.

National constitutional courts are not alone in that task – we work in a spirit of ongoing cooperation, often drawing inspiration from the arguments of other constitutional courts, as well as with the Court of Justice of the European Union, above all via the possibility of making references for a preliminary ruling. With the help of comparative law, judges broaden their understanding of their own legal system. Comparative law contributes to the enrichment of the possibilities available for interpreting the constitutional texts with which we, as constitutional judges, work. In the various legal systems, similar legal problems arise before the constitutional courts and equivalent institutions (the crisis provoked by COVID-19 being one such example).

The fact is that we – all Europeans – are very different. That is also the beauty of our community. The authors of the Treaties were aware of that when they decided that the European Union should 'respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced'.[4]

One word appears to describe the essence of the European project very aptly, namely pluralism, understood as the possibility for different actors to coexist in a community, each one free to develop as it best sees fit.

However, the goal of 'the peoples of Europe, in creating an ever closer union among them, … to share a peaceful future based on common values'[5] requires that pluralism

3| Opinion 2/13 of 18 December 2014, *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, paragraph 168.

4| See Article 3(3) of the Treaty on European Union.

5| See the Preamble to the Charter of Fundamental Rights of the European Union (2012) (OJ C 326/02).

be ordered.[6] Recently, the Court of Justice of the European Union took the clear position that 'Article 2 [of the Treaty on European Union] is not merely a statement of policy guidelines or intentions, but contains values which … are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States'.[7]

Neither unity in the community nor diversity is an absolute value. The European Union is committed to achieving a balance and ensuring respect for both. Respect for fundamental values may sometimes require a compromise with certain aspects of the national communities. The question arises as to the extent, and where, the autonomous legal order of the European Union leaves room for diversity. The legal structure of the European Union is based on pluralist relations, in the context of which no one can mount a claim to supreme power in all areas of public relationships. In that regard, our responsibility as judges is of particular importance for the safeguarding of that balance.

Primary EU law sets out three fundamental principles that govern the relations between the Member States as well as between the European Union and Member States. Established in the case-law of the Court of Justice of the European Union,[8] those principles are: the autonomy of the EU legal order, the principle of the supremacy (or primacy) of EU law over national law, and the principle of direct effect of EU law. Those three principles are balanced by the fundamental principles which, on the other hand, guarantee the autonomy of the internal legal order of the Member States: the principle of conferral laid down in Article 4(1) and Article 5(2) of the Treaty on European Union and the principle of respect for national identity laid down in Article 4(2) of the Treaty on European Union.

In order to protect the common values that are especially important for ensuring unity within the community, it is essential that competences are clearly allocated

6| Delmas-Marty, M., *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, Hart Publishing, Portland, 2009.

7| Judgments of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, ECLI:EU:C:2022:97, paragraphs 127 and 232; and of 16 February 2022, *Poland* v *Parliament and Council,* C-157/21, ECLI:EU:C:2022:98, paragraphs 145 and 264.

8| Judgments of 5 February 1963, *van Gend & Loos*, 26/62, ECLI:EU:C:1963:1; and of 15 July 1964, *Costa*, 6/64, ECLI:EU:C:1964:66.

and respected by both the European Union and by the individual Member States. In that regard, the interpretation made by both the Court of Justice of the European Union and the national constitutional courts of Article 4(1) and Article 5(1) and (2) of the Treaty on European Union, according to which the European Union may act only within the limits of the competences conferred upon it by the Member States in the Treaties, plays a crucial role. Although, as the Court of Justice of the European Union has noted, it has exclusive jurisdiction to give the definitive interpretation of EU law, [9] including as regards the assessment of whether the EU institutions have acted within the limits of the competences conferred on them, in some cases, the supreme and constitutional courts of the Member States assess, by means of an ultra vires review, whether the EU institutions have exceeded the limits of the powers conferred on them. That inevitably also raises the question of the responsibilities of the constitutional courts in applying EU law. It is important not only to engage in dialogue, but also to listen to each other, so as to strike a balance between the safeguarding of the common values and the safeguarding of national particularities.

That inevitably raises the classic but ever-relevant question of the freedom that judges have in their interpretations. The main judicial activity in the modern world consists in the interpretation of legal texts, in accordance with which the legal issue raised before us is resolved. The 'classic' interpretation methods, including the literal, historical, contextual (systematic), and teleological interpretation, which are present in both national legal systems and international law, as set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, [10] create the framework allowing the courts to clarify the meaning and scope of a legal provision that they are empowered to apply. The often obscure and ambiguous nature of the language used in the wording of the texts that we must interpret, sometimes also ideologically charged, as well as the lack of consensus on the rules of interpretation, are a prerequisite for the discretion available to each judge. However, that discretion is not unlimited. It is of great importance for any democratic State governed by the rule of law that the methods of interpretation be used without the courts engaging in unnecessary judicial activism. By ensuring that judicial decisions are clearly and logically reasoned, those methods of interpretation, used by us, help to limit judges'

9| Judgment of 2 September 2021, *Republic of Moldova,* C-741/19, ECLI:EU:C:2021:655, paragraph 45.

10| See Articles 31 and 32.

discretionary power and the risk of arbitrariness. Thereby, the legitimacy of the courts in the common European legal order is strengthened for the benefit of the citizens.

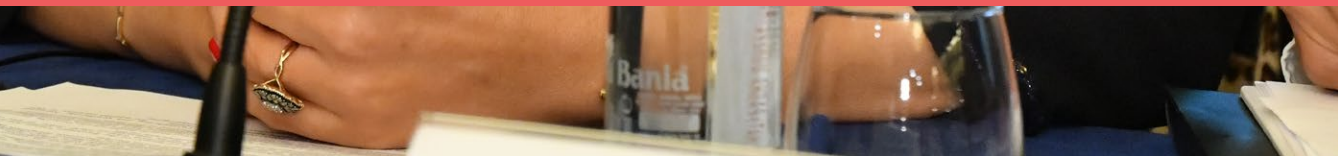
This year, the conference 'EUnited in Diversity' focuses on the role of constitutional justice within the common European legal order. I sincerely believe that the role of constitutional justice would be strengthened if and when we work together. That would also limit the possibility of inconsistent interpretations of our otherwise common values. The experience from the first two conferences, the first held in Riga and the second, organised by the Supreme Court of the Netherlands, the Constitutional Court of Belgium, the Constitutional Court of Luxembourg and, of course, the Court of Justice of the European Union, and held in The Hague in 2023, proves the usefulness of our meetings. I believe that this year's meeting in Sofia will also contribute to that.

I am confident that we are all looking forward to participating in the upcoming discussions, guided by the clear awareness of our common mission – to contribute to the realisation of the dream of generations of Europeans, that is, to build and consolidate a European Union governed by the principles of justice, the rule of law, and accountability to citizens.

With avid excitement and enormous gratitude for the opportunity given to the Constitutional Court of Bulgaria to host this high-level forum, I hereby declare the conference 'EUnited in Diversity III' open.

Thank you!

Ms Diana Kovatcheva
Judge at the European Court of Human Rights



Introductory speech

Diana Kovatcheva, Judge at the European Court of Human Rights

Dear President Lenaerts,

Dear President Panova,

Esteemed judges and colleagues,

It is both a privilege and a profound responsibility to address you today on behalf of the President of the European Court of Human Rights, Judge Mattias Guyomar, and, on my own behalf, as the judge elected in respect of Bulgaria.

We meet here not only *as judges and lawyers,* but as custodians of a shared European project – a project that has no single author, no single text, but one that is nonetheless deeply constitutional in its spirit.

European constitutionalism is unlike any other. It does not rest upon a single codified constitution, nor upon the authority of a single sovereign leader. Rather, it is a dynamic and ongoing process – a process that weaves together democracy, the rule of law, and the protection of fundamental rights across our continent.

Its task is delicate yet essential: to reconcile national constitutional traditions with supranational norms, to integrate without erasing diversity, and to foster a common constitutional space that respects both unity and pluralism.

This sets European constitutionalism apart from its classical counterpart. Where classical constitutionalism assumed one polity and one constitution, European constitutionalism is inherently pluralist. It presupposes multiple legal orders, multiple sources of authority, and therefore requires permanent dialogue and negotiation. The challenge – and the beauty – lies in ensuring that while each system retains its autonomy, altogether they preserve the coherence of fundamental rights protection across Europe.

In this architecture, the Court of Justice of the European Union has played a central role. Through its jurisprudence, it transformed what were once technical treaties of economic cooperation into the foundation of an autonomous legal order. It has developed *its own constitutional jurisprudence on fundamental rights*.

On the other hand, the European Court of Human Rights *and its founding treaty, the European Convention on Human Rights, which* will soon celebrate its 75th anniversary – has exercised its own transformative influence. Its judgments have shaped domestic legal systems and extended a common constitutional space across *47, then 46,* States, many of them outside the European Union.

Together, these two courts illustrate the pluralist nature of European constitutionalism. Their relationship is not one of hierarchy, but of complementarity. They cite one another, they reinforce one another, and above all, they share the same mission: the protection of fundamental rights and the defense of the rule of law. They represent a deeper judicial conversation, an important judicial dialogue, one that sustains the coherence of European constitutionalism.

But this dialogue does not take place only between Luxembourg and Strasbourg. National constitutional courts – and, in some States, supreme courts – are natural partners in this process. They are, after all, the first guardians of fundamental rights.

The Strasbourg Court speaks primarily through its judgments, occasionally through separate opinions or *obiter dicta*. Yet it also listens – listens carefully – to the reasoning of national constitutional jurisdictions. There are numerous examples where the Strasbourg Court has quoted and relied on the reasoning of national courts *and vice versa.*

The Superior Courts Network, established in 2015, is a concrete expression of our judicial community*. It now boasts a membership of 111 superior courts from all 46 States and 5 observer courts.* Through it, Strasbourg is not a distant apex court, but part of a community of judges, each of whom acts in a very real sense as a Strasbourg judge at the domestic level.

This is essential in a system built on subsidiarity. The Convention is therefore not a remote international treaty but, in most Member States, a living part of their domestic legal order.

We must recognise, however, that this constitutional conversation is not without tensions. At times, national courts perceive a conflict between constitutional norms and international obligations. At other times, political actors challenge openly the very values of democracy, rule of law, and human rights on which our European constitutional heritage is built.

Here lies our responsibility. Judicial dialogue is not a luxury; it is a necessity. It is the best safeguard against democratic backsliding and constitutional crises. By speaking to one another, citing one another, and respecting one another, we ensure that no legal order – whether national, EU, or international – escapes constitutional scrutiny.

Our challenge is not to erase difference, but to find harmony within diversity. The plurality of voices – Luxembourg, Strasbourg, national capitals – does not weaken the constitutional order; it strengthens it, provided that dialogue remains open, respectful, and principled.

Ladies and gentlemen,

European constitutionalism is not a static edifice but an evolving project. Its success depends on constant dialogue – between courts, between institutions, and between Europe and its citizens.

The Court of Justice of the European Union and the European Court of Human Rights *are partners*. Alongside national constitutional courts, they form a triangular structure of guardianship. Together, they remind us of Europe's greatest constitutional achievement: that no person stands alone before power, and that rights are not abstract ideals but enforceable guarantees.

At a time when democracy and the rule of law are challenged both within and beyond our continent, our duty is clear: to join forces, to defend the authority of our courts, and to ensure that European constitutionalism remains a living shield for human dignity.

Let us therefore continue this dialogue – with vigilance, with humility, with determination and with courage – so that the values we hold in common may endure for future generations.

Thank you for your attention!

1st panel

The allocation of competences between the Member States and the EU

Mr Constantinos Lycourgos
President of the Third Chamber of the Court of Justice of the European Union

The allocation of competences between the Member States and the European Union – relevant case-law of the Court of Justice

Constantinos Lycourgos, President of the Third Chamber of the Court of Justice of the European Union

European integration is a process – indeed, a process of creating an ever-closer union, but nevertheless a gradual process under the ultimate control of the Member States as masters of the Treaties. The European Union can only exercise competences allocated to it by the Treaties. It is therefore an essential part of the Court of Justice's role to ensure respect for this allocation, protecting both the Member States and the Union from encroachments upon their respective competences.

This protection is provided both directly and indirectly.

By 'direct protection', which I will address first, I refer to cases in which the Court is called upon to determine whether a specific matter falls within the competence of the Member States or of the Union. However, what happens more frequently is that issues of competence arise indirectly in the application or interpretation of provisions of EU law. In such instances, the fact that a given matter falls within the competence of the Member States is not disputed. What is crucial, however, are the legal implications of that finding, which the Court must carefully assess so as not to circumvent or undermine the established allocation of competences. I will explore these indirect implications of the allocation of competences in the second part of my presentation.

1. The Court exercises direct control over respect for the allocation of competences

The Court must, on the one hand, guarantee that the institutions and bodies of the Union do not act beyond the competences conferred upon the European Union by the Treaties, which is the essence of the first sentence of Article 5(2) TEU. On the other hand, it must ensure the effectiveness of Union competences, as described in the Treaties.

1.1. The Court ensures that the institutions and bodies of the Union do not act beyond the competences of the Union

Both Article 4(1) and Article 5(2) TEU clearly stress that ʼ[c]ompetences not conferred upon the Union in the Treaties remain with the Member Statesʼ.

An important implication of the principle of conferral is that a valid legal basis is a prerequisite for the adoption of any act of EU secondary law. An action for annulment constitutes the most direct procedural means to contest such an act for lack of legal basis. While it is rare for legislative acts to be challenged on this ground, the pending case in *Denmark* v *Parliament and Council*, concerning the Directive on adequate minimum wages,[1] is a textbook example.[2]

However, the issue of legal basis may also arise in the context of preliminary references. A well-known illustration is the judgment in *Weiss* (2018), where the *Bundesverfassungsgericht* questioned whether the ECB's public sector asset purchase programme could be based on Treaty provisions on monetary policy, thus

1| Judgment of 11 November 2025, *Denmark* v *Parliament and Council (Adequate minimum wages)*, C-19/23, ECLI:EU:C:2025:865.

2| For an example of an act annulled following such a direct challenge, see judgment of 5 October 2000, *Germany* v *Parliament and Council*, C-376/98, ECLI:EU:C:2000:544, whereby the Court annulled a directive relating to the advertising and sponsorship of tobacco products, holding that the legal basis chosen by the EU legislature did not allow it to adopt that directive.

implicitly suggesting the absence of a valid legal basis. The Court explicitly confirmed the admissibility of such a request for a preliminary ruling, [3] despite an argument put forward by the Italian Government that the national proceedings which gave rise to said request in essence opened the way to a direct action against the validity of an EU act before the national courts. It is therefore after a thorough examination of the substance, including the delimitation of the EU's monetary policy, that the Court concluded that it had found no factor affecting the validity of the ECB decision concerned.

Even where there is no challenge against the validity of an EU law act, the Court may be called upon to determine whether a matter falls within the EU's competence. The judgment in *TSN and AKT*[4] (2019) provides an interesting example. Article 153(4) TFEU, explicitly provides that minimum requirements introduced by directives in the field of social policy shall not prevent Member States from maintaining or introducing more stringent protective measures in that field. In its judgment, the Court held that this was the expression of a competence *retained* by the Member States. Thus, when providing for days of paid annual leave which exceed the minimum period of four weeks laid down under the Working Time Directive, Member States act freely outside the framework of EU law, where neither that directive nor the Charter apply.

3| Judgment of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000, in particular paragraphs 20 and 21.

4| Judgment of 19 November 2019, *TSN and AKT,* C-609/17 and C-610/17, ECLI:EU:C:2019:981, paragraphs 45 to 55.

1.2. The Court ensures the effectiveness of EU competences

As shown by these cases, the principle of conferral protects Member States against unlawful action by the European Union. However, when the Treaties confer competences upon the European Union, the Court must ensure respect for those competences, depending on their nature.

In areas of *shared competence*, Member States may legislate only to the extent that the EU has not exercised its own competence (Article 2(2) TFEU). This principle is regularly reaffirmed regarding, *inter alia*, the Common Agricultural Policy. [5]

In areas of *exclusive competence* of the Union (Article 2(1) TFEU), Member States may only adopt binding acts if empowered by the EU or in order to implement EU acts. This principle was reaffirmed in 2024 in two Grand Chamber judgments, in relation to the common commercial policy, where the Court clarified that Member States may not unilaterally adopt a measure banning the import of non-EU agricultural goods, even when the labelling of these products systematically fails to comply with the EU legislation; nor can they authorise or prohibit the participation in public procurement procedures of economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to those procedures. [6]

5| Judgment of 12 September 2024, *SPAR Magyarország*, C-557/23, ECLI:EU:C:2024:737.

6| Judgments of 4 October 2024, *Confédération paysanne (Melons and tomatoes from Western Sahara)*, C-399/22, ECLI:EU:C:2024:839; and of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, ECLI:EU:C:2024:910.

2. The Court takes the allocation of competences into account when interpreting and applying EU law

As I mentioned earlier, it would be wrong to consider that the only way in which the Court can ensure the respect of EU law is by correctly determining whether the European Union or the Member States have competence over a given issue. On the contrary, in a number of cases, the Court must integrate the need to respect the allocation of competences between the Member States and the European Union into its analysis of EU law provisions in order to ensure that the interpretation and application of these provisions remain consistent with it. In doing so, the Court is conscious of the need to preserve both EU law and the margin of discretion available to Member States in the exercise of their competences.

2.1. The scope of EU law does not coincide with the areas of EU competence

The relationship between the allocation of competences and the preservation of the very existence of the EU legal order is based on a simple idea: even when acting within their own competences, Member States must comply with their obligations under EU law.[7] This is a straightforward rule, which goes as far back as the origins of the European Communities and without which even the internal market could not function, given how closely EU and national competences are intertwined.

This implies that the scope of application of EU law, as set by the Treaties, does not necessarily coincide with the areas of EU competence.

7| Judgments of 14 February 1995, *Schumacker*, C-279/93, ECLI:EU:C:1995:31, paragraph 21; and of 23 February 2016, *Commission* v *Hungary,* C-179/14, ECLI:EU:C:2016:108, paragraph 171.

Whilst this has long been established and no one would imagine, for example, that a Member State could invoke its competences in the field of direct taxation in order to adopt rules infringing the freedom of establishment or the freedom to provide services, recent cases provide several examples where the Court has reasserted the obligation to respect EU law in areas pertaining to certain core national competences.

In the judgment in *Cilevičs* (2022),[8] the Court found that despite education and vocational training being primarily matters of national competence, Member States exercising their competences in those fields are required to respect the freedom of establishment under EU law.

As shown by the judgment in *KUBERA* (2024),[9] each Member State is competent to organise its own Supreme Court(s), provided that this organisation complies with the preliminary reference procedure laid down in Article 267 TFEU.

In the judgment in *Commission* v *Malta (Citizenship by investment)* (2025),[10] the Court held that a national scheme that conferred nationality on the basis of a financial transaction infringed Article 20 TFEU and Article 4(3) TEU (the principle of sincere cooperation).

And in the judgment in *Commission* v *Czech Republic* and *Commission* v *Poland* (2024),[11] the Court found that the right enshrined in Article 22 TFEU for EU citizens residing in a Member State to vote and to stand as candidates in municipal and European Parliament elections encompasses the right for those citizens to become members of political parties in their Member State of residence.

The Court ensures that the Member States' margin of discretion is preserved in the exercise of their competences.

8| Judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:638.

9| Judgment of 15 October 2024, *KUBERA*, C-144/23, ECLI:EU:C:2024:881.

10| Judgment of 29 April 2025, *Commission* v *Malta (Citizenship by investment),* C-181/23, ECLI:EU:C:2025:283.

11| Judgments of 19 November 2024, *Commission* v *Czech Republic (Ability to stand for election and membership of a political party),* C-808/21, ECLI:EU:C:2024:962; and of 19 November 2024, *Commission* v *Poland (Ability to stand for election and membership of a political party)*, C-814/21, ECLI:EU:C:2024:963.

At the same time, the Court is aware that, if EU law provisions were interpreted and applied without regard for the allocation of competences, this could unduly reduce the margin of discretion of Member States.

Consequently, first, in areas which have not been harmonised, the Court is particularly careful when it comes to restricting the Member States' exercise of their powers and does so only to the extent necessary to preserve the effectiveness of EU rules. Thus, in its judgment in *Stolichna obshtina, rayon 'Pancharevo'* (2021), [12] the Court found that a Member State is obliged to recognise the parent-child relationship between that child and each of his or her same-sex parents in the context of that child's exercise of his or her right of free movement. At the same time, the Court explicitly held that such an obligation does not require the Member State of which the child is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the two persons mentioned on the birth certificate drawn up by the authorities of the Member State where those persons reside.

Second, in areas that have already been harmonised, the fact that a situation is covered by EU law does not mean that Member States automatically lose entirely their ability to regulate it. In particular, in the context of settled case-law, the Court recognises the power of Member States to lay down procedural rules governing the application of EU law, where such rules have not been adopted in detail by the EU legislature. Member States then act freely, in accordance with the principle of procedural autonomy, within the limits of the principles of equivalence and effectiveness and provided they respect fundamental rights. [13] The Court therefore carefully avoids supplementing legislative harmonisation with judicial harmonisation.

12| Judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008.

13| Judgment of 24 June 2025, *GR REAL,* C-351/23, ECLI:EU:C:2025:474, paragraph 56.

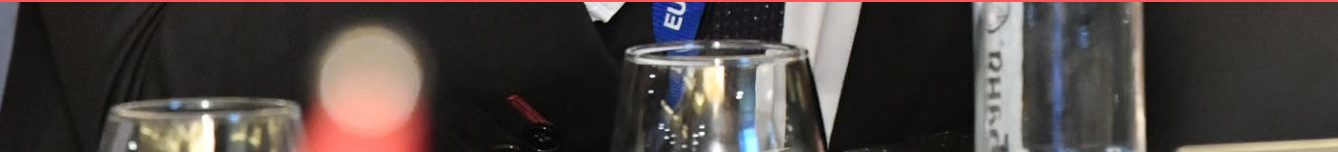
Moreover, the Court did not hesitate to interpret derogations provided for in EU secondary legislation to ensure that the essential competences of the Member States are preserved, as required by primary EU law. For example, in the judgment in *Ministrstvo za obrambo* (2021),[14] the Court excluded military personnel from the scope of the Working Time Directive in those cases where essential State functions, including ensuring the territorial integrity of the State, render the application of that directive impossible. This applies to numerous activities, including military operations, compulsory military service and training.

Being the court that can interpret the provisions determining the limits of the EU's competences, the Court of Justice must always be mindful, and I believe – as I have tried to show – , that it is, of the delicate balance that needs to be preserved between securing the effectiveness of EU law and respecting the competences of the Member States.[15] From that point of view, direct dialogue with national constitutional courts, either held bilaterally or in this forum, is essential in order for us, judges of the Court of Justice, to better understand national particularities and concerns, hoping that we are also able to explain our own point of view so that it may be better understood.

14| Judgment of 15 July 2021, *Ministrstvo za obrambo,* C-742/19, ECLI:EU:C:2021:597.

15| It is also important that the Court's judgments be complied with. In that regard, the Court held in its judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* C-430/21, ECLI:EU:C:2022:99, paragraph 72), that the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court of Justice has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from that Court. The unity and effectiveness of EU law would otherwise be jeopardised. This is also coherent in the judgment of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000, paragraph 19, where the Court reaffirmed that a judgment in which it gives a preliminary ruling is binding on the referring national court.

Mr Zdeněk Kühn
Judge of the Constitutional Court of the Czech Republic



On the relationship between the Czech Constitution and EU Law

Zdeněk Kühn, Judge at the Constitutional Court of the Czech Republic

1. The basis of the application of EU law in the Czech legal system

The Czech Constitution deals with its relationship to EU law primarily in Articles 10a and 10b. According to Article 10a, certain powers of the authorities of the Czech Republic may be transferred to an international organisation or institution by means of an international treaty. The ratification of such an international treaty requires the consent of Parliament, unless a constitutional law stipulates that ratification requires consent by means of a referendum. Article 10b then establishes the duty for government to inform Parliament and generally anticipates the involvement of the chambers of Parliament in the decision-making of such an international organisation (most typically, the EU).

Both articles are applicable to any international organisation to which the Czech Republic transfers power. An example of the use of Article 10a was the ratification of the Rome Statute of the International Criminal Court.[1] However, the most important application is in relation to the EU, especially the Czech Republic's accession to the EU and changes to the founding Treaties of the EU (see the Treaty of Lisbon, analysed in detail below). While the Czech Republic joined the EU based on the results of a referendum,[2] further changes to EU law have been approved by parliamentary procedure.[3]

1| No. 84/2009 Sb. m. s. (Collection of International Treaties).

2| Constitutional Act No. 515/2002 Coll., on the Referendum on the Accession of the Czech Republic to the European Union.

3| Cf. more on this, Malenovský, J., "Mezinárodní smlouvy podle čl. 10a Ústavy ČR" International Treaties according to Art. 10a of the Czech Constitution], *Právník*, no. 9/2003, pp. 841 to 854.

The effects of EU law arise from EU law itself. The Court of Justice has derived from European primary law its direct effect, without the need for any confirmation by domestic law, and its precedence over the legal systems of Member States.[4] Czech courts have a duty, established by EU law, to apply EU law, even where it conflicts with national law. The domestic support for these conclusions is Article 10a of the Constitution, which acts as a 'bridge' between domestic legal order and EU law. As the Constitutional Court stated in 2006:

> 'With the transfer of certain powers to the EC [now the EU], there is also the loss of the Czech Republic's freedom to determine the domestic effects of Community law, which, in areas where such transfer has occurred, derive directly from Community law. Article 10a of the Constitution of the Czech Republic thus actually operates bidirectionally: it forms the normative basis for the transfer of powers and at the same time is the provision of the Constitution of the Czech Republic that opens the domestic legal order to the operation of Community law, including rules concerning its effects within the legal order of the Czech Republic.'[5]

In case of interpretative doubts regarding the meaning of EU law, or where a Czech general court doubts the conformity of an EU regulation with EU primary law, including the Charter of Fundamental Rights of the European Union, the exclusive authority to decide these questions lies with the Court of Justice. This is done through the preliminary ruling procedure which ordinary courts are obliged to use.[6] If a general court fails in its duty

4| Judgments of 5 February 1963, *van Gend & Loos*, 26/62, ECLI:EU:C:1963:1; and of 15 July 1964, *Costa*, 6/64, ECLI:EU:C:1964:66.

5| Judgment of the Czech Constitutional Court of 8 March 2006, no. Pl. ÚS 50/04 – *Sugar Quotas III*. See, Kühn, Z., "The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires", in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, T.M.C. Asser Press, Hague, 2019, pp. 795 to 833.

6| See, for example, the resolution of the Czech Constitutional Court of 21 February 2006, no. Pl. ÚS 19/04, which reacted to the proposal of the regional court to annul the law for its unconstitutionality: 'The Constitutional Court has not overlooked that the regional court in its proposal argued that [the law in question is] primarily in conflict with EU law, and only secondarily with the Czech constitutional order.' Therefore, the regional court alone must resolve the question of the conformity of the said law with EU law, without the cooperation of the Constitutional Court, and, if necessary, under the conditions given by EU law, even with the help of a preliminary question to the Court of Justice of the European Union [...]. The Constitutional Court is generally not competent to intervene in the assessment of these questions.'

to submit a preliminary question, it infringes the right to a lawful judge (Article 38(1) of the Czech Charter of Fundamental Rights and Freedoms), which in this case is the Court of Justice. [7]

2. The problem of primacy and the issue of a final interpreter

As in many other European Constitutional Courts, the Czech Constitutional Court rejected the notion that EU law enjoys primacy over the Czech Constitution or the constitutional order. On the contrary, it set certain limits for the operation of EU law within Czech law, drawing inspiration from the case-law of the German Federal Constitutional Court.

The key decision establishing this doctrine is the ruling Pl. ÚS 50/04 (*Sugar Quotas III*). The application of EU law in domestic law, including the precedence of EU law over national law, is conditional on the exercise of powers transferred to the EU not threatening the 'foundations of State sovereignty' and not infringing 'the very essence of the material rule of law'. The latter condition essentially expresses the 'eternity clause' in Article 9(2) of the Constitution (the prohibition of removing essential requirements of a democratic rule of law). [8]

7| See, for example, judgments of the Czech Constitutional Court of 8 January 2009, no. II. ÚS 1009/08, or of 26 September 2017, no. II. ÚS 4255/16.

8| See note 5 supra.

It is, I think, positive that the Czech Constitutional Court did not express itself in the decision in *Sugar Quotas III* or in later decisions concerning the limits of European integration as resolutely as the German Federal Constitutional Court did in its controversial Maastricht decision. [9]

When the German Federal Constitutional Court slips into extensive political science analyses, it thereby risks displacing the role of democratic discourse and possible democratic consensus aimed at achieving a higher degree of European integration and unnecessarily shifts the role of constitutional justice into a sphere where judicial power should not exercise its authority.

The ruling in *Sugar Quotas III* does not yet clearly formulate the 'competence competence' of the Constitutional Court, that is, the power to finally determine what is and what is not a power transferred to the European Union. [10] However, this decision moved in the direction of such a power. The Czech Constitutional Court refused to recognise the absolute primacy of EU law. It stated that the transfer of part of the powers of national authorities to EU bodies may last as long as these powers are exercised by EU bodies in a manner compatible with the preservation of the foundations of State sovereignty of the Czech Republic and in a way that does not threaten the very essence of the material rule of law (Article 9(2) of the Constitution). If such an 'exceptional and highly unlikely situation' were to arise, the Constitutional Court 'will not review individual norms of Community law in terms of their compliance with the Czech constitutional order'. [11]

9| Judgment of the German Federal Constitutional Court of 12 October 1993, *Maastricht*, 2 BvR 2134/92, 2 BvR 2159/92 and the latter case-law. Cf., on the other hand, the relatively moderate opinion of the Czech Constitutional Court of 26 November 2008, no. Pl. ÚS 19/08, *Treaty of Lisbon I*, paragraph 109: ' The concept of sovereignty interpreted in the mutual context of Article 1(1) of the Constitution and Article 10a of the Constitution thus clearly shows that there are also certain limits to the transfer of sovereignty, the non-compliance with which would already affect both Article 1(1) and Paragraph 10a of the Constitution. These limits should be left primarily to the legislator to specify, as this is prima facie a political issue that gives the legislator a wide margin of discretion; intervention by the Constitutional Court should be considered here as a last resort, i.e., in a situation where the margin of discretion has been clearly exceeded and Article 1(1) of the Constitution has been violated because powers have been transferred beyond the scope of Article 10a of the Constitution'.

10| This term originated from German doctrine: 'Competence competence (*Kompetenzkompetenz*) is the power of a state authority (especially a court) to make binding decisions in relation to doubts concerning the competence of administrative authorities or the competence of courts.' Creifelds, C. *Rechtswörterbuch*, 23rd edition, C.H. Beck, Munich, 2007, s. 681.

11| Judgment of the Czech Constitutional Court, 3 May 2006 no. Pl. ÚS 66/04, *European Arrest Warrant*, paragraph 53.

Logically, this line of reasoning was completed in the ruling in *Treaty of Lisbon I*:

> 'The Constitutional Court remains the supreme protector of Czech constitutionality, even against possible excesses of Union bodies and EU law, which also clearly answers the questioned issue of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic, which have the highest legal force in Czech territory, it is clear that Article 1(1) of the Constitution cannot be violated. If European bodies interpret or develop EU law in such a way that threatens the foundations of materially understood constitutionality and the essential requirements of a democratic rule of law, which are understood as inviolable in accordance with the Constitution of the Czech Republic (Article 9(2) of the Constitution), then such legal acts could not be binding in the Czech Republic. Accordingly, the Czech Constitutional Court intends to review, as *ultima ratio*, whether the legal acts of European bodies remain within the limits of the powers granted to them.' [12]

The influence of the German Federal Constitutional Court is evident here. At the beginning of the 1990s, it reserved the right to have the final say as to whether an EU act exceeded the limits imposed on the European Union by German law (in the form of ratification of the founding treaties and their amendments). From the perspective of domestic constitutional law, it is therefore theoretically possible that the Court of Justice itself could exceed the EU's powers, for example, by interpreting the founding Treaties in a way that is no longer an interpretation but rather inadmissible law-making, or by failing to declare invalid an act that has exceeded the EU's powers. [13]

Since EU law forms a separate part of the legal system, it is not really possible to talk about EU law being enshrined in the hierarchy of the legal system. Simply put, EU law takes precedence over national law, which is supported by Article 10a of the Constitution from the perspective of Czech law. However, the question remains as to the relationship between the Czech constitutional order and EU law, particularly with regard to the principle

12| Treaty of Lisbon I, supra, note 9, paragraph 216.

13| Judgment of the German Federal Constitutional Court of 12 October 1993, *Maastricht*, 2 BvR 2134/92, 2 BvR 2159/92. Available at: Bundesverfassungsgericht - Decisions search - Judgment of 12 October 1993.

of the primacy of EU law, which, from the perspective of EU law, also takes precedence over the domestic Constitution.

The most important conclusion from a legal point of view is therefore that the Constitutional Court has the final say within its jurisdiction in determining which EU acts are *ultra vires*, that is to say, outside the competence (jurisdiction) of the EU. Similar to its German counterpart, the Czech Constitutional Court essentially creates a specific 'Schmittian' understanding of sovereignty: the sovereign is the one who has the right to decide on exceptions. According to Schmitt, an exception should not be something that escapes the attention of a lawyer, but rather says something very important about the rule itself ('the rule proves nothing; the exception proves everything: [i]t confirms not only the rule but also its existence, which derives only from the exception.') [14] An exception is something that cannot be subsumed, it is incompatible with any codification, but, at the same time, it contains a specifically legal element – 'the decision in absolute purity ... For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists'. [15]

The problem of sovereignty against the backdrop of interaction between the EU legal order and the Czech Constitution cannot be answered by Kelsen's world of a legal order based on a fundamental (basic) norm (*grundnorm*). In an environment of constitutional pluralism, it is necessary to accept different perspectives on the understanding of the fundamental basic norm: from the point of view of the Court of Justice and the EU legal order, the founding Treaties serve as the basic norm, while from the point of view of the Czech legal system, the basic norm is the Czech constitutional order. The content of the principle of the primacy of EU law is therefore the result of the systematic interaction between the EU and domestic perspectives on the relationship between the two legal systems, represented, among other things, by the dialogue between the Court of Justice of the European Union and the domestic supreme and, in particular, constitutional courts.

14| Schmitt, C., *Political Theology. Four Chapters on the Concept of Sovereignty*, University of Chicago Press, 2005, at p. 15.

15| Ibid., at p. 13.

The problem with Kelsen's theory, however, does not lie in its imperfection, but rather in the fact that Kelsen's monistic conception of the legal order, with international law at its apex, is currently unacceptable for political reasons. After all, Kelsen himself stated that his monistic conception ultimately presupposes political, not legal, decisions.[16] Schmitt's pragmatic (and cynical) theory thus says a lot about the current state of European integration.

The Czech Constitutional Court exercised its power to declare an EU act ultra vires for the first (and so far only) time in the ruling in *Slovak Pensions XVII*.[17] The case concerned a dispute over the interpretation and application of the Agreement between the Czech Republic and the Slovak Republic on Social Security of 1993, as a result of which certain Czech citizens who had worked for Slovak employers during the former Czechoslovak federation received lower pensions than those who had worked under the same conditions for Czech employers. The Supreme Administrative Court (SAC) considered this conclusion to be in accordance with both Czech law and EU law. In contrast, the Constitutional Court repeatedly overturned the SAC's judgments. During the long-running dispute between the SAC and the Constitutional Court, the issue of Czechoslovak pensions came under the scrutiny of EU law, in particular with regard to Regulation (EEC) No 1408/71[18] of the Council. The Constitutional Court refused to admit that EU law was applicable to Czechoslovak pensions at all. The dispute over the (in)applicability of the Treaty between the Czech Republic and Slovak Republic and the (in)applicability of EU law first escalated with a preliminary question submitted by the Supreme Administrative Court to the Court of Justice of the European Union. In June 2011, the Court of Justice ruled that the Czech Republic could pay a compensatory pension supplement to its citizens, but could not restrict that supplement exclusively to Czech nationals.[19] In doing so, the Court of Justice partially challenged the eight-year-old and consistent case-law of the Czech Constitutional Court, although it left the door open, at least to some extent, for the Constitutional Court to seek clarification through its own preliminary reference, however, no such reference was made.

16| Kelsen, H., *Pure Theory of Law*, University of California Press, 1967, pp. 346 and 347.

17| Judgment of 31 January 2012, no. Pl. ÚS 5/12.

18| Regulation of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition, 1971(II), p. 416).

19| Judgment of 22 June 2011, *Landtová*, C-399/09, ECLI:EU:C:2011:415.

After the SAC began applying the decision of the Court of Justice, one plaintiff filed a constitutional complaint against one of the SAC's judgments. The constitutional complaint was received by the Constitutional Court at the end of November 2011, and within two months the Constitutional Court issued its ruling, which not only overturned the judgment of the SAC, but also clearly defined its position against the Court of Justice itself. Given the general constitutional importance of the matter, the case was decided by the plenary session of the Constitutional Court.

The Constitutional Court criticised the Court of Justice for treating the claims of Czech pensioners from the former Czechoslovak federation as if they were pension claims accrued in different States. 'Failing to distinguish between the legal circumstances arising from the break-up of a State with a unified social security system and the legal circumstances arising in the area of social security from the free movement of persons within the European Communities or the European Union means disregarding European history and comparing the incomparable.' On this basis, the Constitutional Court concluded that EU law could not apply to social security entitlements accrued by Czech citizens before 31 December 1992. With regard to the implications of the judgment in Landtová for similar cases, the Constitutional Court stated that 'there was an excess on the part of the EU body, a situation in which the act of the European Union body exceeded the powers that the Czech Republic had transferred to the European Union under Article 10a of the Constitution, exceeding the scope of the powers conferred, an ultra vires procedure.' [20]

The SAC attempted to reverse the whole matter by submitting another preliminary question to the Court of Justice. However, as the Czech Government reached an out-of-court settlement with the complainant and the cassation complaint was withdrawn, the proceedings before the Court of Justice were removed from the register (Case C-253/12).

20| See *Slovak Pensions XVII*. This ruling had quite a spicy aftermath. As it turned out, the complainant had filed a constitutional complaint and previous lawsuits essentially under the mistaken belief that the Czech pension would be more favourable for him. However, as it turned out, the pension calculated in Slovakia was actually more favourable for the complainant. The Czech Social Security Administration therefore had no way of implementing the ruling, as it had nothing to pay in addition to the Slovak pension. This issue gave the whole matter an even more unpleasant taste. It seems that the complainant's interests and rights in the ruling completely gave way to the judges' desire to assert their own truth.

In essence, the Constitutional Court ruled that the Court of Justice had acted ultra vires simply because it had arrived at a different interpretation of EU law (a different interpretation of its own jurisdiction) than the Constitutional Court. This stance is obviously problematic, because rather than protecting the integrity of the legal system, the Constitutional Court protected what it regarded as its own 'correct' interpretation of the law. The dispute was therefore not one of constitutional identity or the preservation of sovereignty, but rather a conflict over interpretative authority: the Constitutional Court sought to maintain the final interpretation on questions of Czech law, even though after 2004 these questions were no longer a domestic issue.

3. Questions surrounding the role of the Constitutional Court in the application of EU law

Since the beginning of its case-law, the Czech Constitutional Court has consistently stated that EU law is not a reference criterion for its decision-making within the meaning of Article 87 of the Constitution, therefore the Constitutional Court cannot review Czech legal norms for their inconsistency with EU law. [21] The non-application of a law that is contrary to EU law is within the competence of ordinary courts, which, in case of doubt about the application of this law, have the possibility, or even the obligation, to refer a preliminary question to the Court of Justice under Article 267 TFEU. [22]

If a privileged petitioner (for example, a group of deputies or senators) approaches the Constitutional Court in proceedings for the annulment of a law for its unconstitutionality and argues both inconsistency with the constitutional order and inconsistency with EU law, the Constitutional Court does not examine the argument of inconsistency with EU law, rather, it focuses on the alleged inconsistency with the constitutional order. This does not preclude the supportive use of arguments from the field of EU law for the interpretation of the domestic constitution (as discussed earlier). If the petitioner were to argue only

21| Cf. judgment of 10 July 2018, no. Pl. ÚS 3/16, paragraph 94, including citations of older case-law.

22| Judgment of 27 March 2008, no. Pl. ÚS 56/05 – *Squeeze-out*, paragraph 48.

inconsistency with EU law, the Constitutional Court would lack jurisdiction to hear such a case. [23]

From the outset of the application of EU law, a thorny issue has been how a general court should proceed if it identifies inconsistencies with both EU law and the constitutional order in a given case. This question was resolved by the Constitutional Court as early as 2009. It ruled that the ordinary court must decide whether to examine the inconsistency of the statutory provision with EU law or the inconsistency with the constitutional order of the Czech Republic. If the court chooses to focus on the unconstitutionality of the law, it must proceed according to Article 95(2) of the Constitution. However, if it examines compliance with EU law and concludes (possibly on the basis of a preliminary reference) that the provision under review is inconsistent with EU law, it must draw the relevant conclusions and refrain from applying the contested provision.

It is certainly possible to say that EU law 'is not part of the constitutional order, and for this reason the Constitutional Court is not competent to interpret this law.[...] it is both supreme courts belonging to the system of general courts that ensure the uniformity of case-law in the territory of the Czech Republic to the extent of their statutory competences. Since EU law belongs to the body of sub-constitutional law, it is fundamentally a matter for the ordinary courts to examine the application of EU law and, in certain cases falling within the scope of Article 234 of the Treaty establishing the European Communities [now Article 267 TFEU], to refer a question to the CJEU for interpretation or validity of EU law.' [24]

These premisses have led to the formal narrowing of the Constitutional Court's role primarily to checking whether general courts fulfil their obligation to refer a preliminary question to the Court of Justice. These correct premisses, however, say nothing about what to do in a situation where the application of EU law directly affects a particular human rights issue. Here, too, the protection of fundamental rights must primarily be provided by the general courts. But does this really mean that the role of the Constitutional Court is reduced merely to monitoring whether general courts refer preliminary questions? I think that such a restrictive conclusion would unnecessarily marginalise the Constitutional

23| Ibid.

24| Judgment of 9 January 2009, no. II. ÚS 1009/08.

Court's decision-making powers and exclude it from participating in judicial dialogue with the Court of Justice.

Nor does reference to the constitutional order as a reference criterion for the Constitutional Court's decision-making activity offer a solution. For example, if it is a case decided by general courts, which falls within an area where EU law applies directly (for example, directly applicable EU regulations in the field of customs or data protection), the Constitutional Court certainly cannot reject a constitutional complaint just because the matter is governed by EU law and with it the human rights catalogue enshrined in the EU Charter.

Yet another problem is that the scope of EU law is very broad and also covers situations that, at least at first glance, have a purely domestic character. For example, the regulation of the provision of services by a Member State of the EU is subject to Article 56 TFEU which prohibits restrictions on the free movement of services within the Union for nationals of Member States who are established in a Member State other than that in which the recipient of the services is located. The Court of Justice has held that Article 56 TFEU also applies to the regulation of the operation of games of chance by municipal decree, simply because some of the casino's customers come from a Member State other than the Member State in which it is established. [25]

This essentially means that the basic principles of the free movement of services (Article 56 TFEU et seq.) apply to any regulation of services within a Member State. Today, there is probably no service in the Czech Republic that is not also used by citizens of another EU Member State, so EU law essentially oversees any domestic regulation of services. In my opinion, such an interpretation of the scope of EU law is not only impractical (it significantly expands the reach of EU law beyond what is reasonably applicable), but above all fundamentally extends the applicability of EU law even to areas that are purely domestic or entirely local, where there is not even any hint of a discriminatory intent towards nationals of Member States. This has a potential to create further and unnecessary conflicts between national constitutional courts and the Court of Justice.

25| Judgment of 3 December 2020, *BONVER WIN*, C-311/19, ECLI:EU:C:2020:981.

Mr Yanaki Stoilov
Judge at the Constitutional Court
of the Republic of Bulgaria

Allocation of competences between the Member States and the European Union. Relationship between the Court of Justice of the European Union and the national constitutional jurisdictions

Yanaki Stoilov, Judge at the Constitutional Court of the Republic of Bulgaria

The judicial review exercised
by the Court of Justice of the European Union over EU and national legal acts is dependent on the manner in which the allocation of competences between the European Union and the Member States is conceived and applied. That allocation is akin to the principle of the separation of powers and of the judicial protection thereof in the relations between the EU institutions and the Member States. [1] That issue, which has great practical significance for the application of the law, is one of the most sensitive topics for the EU Member States. The various views concerning the nature of the European Union lead to different conceptions of the role of the Court of Justice of the European Union and of the constitutional jurisdictions within the European Union.

'Some conceptualize the [European] Union as a federal commonwealth, others as an instrument of interstate cooperation. These different understandings lead to different conceptions of the judicial office. The same holds true for political convictions and normative world views that inevitably inform the judges' work.' [2]

1| *Pace* Jacqué, J.-P., *Droit institutionnel de l'Union européenne*, 8th edition, Dalloz, Paris, 2015, p. 237. He considers that the theory of the separation of powers is not applicable to the European Union, although he accepts the terminological similarity between the distribution of competences between the European Union and the Member States, which is similar to the distribution of competences in a federation.

2| von Bogdandy, A., Chapter 4, "Courts", in *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach, Collected Courses of the Academy of European Law,* Oxford University Press, Oxford, 2024, p. 235. Available at: https://academic.oup.com/book/56270/chapter/445198181.

Many authors present the governmental system of European society as transnational executive federalism.[3] Within it, the Court of Justice appears to be a functional equivalent of a federal court, but in a less rigid, supranational legal framework bound by the Treaties.[4] '... [T]he [Court of Justice of the European Union] performs much the same function as the Supreme Court with respect to issues regarding the vertical and horizontal division of powers ...'[5] 'While the European Union does not have a constitution, the [Court of Justice of the European Union] often engages in what amounts functionally to constitutional review, particularly in relation to the [European Union's] quasi-federal structure'.[6] Other authors, without engaging in generalisation, state that 'it is becoming increasingly difficult to deny what the European Union owes to the federal model, once it is accepted that the State is not the only form of federal organisation',[7] but, 'owing to its particular nature, nowadays, it is not possible for the European Union to be included in the usual categories without its nature being distorted. ... [I]t remains fundamentally original'.[8] 'The authors of the Treaties define the [European] Union as an organization for integration. In this sense, the full court of the [Court of Justice of the European Union] stated in 2014 that implementing the process of integration "is the raison d'être of the [European Union] itself". ... However, this dynamism is limited to the stage attained with the Lisbon Treaty, as follows from Articles 1(1), 5(2) and 48 [of the Treaty on European Union], among others.

3| See Oeter, S., "Federalism and Democracy", in von Bogdandy, A. and Bast, J., (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford, 2006, p. 55. Available at: https://doi.org/10.1093/oso/9780198909347.003.0004.

4| See Claes, M. and De Visser, M., "The Court of Justice as a Federal Constitutional Court: A Comparative Perspective", in Cloots, E., De Baere, G. and Sottiaux, St., (eds.), *Federalism in the European Union,* Part I, Chapter 4, Hart Publishing, 2012, p. 83. Available at: https://www.bloomsbury.com/in/federalism-in-the-european-union-9781847319982/?utm.

5| Rosenfeld, M., "Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court", *International Journal of Constitutional Law*, Vol. 4, No 4, 2006, pp. 618, 622 and 623. Available at: https://academic.oup.com./icon/article/4/4/618/640269.

6| Ibid., p. 618.

7| See Jacqué, J.-P., op. cit., p. 127 (citation translated from French).

8| Ibid., p. 127 (citation translated from French).

This suggests, for example, that the [European] Union can only transform into a federal state with a new treaty.'[9]

If the European Union were to be regarded as a *sui generis* organisation with a particular legal system[10] rather than as an organisation that is transforming into a State,[11] that would have repercussions on the assessment of some of the case-law of the Court of Justice of the European Union. The Court of Justice of the European Union is the institution exercising judicial review so as to safeguard the competences of both the European Union and the Member States. Therefore, the stance on the nature of the European Union is key. It is precisely that stance that determines the role of the Court of Justice of the European Union in reviewing the acts and conduct of both EU and national authorities.

9| Bast, J. and Bogdandy, A., "The Constitutional Core of the Union: On the CJEU's New Constitutionalism", *Max Planck Institute for Comparative Public Law and International Law (MPIL)*, Research Paper No 2024-06, 2024, pp. 11 and 12. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4740888.

10| The European Union has been defined as a hybrid *sui generis* system, which is neither wholly federal nor wholly confederal; there are no prescribed means for dealing with conflicts between EU law and national constitutions. See, in that regard, Rosenfeld, M., op. cit., p. 633.

11| See Grimm, D., "Defending Sovereign Statehood Against Transforming the European Union into a State", *European Constitutional Law Review*, Vol. 5, No 3, 2009, p. 353.

1. The issue regarding the jurisdiction of the Court of Justice of the European Union in connection with the competences of the European Union

The competences of the European Union are defined above all in EU primary law, in the founding Treaties of the European Union. The case-law of the Court of Justice of the European Union also has a significant influence on how those competences are exercised.

Competences in the various areas are divided between the European Union's institutions, on the one hand, and its Member States, on the other. According to the fundamental provisions of the Treaty on European Union (Article 4(1) and Article 5(2)), competences not conferred upon the European Union in the Treaties remain with the Member States. That delineates the areas of exclusive, shared and supporting competences of the European Union (Articles 3 to 6 of the Treaty on the Functioning of the European Union). At the same time, the principles of conferral, proportionality (the content and scope of EU action may not exceed what is necessary to achieve the objectives of the Treaties) and subsidiarity (the European Union is to intervene only if the objective of the proposed action cannot be sufficiently achieved by the Member States but can be achieved at EU level) apply. Both the national bodies, including courts, and the EU bodies, including the Court of Justice of the European Union, must act in a manner that does not exceed their respective competences, that is to say, they must not act *ultra vires*. In general, it is unlikely that anyone would dispute that both the Member States and the European Union must act in accordance with the competences conferred upon them in the founding Treaties. Nevertheless, in both legal theory and judicial practice, differences arise regarding the approach to resolving issues concerning competences.

In recent decades, there has undoubtedly been a tendency to broaden the European Union's competences. The problem is that, in a number of instances, that has been done not by the Member States but by the Court of Justice of the European Union, extending the impact of EU legal acts. Whether or not that practice is acceptable to many of the States is a separate – political rather than legal – issue that will not be discussed

here. It is important to note that the broadening of the European Union's competences takes place by broadening the scope of EU law. The reverse is also true: the broader the scope of EU law, the broader the European Union's competences. Several recent examples confirm that.

The application of EU law has an impact even on a competence that is explicitly reserved to the Member States by the founding Treaties – national security. According to the Court of Justice of the European Union, if a case concerns the use and/or storage of personal data that are governed by EU rules, then the storage of such data, even if for national security purposes, also comes within the scope of the relevant directive [12] – Case C-511/18, [13] Case C-512/18, [14] and Case C-520/18. [15] The Court of Justice of the European Union proceeded in the same manner also when seeking to find a balance between the rights of the defence and the safeguarding of national security in Case C-300/11. [16]

12| Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31.7.2002, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 337, 18.12.2009, p. 11); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

13| Judgment of the Court of Justice (Grand Chamber) of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, delivered on a request for a preliminary ruling from the French Council of State.

14| Judgment of the Court of Justice (Grand Chamber) of 6 October 2020, *La Quadrature du Net and Others,* C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, delivered on a request for a preliminary ruling from the French Council of State.

15| Judgment of the Court (Grand Chamber) of 6 October 2020, *Ordre des barreaux francophones et germanophone and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, delivered on a request for a preliminary ruling from the Belgian Constitutional Court.

16| Judgment of the Court (Grand Chamber) of 4 June 2013, *ZZ,* C-300/11, ECLI:EU:C:2013:363, delivered on a request for a preliminary ruling from the United Kingdom Court of Appeal (England and Wales) (Civil Division).

The situation is similar as regards the rules governing citizens' personal status. As early as 2001, the Court of Justice of the European Union engaged in the following inversion: 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[17] Thereby, Union citizenship, which derives from national citizenship, has been given an autonomous meaning. It appears that the aim is for Union citizenship to serve as a standard for the equal treatment of persons for the purposes of Article 2, the second subparagraph of Article 3(3) and above all, Article 9 of the Treaty on European Union, so that certain categories of persons may benefit from the principle of the freedom of movement. Subsequently, judgments were delivered concerning the civil status of persons: the landmark judgment in *Coman* (Case C-673/16),[18] the judgment in *Pancharevo* (Case C-490/20),[19] as well as other, similar judgments.

The Court of Justice of the European Union usually relies on the principle of effectiveness of EU law in order to broaden the scope of EU law. That is true for the judgment in *Commission* v *Poland* (Case C-619/18).[20] In that judgment, the Court of Justice pointed out that, 'although … the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.

The examples given are sufficiently indicative of the role of the Court of Justice of the European Union in unifying EU law and the legal order of the European Union. Furthermore, the Court of Justice has significantly broadened the scope of EU law with the aim of protecting the legal order of the European Union. At the same time, regard should still be had to the requirement for the democratic functioning of the European

17| Judgment of the Court (Grand Chamber) of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, on a request for a preliminary ruling from the Belgian Labour Court, Nivelles, paragraph 31.

18| Judgment of the Court (Grand Chamber) of 5 June 2018, *Coman and Others*, C-673/16, ECLI:EU:C:2018:385, delivered on a request for a preliminary ruling from the Romanian Constitutional Court.

19| Judgment of the Court (Grand Chamber) of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008, delivered on a request for a preliminary ruling from the Bulgarian Administrative Court, Sofia City.

20| Judgment of the Court (Grand Chamber) of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, ECLI:EU:C:2019:531, delivered on an action for failure to fulfil obligations in respect of a court of the Republic of Poland – the Polish Supreme Court.

Union in accordance with the Treaties, in order to maintain its democratic legitimacy, which flows from the citizens and Member States. On the one hand, in accordance with the founding Treaties, the European Union is to act only within the limits of the competences conferred upon it, yet, on the other hand, the Court of Justice has stated that legal consequences resulting from the application of EU law may arise also in areas where the European Union has no competence. That has reached such a degree that the application of EU law appears not to recognise any legal boundaries. Figuratively speaking, similar to the principles of the free movement of persons, goods, services and capital within the European Union, a principle that is not stated by the Court of Justice of the European Union but is applied by it emerges – that of the almost universal applicability of EU law. Thus, in practice, any situation that is governed solely by the Member States' domestic law may be brought within the scope of EU law and even be liable to direct legal consequences resulting from the application of EU legal norms, even though in many of those situations the European Union has no competence whatsoever. [21]

That, however, almost fully removes the limits on the scope of EU law. [22] The result is a boundless expansion of EU law, so that it is hardly possible to point to an area in which it does not apply. The Judge of the Court of Justice of the European Union, Allan Rosas, summarised that as follows: 'it is becoming increasingly difficult to find areas where Union law is totally absent'. [23] In my view, that necessitates the use of criteria rooted in the flexible, but nevertheless present, limits between Member States' domestic law and EU law.

21| Semov, A., Prilozhno pole na pravoto na ES. Opredelyane dali pravoto na ES e prilozhimo – parva po vreme zadacha v pravoprilaganeto. Éditions académiques « Sv. Kliment Ohridski », Sofia, 2023.

22| Semov, A., 'Pochti palno premahvane na ramkite na prilozhnoto pole na pravoto na ES? Novi vaprosi za syvereniteta po povod reshenieto « Pancharevo » na SES', Norma, No 2, 2023.

23| Rosas, A., "When is the EU Charter of Fundamental Rights Applicable at National Level?", *Jurisprudencija: Mokslo darbu žurnalas*, Vol. 19, No 4, 2012, p. 1269. Available at: https://www.mruni.eu/1t/mokslo.darbai/jurisprudencija.

2. Criteria for determining the scope of EU law

2.1. The first criterion is based on subject matter

The criterion based on subject matter determines which relationships come under national and which come under EU regulation, as well as where the rules governing each legal order can be found. That constitutes the basis for the division of competences between the Member States and the European Union. [24] The allocation of competences between the Member States and the European Union prescribed by the Treaties outlines the areas of application of the Member States' domestic law and EU law, respectively. That is the starting point for an analysis of the judicial practice in which EU law and the Member States' domestic law come into contact. For the sake of greater clarity, the term 'primacy' is used to refer only to the relationship between EU law and national law, while formal relationships within a single legal order, such as EU law, are addressed by the term 'supremacy' (or 'being superior'). [25] In that manner, a single legal order within the European Union is established, but, at the same time, it should not be uncritically assumed that the concept and practice of the primacy of national law is simply replaced by the unconditional primacy of EU law; the problem is more complex and needs a balanced solution. [26] Such primacy should exist only in the areas where EU law applies.

The criterion based on subject matter is laid down by law and is therefore generally clear. However, it is mostly formal and therefore insufficient to provide an exhaustive answer to the question regarding the manner in which EU law applies in each specific case. In most areas of regulation, both EU law and domestic law are applied. It is precisely those instances that require an interpretation of the applicable domestic legal norms that is in line with EU law. In addition, other criteria outlining the scope of EU law also have to be used.

24| Stoilov, Ya., 'Vzaimodeystvie mezhdu pravnite sistemi', in Quo Vadis Justitia, Éditions académiques « Sv. Kliment Ohridski », Sofia, 2020, p. 64

25| Bast, J. and Bogdandy, A., op. cit., p. 15.

26| See Stoilov, Ya., op. cit., p. 64.

2.2. The role of the rule of law when applying EU law

Applying the law is not only a formal process, but an activity that is not isolated from the social context, because it has to solve real-life issues. That position is reflected in the Bulgarian Constitutional Court's understanding of the rule of law, which encompasses both the principle of legal certainty (the formal element) and the principle of substantive justice (the substantive element). [27] Therefore, the rule of law necessitates both legality and justice. In a number of its decisions, the Court of Justice of the European Union also refers to the rule of law. [28]

The rule of law guarantees the unity and effectiveness of the EU legal order. The protection of that legal order may warrant an exception leading to the applicability or relevance of EU law, or to the involvement of the Court of Justice of the European Union in situations which, taken in isolation, appear to be entirely domestic. In such situations, the Court must assess the appropriate measures to be taken and what involvement is proportionate in order to attain the necessary effect of its decision. That must be done with due account being taken of the rights of the Member States and their courts. The aim of that approach is not for the authorities of the Member States to regard themselves as being 'free' with regard to EU legal standards, but for every institution, be it national or European, to act within the limits of its competence, in compliance with the rule of law.

27| See judgment of the Bulgarian Constitutional Court No 1/2005 of 27 January 2005, in Constitutional Case No 8/2004.

28| See, for instance, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117; of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586; and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

2.3. The role of constitutional identity and the application of EU law

While respect for the rule of law inherently warrants a broadening of the scope of EU law, respect for national constitutional identity is, owing to its purpose, a means for a State not to apply a particular rule of EU law and thus, in a specific case, a means to limit the primacy of EU law.

National identity is not necessarily unique to one State. In most cases even, within the European Union, it is particular to a group of States, reflecting their historical, cultural and other characteristics vis-à-vis other States. Constitutional identity is a concept allowing a State to claim protection of specific substantive elements of its constitution, the core of that constitution, even vis-à-vis EU law. In that manner, national constitutional identity allows for flexibility when applying EU law. However, it does not serve as a means of disregarding, circumventing or infringing EU law. Therefore, if there is a dispute as to whether such an identity exists, the assessment ultimately falls to the Court of Justice of the European Union. That fact, however, demonstrates the need for a dialogue between the national constitutional jurisdictions and the Court of Justice of the European Union, in view both of the application of EU law and of respect in practice for national identity. Figuratively speaking, just as a national judge must put himself or herself in a position similar to that of an EU judge, so too must the judges in Luxembourg endeavour to understand the relevant constitution and the national legal context that the constitution creates. Such a balanced approach, without tolerating actions on the part of State authorities that infringe national or EU legal norms, would contribute to mutual understanding between the courts and increased trust in the EU institutions.

3. Regulatory and institutional guarantees for resolving inconsistencies in the case-law of the Court of Justice of the European Union and the national constitutional jurisdictions

In order to avoid inconsistencies when applying EU law, the national courts, including constitutional jurisdictions, may make references for a preliminary ruling to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union. The Court of Justice is the only court whose interpretation of EU law is binding on all other courts. Nevertheless, inconsistencies between the case-law of the Court of Justice of the European Union, on the one hand, and that of the national constitutional courts, on the other, cannot be ruled out. A conflict arises where a national court does not accept the interpretation of the Court of Justice of the European Union because it considers that it goes beyond the European Union's competence or infringes a right of the Member States. Perhaps the most famous such case is in connection with the judgment of the Court of Justice of the European Union regarding Germany in Case C-62/14. It is therefore not surprising that the first instance of *ultra vires* review led to an almost unprecedented interest in the wake of the Court's ruling on the European Central Bank's programme for the purchase of public sector assets on the secondary market. [29]

According to the German Federal Constitutional Court, the European Central Bank, by its programme, exceeded the powers conferred upon it and infringed Article 123 of the Treaty on the Functioning of the European Union, and impaired German constitutional identity with regard to the principle of democracy. Examples of similar instances of disagreement with the Court of Justice of the European Union can also be found in the decisions of the national constitutional jurisdictions of Spain, Poland,

29| Judgment of the German Federal Constitutional Court of 5 May 2020, 2 BvR 859/15 (judgment concerning the Public Sector Purchase Programme); see also, Anagnostaras, G., "Activating *Ultra Vires* Review: The German Federal Constitutional Court Decides *Weiss*", *European Papers*, Vol. 6, No 1, 2021, p. 803.

the Czech Republic, Slovakia and Denmark. This situation calls for a solution to the existing problem.

The starting point for such a solution, as already stated, is the understanding that the harmonisation of the legal systems of the European Union and of the Member States must be carried out in accordance with the division of competences prescribed under the founding Treaties.

The next step is to reach a shared understanding among – both EU and national – judges on the further development of judicial dialogue. That would work better if an appropriate form of the initiative for communication were to be found, such that it is not unidirectional, that is to say, flowing from the national courts to the Court of Justice of the European Union. Further to the reference for a preliminary ruling, it would be useful to discuss the introduction of an institutional mechanism to render the judicial dialogue bidirectional and equal. The arbitration model for dispute resolution could be used to create such a mechanism. In the event of a difference in the views of the constitutional courts and of the Court of Justice of the European Union, an ad hoc panel should be formed, including, in addition to judges of the Court of Justice of the European Union, judges of the constitutional court of the State claiming that its reserved competence has been encroached upon or its constitutional identity has not been respected. Naturally, such a change requires an amendment to the EU founding Treaties. Beforehand, however, that could be endorsed in practice by way of a consultative dialogue between judges of the Court of Justice of the European Union and judges of the relevant constitutional court preceding the official and decisive ruling by the Court of Justice. A solution to the problem at hand that does not undermine the application of EU law would render the dialogue between the national constitutional jurisdictions and the Court of Justice of the European Union not only equal, but also more constructive and effective.

The proposed solution is in line both with the role of the Constitution as the supreme law and with that of the relevant constitutional court, as its guardian, as well as with the specific nature of the EU legal order. The search for solutions of this kind is gaining in urgency at a time when the European Union and its Member States are faced with novel and serious trials and challenges. Such communication on the issues raised with a view to resolving them would contribute to restoring the confidence of many Union citizens in the EU institutions as well as to fostering a meaningful dialogue between the Court of Justice of the European Union and the constitutional jurisdictions of the Member States.

Mr Cándido Conde-Pumpido Tourón
President of the Constitutional Court
of the Kingdom of Spain

The allocation of competences between the Member States and the European Union

Cándido Conde-Pumpido Tourón, President of the Constitutional Court of the Kingdom of Spain

Dear colleagues,

The process of European integration has largely resolved some of the major political and economic problems arising from the long-standing division of the European continent and consolidated a long period of peace and prosperity in Europe.

The main characteristic of this integration process has been integration through law, as it has been achieved through the creation of supranational institutions with effective decision-making powers by means of European Treaties. Indeed, the Member States have, in the Treaties, conferred on these institutions powers enabling them to adopt acts and legal provisions with direct effect in the territory of the Member States themselves.

However, the conferral of powers on European institutions opens up a potential area of conflict linked to the need to determine the exact scope of the powers conferred by Member States on these new supranational institutions. This determination is essential to specify, in turn, the scope of the powers retained by state authorities.

The distribution of powers between the different territorial levels would thus be based essentially on the application of the so-called principle of conferral, which means that the European Union would have the powers conferred on it by the Treaties themselves.

In so far as the Court of Justice of the European Union is the 'final interpreter' of EU law [1] it is for the Court to determine whether the European institutions have acted within the limits of the powers conferred on them by the Treaties.

1| See judgment of 2 September 2021, *Republic of Moldova,* C-741/19, ECLI:EU:C:2021:655, paragraph 45.

The Court of Justice is also responsible for determining whether Member States have acted in accordance with the system of distribution of powers through its jurisdiction to declare that Member States have failed to fulfil their obligations under the Treaties; primarily through actions for failure to fulfil obligations, but also through the mechanism of preliminary rulings on questions of interpretation, which may allow national courts to disapply domestic rules that are incompatible with EU law, thereby ensuring the principle of primacy.

This means that the Court of Justice is, *a priori*, the natural arbiter of disputes concerning powers that may arise between the European Union and the Member States through its role of reviewing the legality of European acts and its role of determining, directly or indirectly, whether Member States have failed to fulfil their obligations. In exercising these functions, the Court of Justice has carried out a task that is unanimously recognised as crucial to the construction of the European Union as we know it today.

However, the essential issue in composite states, and of course also in the European Union, is not so much the acceptance of the principle of conferral itself as a fundamental criterion for the delimitation of powers, but rather the determination of the precise extent of the powers conferred. [2]

Equally relevant issues from the point of view of the distribution of powers and functions between the various territorial levels are those relating, on the one hand, to the division of functions between the constitutional courts of the Member States and the Court of Justice and, on the other, to the division of functions between the constitutional courts and the ordinary national courts when they act as European courts.

The solution to these issues, which are obviously of concern to the presidents of the constitutional courts of the European Union, cannot consist in stripping the constitutional courts of the Member States of their powers as the ultimate guarantors of their own constitution and of national constitutional rights and guarantees. Nor can it be achieved through conflict, but rather through dialogue between the courts, based on the principles of constitutional loyalty and mutual respect.

2| This was expressed by Judge Marshall when referring to the problems of American federalism, which is also based on the principle of conferral in the well-known judgment of the Supreme Court of the United States of 6 March 1819, *McCulloch v Maryland*, 17 U.S. (4 Wheat.) 316, p. 405.

With regard to the first question, concerning the division of functions between the constitutional courts and the Court of Justice, it should be noted, as the Spanish Constitutional Court has pointed out, for example, that the purpose of abstract review proceedings for unconstitutionality (both appeals and questions of unconstitutionality) is to guarantee the supremacy of the constitution over any national law that contradicts it, in order to purge the Spanish legal system of unconstitutional rules; whereas the purpose of a preliminary ruling on interpretation is to ensure that there are no discrepancies in the interpretation of EU law as a whole, thereby enabling the national courts responsible for applying the legal system to interpret European rules correctly and not to apply domestic rules that are incompatible with them.

This different purpose means that both procedural mechanisms, the preliminary ruling and the question of unconstitutionality, can generally operate independently, since the fact that a rule with the force of law is in conformity with the Constitution (and does not have to be removed from the Spanish legal system for that reason) does not preclude that, in a specific case, it may be considered inapplicable due to its incompatibility with a rule of the European Union, and that the competent court may raise the corresponding preliminary ruling.

Thus, the analysis of constitutional validity does not prejudge that of applicability (and vice versa), since both use different regulatory parameters of control, given that constitutional proceedings examine the adequacy of the legal rule to the national Constitution and preliminary rulings on interpretation determine its compatibility with EU law. Furthermore, both proceedings are resolved through equally diverse legal institutions, the constitutional courts in the first case and the Court of Justice in the second.

This does not prevent a constitutional court itself from referring questions to the Court of Justice for a preliminary ruling, for example, when it is asked to review the constitutionality of a national law the content of which relates to the adaptation of national law to the mandatory provisions of European rules. This would enable the Court of Justice to review the validity of those provisions in the light of primary EU law, in particular, the rights recognised in the Charter of Fundamental Rights; [3] or when

3| Judgment of 22 June 2010, *Melki and Abdeli*, C-188/10, ECLI:EU:C:2010:363.

the constitutional court finds a possible conflict between the requirements of EU law, as interpreted by the Court of Justice, and national constitutional identity.

With regard to the second question, concerning the division of functions between constitutional and ordinary national courts when acting as European courts, the process of European integration has transformed the systems of concentrated constitutional review of laws into a kind of mixed system where ordinary courts may carry out diffuse reviews of the conformity of those same laws with European law, which may lead to their non-application.

This failure to apply domestic law can be a problem, if it is not kept within reasonable limits, in constitutional systems such as that of Spain, which in all cases subject the judiciary to the rule of law and directly link the rule of law itself to 'ensur[ing] the rule of law as an expression of the popular will', as the preamble to our Constitution does. That is why it is so important to guarantee that the preliminary ruling procedure is used effectively to fulfil its natural function of ensuring the primacy of EU law, and is not used in certain cases as an indirect means of avoiding or delaying the application of domestic law or the functioning of the national system of legal remedies, which is what guarantees legal certainty in the application of the law of each Member State. This is particularly true in cases where the fundamental human rights of citizens protected by the law in question are at stake and the application of that law is delayed.

The Court's own case-law has rightly referred to certain cases in which a preliminary ruling is inadmissible, such as a manifest lack of causal link between the questions raised and the main proceedings; abuse of the preliminary ruling procedure by the national court (in cases of fictitious litigation or where the European rule subject to interpretation cannot clearly be applied) and the insufficiency of the factual and legal information provided by the national court in the request for a preliminary ruling.

And sometimes, we find that the same substantive principle, enshrined both in the constitutions of the Member States and in the original EU law (principles such as the rule of law, legal certainty or fundamental rights themselves), constitutes a parameter for reviewing State provisions in order to determine both their conformity

with national constitutions – and therefore their validity – as well as their conformity with EU law – and therefore their applicability.

This in itself need not be problematic, provided that both the Court of Justice and the constitutional court act with the necessary loyalty and mutual deference. This is especially true if we take into account that the Charter actually recognises fundamental rights resulting from the common traditions of the Member States and that, in general, their interpretation will be equivalent in the internal constitutional order and in that of the European Union, except in extraordinary cases.

With regard to appeals for the protection of human rights *(amparo* appeals), in which the Spanish Constitutional Court guarantees the effectiveness of constitutional rights and guarantees through a direct appeal by the citizens concerned, a different problem may arise.

In such cases, the raising of preliminary questions that are obstructive, that do not correspond to a genuine legal doubt and that do not affect EU law, at the stage of enforcement of a judgment that has recognised fundamental rights, may constitute, at the same time, a breach of constitutional *res judicata*, an unlawful alteration of the principle of internal judicial hierarchy and the unjustified suspension of the protection of fundamental rights recognised by the court of last instance of the national legal system.

It is important to note that the internal regulations of the Kingdom of Spain are very clear regarding the binding nature of Spanish Constitutional Court judgments on ordinary domestic courts and judges.

In this regard, Article 164 of the Spanish Constitution establishes that the judgments of the Spanish Constitutional Court 'have the validity of *res judicata*' and are not subject to appeal.

During the 45 years of the existence of the Spanish Constitutional Court, this national regulation has been scrupulously respected by Spanish judges and courts, without exception.

However, we cannot hide our concern at the fact that cases have recently arisen in which the court of instance leaves open the application of fundamental rights recognised by the Spanish Constitutional Court in proceedings that have already been concluded

and even partially enforced, by referring questions for a preliminary ruling when the possible application of EU law had not been raised at any stage of the proceedings, thereby delaying or circumventing the effective application of the fundamental right of citizens who had already been recognised, with the validity of *res judicata*, by the Spanish Constitutional Court.

The Court of Justice has repeatedly emphasised the importance of the principle of *res judicata* in both the legal order of the European Union and in national legal orders.

Indeed, according to the Court, in order to ensure both the stability of the law and legal relations and the proper administration of justice, it is necessary that judicial decisions which have become final after all available legal remedies have been exhausted cannot be challenged. [4]

It follows from the Court's own case-law that EU law does not require Member States to call into question the *res judicata* effect of national decisions; nor does it require a national court to disapply domestic rules of procedure which confer *res judicata* effect on a judicial decision.

The Court of Justice has established an exception to this principle of *res judicata:* where the defendant has not been able to invoke the rights conferred on him or her by EU law.

Thus, in order to assess whether such an exception to the principle of *res judicata*, based on the principle of the effectiveness of EU law, applies, it would be necessary to determine whether the validity of *res judicata* makes it impossible in practice or excessively difficult to exercise the rights conferred by the legal order of the European Union. [5]

4| See, in particular, judgments of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513, paragraph 38; 16 March 2006, *Kapferer*, C-234/04, ECLI:EU:C:2006:178, paragraph 20; 3 September 2009, *Fallimento Olimpiclub*, C-2/08, ECLI:EU:C:2009:506, paragraph 22; 6 October 2009, *Asturcom Telecomunicaciones*, C-40/08, ECLI:EU:C:2009:615, paragraphs 35 and 36; 10 July 2014, *Impresa Pizzarotti*, C-213/13, ECLI:EU:C:2014:2067, paragraph 58; 6 October 2015, *Târşia*, C-69/14, ECLI:EU:C:2015:662, paragraph 28; and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 38.

5| See, in particular, judgments of 16 March 2006, *Kapferer*, C-234/04, ECLI:EU:C:2006:178, paragraphs 21 and 22; 26 October 2006, *Mostaza Claro*, C-168/05, ECLI:EU:C:2006:675, paragraph 24; 3 September 2009, *Fallimento Olimpiclub*, C-2/08, ECLI:EU:C:2009:506, paragraph 24; 6 October 2015, *Târşia*, C-69/14, ECLI:EU:C:2015:662, paragraph 27; and 18 February 2016, *Finanmadrid EFC*, C-49/14, ECLI:EU:C:2016:98, paragraph 40.

This makes it particularly important to ascertain whether such a circumstance exists in a dispute in which the national court, questioning the validity of *res judicata* conferred by a national provision, seeks to reopen the case, ruling again or referring a question for a preliminary ruling that would allow it to rule again, when the proceedings have already been concluded and even partially enforced, thereby also jeopardising, for citizens whose fundamental right has already been recognised, the possible breach of the principle against double jeopardy *(non bis in idem)*, by making a new trial possible. [6]

Only the finding that there are rights conferred by EU law that cannot be exercised would, in our view, determine the possibility of derogating from this principle of *res judicata*. This is not the case in the proceedings in which this issue has been raised before us to date.

Furthermore, the principle of effectiveness of EU law would not enable national courts to enforce objective mandates if this would, in turn, breach fundamental rights. As the Court of Justice recalled in the judgment of 5 December 2017, *M.A.S. and M.B.* (known as *Taricco II*), in those cases it is for the national lawmakers and not the national court to take the necessary measures to ensure compliance with such mandates.

It is therefore necessary, within the framework of this frank and sincere dialogue that is emerging during these sessions in Sofia, to point out the concern of the Spanish Constitutional Court that the preliminary ruling procedure may be used either to seek an alternative application of the principles enshrined in both national constitutions and EU law; or to block the enforcement of constitutional court judgments recognising breaches of fundamental rights, instead of being used to obtain a necessary interpretation of EU law, as is its original purpose.

Throughout my long professional career – as a Supreme Court judge, Attorney General and as both judge and President of the Constitutional Court of the Kingdom of Spain – I have always been a passionate admirer of the enormous work that the Court has carried out, very intelligently, to contribute to the unity, strength and overall effectiveness of EU law and, ultimately, to the construction of the European Union. And I still am. I believe that this is entirely compatible with expressing, in this area of cooperation,

6| Binding provisions of EU law may directly confer rights on individuals. This principle of direct effect means that EU law does not only apply to relations between States, but also confers rights on individuals that they can rely on before any national court.

dialogue and proximity, some of the concerns that, in the context of the application of the common legal order of the European Union, may arise for me as President of the Spanish Constitutional Court. In any case, it is with the sincere intention of contributing to a reflection that will enable us to improve and strengthen our common legal order.

I would like to conclude by reminding my distinguished colleagues, representatives of the European Constitutional Courts, that next October, the Spanish Constitutional Court will host the 6th Congress of the World Conference on Constitutional Justice, an event in which more than 100 Constitutional Courts from around the world will participate. We will welcome them with the utmost hospitality so that we may discuss in depth the issues that concern us in relation to our jurisdiction and our independence.

Thank you very much.

See you in Madrid!

2nd panel

Identity of the EU and EU constitutionalism in times of crisis: Constitutional Courts and the Court of Justice

Mr Maciej Szpunar
First Advocate General of the Court of Justice of the European Union

Preserving the common legal order in times of crisis. Introductory remarks on judicial review before the Court of Justice

Maciej Szpunar, First Advocate General of the Court of Justice of the European Union

Dear colleagues,

Dear friends,

It is a great honour and pleasure to be with you today in Sofia for the third edition of the *EUnited in Diversity* conference. This year is framed by a compelling and timely theme: *Between Common Constitutional Traditions and National Identities*.

I firmly believe that initiatives like this one – which bring together the highest national courts and the Court of Justice – are essential to fostering judicial dialogue within our common legal framework.

They help us safeguard the values we share, while creating space for mutual understanding amid our differences.

This panel is devoted to *The Identity of the EU and EU Constitutionalism in Times of Crisis*. My contribution will focus on the perspective of the Court of Justice during times of crisis, while my colleagues will offer insights from their respective constitutional courts.

The title of this panel invites us, first, to reflect on what constitutes the so-called 'EU identity', as developed by the Court of Justice, and then to explore how the Court has sought to uphold this identity even under the pressure of crisis.

To that end, I will address two central questions:

- Does the Court apply a **different standard of review** to crisis measures as compared to measures adopted under normal circumstances?
- Are EU-level crisis measures subject to **a lighter standard of review** than crisis measures adopted by the Member States ?

While preparing my speech today, I asked myself the following question: why have the organisers linked the identity of the European Union with constitutionality in times of crisis?

In my view, this is entirely justified. As the Court underlined in its conditionality judgments,[1] the values enshrined in Article 2 'define the very identity of the European Union as a common legal order.'[2] As the Court emphasised, these values are not merely a statement of policy guidelines or intentions.

These values – such as democracy, freedom and the rule of law – are often put under pressure during crises. Consider how freedoms can be curtailed in a pandemic, how human rights may be restricted during a massive influx of refugees, or how democratic safeguards can be challenged in emergencies in general. Yet paradoxically, these values become even more essential in such times.

The rule of law, in particular, illustrates this tension: crises often demand swift action, frequently taken by the executive branch. Nevertheless, in a Union based on the rule of law, such actions must remain subject to judicial scrutiny – primarily through the **principle of proportionality.**

In this regard, the task of the Court of Justice mirrors that of administrative and constitutional courts in the Member States – and rightly so. After all, the proportionality principle stems from the constitutional traditions common to the Member States.[3] Within their respective mandates, both the Court of Justice and national constitutional courts serve as guardians of our shared values at all times.

In this context, one has to mention another aspect of identity that may be invoked in times of crisis. I am referring here to national identity, as referred to in Article 4(2) TEU.

1| Judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97; and *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

2| See judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraphs 127 and 232.

3| Lenaerts, K., "Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action", *ECB Legal Conference*, 2021.

The FIDE 2025 Report on EU Emergency Law[4] identifies that some Member States may – in times of crisis – refer to this provision in order to justify extraordinary measures aiming at the safeguarding of 'essential State functions'. Such measures may, however, potentially lead to the breach of obligations stemming from EU law. Although this is not the main theme of our discussion today, I would just like to mention that EU law itself contains many emergency and exception clauses. Furthermore, invoking Article 4(2) TEU cannot be unilateral in nature. The possibility of relying on this provision will ultimately be assessed by the Court of Justice.[5]

In this respect, the Court of Justice plays a unique role: it examines both EU and national crisis measures – the latter obviously only in so far as they fall within the scope of EU law. It is important to clarify briefly this dual function.

The Court has jurisdiction to review the legality of binding EU acts.[6]

National measures, **by contrast,** fall primarily under the scrutiny of national courts, according to the constitutional framework of each Member State.

The role of the Court of Justice in this regard is to determine whether **EU law precludes such national measures,** typically when a national court seeks guidance via the **preliminary ruling procedure.**[7] While the Court can – and does – provide interpretative guidance on the application of the principle of proportionality, it is for national courts to apply that principle to the facts before them. Additionally, in **infringement proceedings,** the Court may assess whether a Member State has infringed its obligations under EU law – including through action or inaction during a crisis.[8]

4| Sarmiento, D., ˝General Report on EU Emergency Law˝. in Pacuła, K., (ed.), *EU Emergency Law*, University of Silesia Press, 2025, p. 149 et seq.

5| For example, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraphs 233 to 235.

6| For example, judgment of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, ECLI:EU:C:2017:631.

7| For example, judgment of 5 December 2023, *Nordic Info*, C-128/22, ECLI:EU:C:2023:951.

8| As in judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

Returning to our core questions, I would like to stress, at the outset, that I **do not think** that **crisis measures** are subject to a **different standard of review.** I also see **no discrepancy** in the scope of the principle of proportionality depending on whether it is the EU or a Member State that acts in response to a crisis.

Instead, the level of judicial scrutiny depends on other well-established factors, such as:

1. Whether the decision-makers – be they legislative or executive – were required to make **complex assessments, or political, economic and social choices;**

2. Whether the **precautionary principle** applies; and

3. Whether the measure restricts **fundamental rights.**

None of these criteria are specific to crises; they apply in ordinary times as well. They indeed reflect well-established principles of judicial review before the EU Courts. Nonetheless, for the purposes of our panel, I have selected some illustrations of the application of these principles to crisis-related measures.

On the first point, the Court has long recognised that EU institutions enjoy a **broad discretion** when adopting measures involving complex assessments or political, economic and social choices. Judicial review in such cases is limited to checking for ***manifest errors of assessment.***

In other words, a measure is invalid only if it is ***manifestly inappropriate*** in the light of the objective pursued.

This standard of review was applied, inter alia, in the Euro crisis case-law.[9] It was also reaffirmed in the judgment in *Slovakia and Hungary* v *Council,*[10] concerning the relocation of asylum seekers amid the 2015 migration crisis. The Court further acknowledged that the Council had to make complex assessments 'within a short time in order to provide

9| For example, judgment of 15 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400, paragraphs 68, 74, 81 and 91; and of 18 October 2017, *Weiss and Others*, C-493/17, ECLI:EU:C:2017:792, paragraph 24.

10| Judgment of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, ECLI:EU:C:2017:631.

a swift and tangible response'.[11] That emergency context thus seems to **reinforce** the need for a limited judicial review focused on manifest errors of assessment.

In such contexts, the Court does not usually engage in proportionality *stricto sensu* – that is, balancing competing interests. That responsibility lies with the political institutions. In this way, the Court respects the separation of powers and stays within its remit.

But let me be clear: broad discretion is never boundless
nor is it a synonym for arbitrariness. Even in times of crisis, the Court has not hesitated to annul measures that were manifestly inappropriate, such as those adopted by the European Union to protect public health after the BSE outbreak.[12]

The second factor shaping judicial scrutiny is the **precautionary principle.** Where there is scientific uncertainty about potential risks – for example, to human health – EU institutions and Member States may adopt protective measures without needing to wait for full evidence of harm.

The Court has recognised that this principle justifies a wider margin of discretion and thus influences the application of the proportionality principle.[13]

This impact of the precautionary principle was particularly relevant when assessing both national and EU measures adopted during the COVID-19 pandemic. In the judgments in *Nordic Info*[14] and *Roos and Others* v *Parliament*,[15] the EU Courts considered measures such as travel restrictions, quarantine requirements and access rules linked to holding an EU Digital COVID Certificate.

11| Judgment of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, ECLI:EU:C:2017:631, paragraph 208.

12| Judgment of 6 December 2005, *ABNA and Others*, C-453/03, C-11/04, C-12/04 and C-194/04, ECLI:EU:C:2005:741, paragraph 83.

13| Judgment of 19 November 2020, *B S and C A (Marketing of cannabidiol (CBD))*, C-663/18, ECLI:EU:C:2020:938, paragraph 90.

14| Judgment of 5 December 2023, *Nordic Info*, C-128/22, ECLI:EU:C:2023:951.

15| Judgment of 27 April 2022, *Roos and Others* v *Parliament*, T-710/21, T-722/21 and T-723/21, ECLI:EU:T:2022:262. Confirmed on appeal: judgment of 16 November 2023, *Roos and Others* v *Parliament*, C-458/22 P, ECLI:EU:C:2023:871.

In the judgment in *Nordic Info*, the Court recognised the discretion enjoyed by national authorities in the light of public health risks and scientific uncertainty. National courts were thus instructed to assess only whether it was evident that less restrictive measures would have achieved the same level of protection – a strong signal of **judicial restraint** concerning national measures adopted during the pandemic. [16]

That said, even precautionary measures cannot be based on purely hypothetical considerations. Authorities must rely on relevant data – including statistics – available at the time of the decision.

Interestingly, in the judgments in *Nordic Info* and *Roos*, the EU Courts **did** conduct a **balancing exercise,** weighing the protection of public health against the restriction of fundamental rights – such as free movement and respect for private life. [17]

This brings me to the **third factor** influencing judicial scrutiny before the Court of Justice: the **involvement of fundamental rights.**

Indeed, when a potential restriction of a fundamental right is at the core of a particular case, [18] the Court applies a **strict proportionality review** – regardless of whether its adoption required complex assessments, irrespective of whether the context is a crisis and regardless of whether the measure was adopted by an EU institution or a Member State.

A landmark example remains the judgment in *Kadi*, [19] where EU restrictive measures implementing a UN Security Council resolution in the aftermath of 9/11 were annulled

16| Judgment of 5 December 2023, *Nordic Info*, C-128/22, ECLI:EU:C:2023:951, paragraph 91.

17| Judgment of 5 December 2023, *Nordic Info*, C-128/22, ECLI: EU:C:2023:951, paragraph 92. Judgment of 27 April 2022, *Roos and Others* v *Parliament*, T-710/21, T-722/21 and T-723/21, ECLI:EU:T:2022:262, paragraphs 106 and 252.

18| In this respect, I would like to draw your attention to the decision of the Lithuanian Constitutional Court of 24 January 2023. That court underlined that if a measure adopted in the context of the COVID-19 pandemic leads to the extinction of the 'essence' of a fundamental right, a more stringent constitutional review applies (see Sarmiento, D., "General Report on EU Emergency Law˝, in Pacuła, K., (ed.), *EU Emergency Law*, University of Silesia Press, 2025, p. 65).

19| Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

because they infringed fundamental rights, including the right to be heard and the right to effective judicial protection.

Likewise, several landmark data protection cases highlight that, within this strict review, the judicial reasoning is based upon, inter alia, the extent and the seriousness of the interference as well as the importance of the objective pursued. In the judgments in *Digital Rights Ireland*, [20] *Tele2 Sverige*, [21] and *La Quadrature du Net*, [22] the Court considered EU and national rules on personal data retention that seriously interfered with the rights to respect for private life and to the protection of personal data. Those rules were subject to **strict review** by the Court, despite the objective of **safeguarding national security and combating terrorism.** But let me be clear: this strict review does not mean that the right to privacy always prevails. As the judgment in *La Quadrature du Net* shows, where a Member State faces a serious threat to national security that is shown to be genuine, present or foreseeable and provided that the duration of the data retention is limited to what is strictly necessary, even particularly serious interferences with the right to privacy are admissible. [23]

In conclusion, whether in times of crisis or normalcy, whether assessing EU acts or national measures, the Court of Justice has remained consistent in applying the principle of proportionality. Its case-law offers both EU institutions and Member States the flexibility needed to act swiftly when necessary, while ensuring adequate judicial review to protect the rights of those affected. The existing framework applied by the Court is, in my view, fully capable of accommodating these needs.

Thank you very much for your attention and I am looking forward to our exchanges.

20| Judgment of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, ECLI:EU:C:2014:238 (see, in particular, paragraphs 47 and 48).

21| Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, ECLI:EU:C:2016:970 (see, in particular, paragraphs 102 and 115).

22| Judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 (see, in particular, paragraphs 134 to 137).

23| See judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791, paragraph 177.

Mr Giovanni Amoroso
President of the Constitutional Court
of the Italian Republic

European and national identity, public powers in situations of urgency and necessity, and constitutional case-law in times of crisis

Giovanni Amoroso, President of the Constitutional Court of the Italian Republic

1. Being united in diversity. Respect for national identities

'United in diversity' is the central theme of this conference.

This is also the core topic of our discussion in today's second panel entitled 'Identity of the EU and EU constitutionalism in times of crisis: Constitutional courts and the Court of Justice'.

The identity of the European Union has long united us and has been a strong value that has given us a long period of peace both in the second half of last century and in the current one.

Unity is key for the European legal system to function properly.

The value of unity is fundamental to the proper functioning of the European legal system, which – although the EU is not yet a confederation of States – is a shared common space governed by the principles of the rule of law and representative democracy.

In the ongoing integration process, European rules must be the same for all States, and the same applies to their interpretation.

The unity of the European legal system is guaranteed by the Court of Justice, which has this specific mission and has the final say in the interpretation of European legislation.

However, at the current stage of the integration process, the diversity of national legal systems, even within a unified context, is itself recognised as a value of the European Union: we are indeed united in diversity. This creates a necessary and balanced equilibrium between the primacy of European law and national identity, typical of the current stage of European integration: the supremacy of European law finds a narrow and exceptional limit in the supreme principles of national constitutional systems.

2. Emergency powers: the COVID-19 emergency

Let's now focus on how the Constitutional Court handles emergency situations, starting with the COVID-19 pandemic. This health crisis tested the government's power to take urgent action through both primary and secondary legislation.

On 30 January 2020, the World Health Organization (WHO) declared the outbreak a 'public health emergency of international concern', which on 11 March 2020 was reclassified as a 'pandemic', i.e. a highly contagious disease spreading rapidly across continents.

Initially, Italy treated the outbreak as a civil protection emergency. The government applied the Civil Protection Code, which allows the Council of Ministers to declare a state of emergency for a set time and to issue executive orders.

The progressive spread of the COVID-19 pandemic led the government to resort to emergency powers to adopt more restrictive measures.

Numerous decree-laws were issued by the government and then converted into law by Parliament. This led to the application of uniform restrictive measures throughout the country, the so-called lockdown, with the shutdown of all non-essential services and even more radical restrictions on movement within the country.

Special rules were imposed on businesses and social activities, requiring specific safety guidelines to be followed in order to prevent the spread of the virus.

Crossing regional boundaries was banned and a 'zone system' was created, with every area being assigned a colour (white, yellow, orange or red) according to the degree of infection spread.

Special measures were also implemented to ensure the safety of schools, universities, social activities, and transportation.

Eventually, vaccination was made mandatory first for health workers, then for school staff, the military, police forces, and finally, for all Italian residents aged 50 and over.

The state of emergency lasted until 31 March 2022.

The government's use of these emergency powers raised several legal questions, especially about the following: (a) the government's right to create a single set of rules for the whole country, preventing regions from making their own laws; (b) the impact of such rules on personal freedom (notably *habeas corpus*); and (c) the constitutionality of mandatory vaccination despite the small risk of side effects.

The Constitutional Court ruled on all these issues.

On the first point, the Court held in 2021 that the national government had the right to make a single set of rules to fight the pandemic because it fell under the government's exclusive power over public health. [1]

On the second point, the Court decided in 2022 that obliging people to quarantine did not seriously deprive them of their personal freedom. Instead, it was a reasonable health measure that limited movement, and this was legally acceptable. [2]

On the third point, the Court ruled in 2023 that mandatory vaccinations were constitutional. It explained that while there is a small risk of side effects, this does not render the relevant law illegal. However, if individuals are harmed by a vaccine required by regulation, they have the right to obtain compensation for the injuries suffered. [3]

1| Judgment of the Italian Constitutional Court of 12 March 2021, 37/2021, ECLI:IT:COST:2021:37.

2| Judgment of the Italian Constitutional Court of 26 May 2022, 127/2022, ECLI:IT:COST:2022:127.

3| Judgment of the Italian Constitutional Court of 9 February 2023, 14/2023, ECLI:IT:COST:2023:14.

3. Constitutional case-law in times of crisis

There have been numerous rulings by the Constitutional Court concerning laws passed to deal with the different crises – economic, financial, migration and security crises – that have affected Italy and the EU in recent years.

3.1. Economic and financial crisis

The Court has reviewed various laws meant to cut public spending during adverse economic times.

The Court has generally held that these laws were constitutional when they were conceived as a reasonable and temporary measure to deal with an emergency situation. [4]

However, the Court declared some laws to be unconstitutional when they provided for emergency measures which later became permanent. This happened with a tax on energy companies, [5] a freeze on public sector salaries, [6] and limits on how much public employees could earn. [7]

In a recent case this year, [8] that court referred a preliminary question to the Court of Justice of the European Union on special fiscal measures. It asked whether a special tax on the extra profits of energy companies complied with EU law, especially since it applied to a wider array of companies than those originally envisaged by the underlying EU provision.

4| Judgments of the Italian Constitutional Court of 17 December 2013, 310/2013, ECLI:IT:COST:2013:310; of 4 June 2014, 154/2014, ECLI:IT:COST:2014:154; and of 18 July 2014, 219/2014, ECLI:IT:COST:2014:219.

5| The so-called Robin Hood tax: judgment of the Italian Constitutional Court of 11 February 2015, 10/2015, ECLI:IT:COST:2015:10.

6| Judgment of the Italian Constitutional Court of 23 July 2015, 178/2015, ECLI:IT:COST:2015:178.

7| Judgment of the Italian Constitutional Court of 28 July 2025, 135/2025, ECLI:IT:COST:2025:135.

8| Order of the Italian Constitutional Court of 20 February 2025, 21/2025, ECLI:IT:COST:2025:21.

3.2. Migration crisis

The Constitutional Court has also been called upon to review laws aimed at controlling illegal immigration.

This year, two important decisions were made:

- The Court criticised the absence of a clear and detailed law providing for the treatment of migrants in repatriation centres. [9] The Constitution requires a specific law to control how an individual's freedom can be limited. The Court pointed out that, by leaving the regulation of the matter almost entirely to regulatory provisions and discretionary administrative measures, the legislature had failed to fulfil its positive obligation to regulate by law the 'means' of restricting personal freedom, thereby bypassing the constitutional protection that the 'absolute reserve of law' is meant to provide.
- In the case of the *Ocean Viking* ship, the Court upheld the constitutionality of the provision applying administrative sanctions to the captain of the ship or the ship-owner who neither complies with the instructions nor provides the information requested by the competent national authority for search and rescue at sea. [10]

3.3. Security crisis

With regard to the constitutional case-law on measures to protect security and public order, a recent ruling is worth mentioning. [11]

The Court ruled on the questions of constitutionality relating to the so-called urban Daspo, i.e. an administrative access ban that prohibits an individual from accessing certain public places or a specific area of the city, such as stations, schools or tourist areas, for a certain period of time. The Court highlighted that, in order to legally adopt the measure,

9| Judgment of the Italian Constitutional Court of 3 July 2025, 96/2025, ECLI:IT:COST:2025:96.

10| Judgment of the Italian Constitutional Court of 8 July 2025, 101/2025, ECLI:IT:COST:2025:101.

11| Judgment of the Italian Constitutional Court of 25 March 2024, 47/2024, ECLI:IT:COST:2024:47.

it is not sufficient that an individual's presence may appear inappropriate to the decorum of the area in question, but it is necessary that their conduct be associated with a concrete danger of committing crimes: the measure must be intended to remove dangerous individuals. The Court specified that the law expressly requires that the danger to public safety emerge from the conduct of the individual (and not, therefore, solely from personal characteristics inferred, for example, from a criminal record). In order for the access ban to be triggered, the individual's behaviour must be a concrete indication of the danger that their presence may pose to others.

3.4. Climate and energy crisis, the promotion of renewable energy

With regard to the climate crisis, a recent constitutional law amended Article 9 of the Italian Constitution, adding that the protection of the environment, biodiversity and ecosystems is 'also in the interest of future generations'.

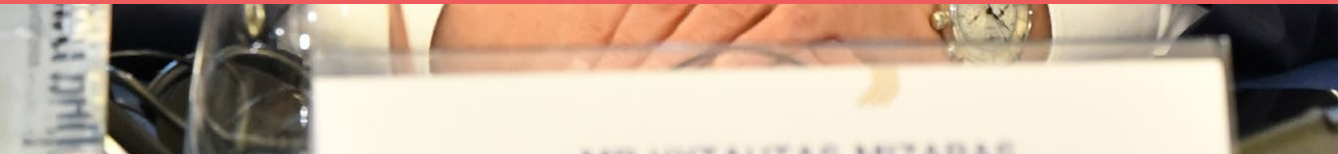
The same law supplemented Article 41 of the Constitution, stipulating that economic activity must not cause damage only to health, safety, freedom and human dignity, but also to 'the environment', and that economic activity must pursue 'environmental' as well as social goals.

The Court has made many decisions that support renewable energy. For example, in 2025, the Court held that a regional law that stopped the construction of new renewable energy plants for 18 months was unconstitutional. The Court explained that this law infringed national laws and European rules on the promotion of renewable energy. [12]

12| Judgment of the Italian Constitutional Court of 11 March 2025, 28/2025, ECLI:IT:COST:2025:28.


MS ANTONELLA SCIARRONE ALIBRANDI

Mr Vytautas Mizaras
Judge at the Constitutional Court
of the Republic of Lithuania



The interests of national security and human rights in the face of threats to the democratic order

Vytautas Mizaras, Judge at the Constitutional Court of the Republic of Lithuania

1. Introduction

In exercising constitutional review, the Constitutional Court evidently bears the duty to reconcile constitutional values and to ensure their coherence; this becomes particularly important in complex crises.

The Constitutional Court of the Republic of Lithuania, like constitutional courts in other States, has faced the necessity of adopting particularly important decisions regarding complex crisis situations arising in the State – such as austerity measures adopted in response to an extremely difficult economic and financial situation, as well as regarding the constitutionality of measures to manage the global COVID-19 pandemic.

At present, Lithuania, like the rest of Europe, is going through new developments. Both Lithuania's domestic and foreign policies are determined by its geographical location, including its proximity to Russia. This has not only affected the decisions made by the participants of the political process in the country but has also influenced the agenda of the Constitutional Court, as the institution of constitutional justice, in cases where the constitutionality of these decisions has been challenged.

In its rulings, the Constitutional Court has emphasised that the geopolitical orientation of the State, enshrined in the Constitution and closely linked to the fundamental constitutional values – namely, the independence of the State, democracy, and the republic, entails the membership of the Republic of Lithuania

in the European Union and in NATO as well as the obligation to fulfil the international commitments arising from such membership. [1]

Such geopolitical orientation of the State of Lithuania is based on recognised and protected universal democratic constitutional values, which are shared with other European States. [2]

The Constitutional Court has held that the independence, territorial integrity and the constitutional order of the State are among the most important constitutional values, the protection of which is the priority duty of the State authorities and all citizens; ensuring the fulfilment of this duty is a guarantee of national security.

At the same time, the protection of human rights is also intrinsically linked to national security. In its doctrine, the Constitutional Court has not developed any separate standards or models for the protection or limitation of human rights that are applied specifically in crises. In other words, the usual test for assessing the protection of human rights and the lawfulness of their limitation remains applicable. The Constitutional Court likewise continues to bear the responsibility of ensuring the harmony of constitutional values.

In this context, I have chosen to focus more specifically on one case examined by the Lithuanian Constitutional Court in 2023 concerning the use of migrants as an instrument of hybrid attack.

1| Judgments of the Lithuanian Constitutional Court of 7 July 2011, no. 22/2008-31/2008-9/2010-35/2010, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta154/content, and of 24 January 2014, no. KT2-N1/2014, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta15/content.

2| Judgment of the Lithuanian Constitutional Court of 24 January 2014, no. KT2-N1/2014, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta15/content.

2. The use of migrants as an instrument of hybrid attack

The incitement and organisation of illegal migration for political purposes has already been employed previously. For instance, in 2015, in the context of its military intervention in Syria, Russia used migrants as an instrument of hybrid attack with the aim, among others, of inciting migration into Europe and thereby provoking political tension and destabilising the EU Member States. The incitement and organisation of illegal migration may be regarded as an element of modern 'hybrid warfare'.

First, it is necessary to outline the key facts and circumstances underlying the constitutional justice case decided by the Lithuanian Constitutional Court in its judgment of 7 June 2023. [3]

2.1. Circumstances of the constitutional justice case

Following the outbreak of civil unrest in Belarus during the summer of 2020, Lithuania undertook a political and moral commitment to provide asylum to Belarusians fleeing the authoritarian regime of Aliaksandr Lukashenko. In parallel, Lithuania extended active support to the Belarusian opposition, which sought to challenge and ultimately remove Lukashenko from power. As a result, Lithuanian policymakers began to express growing concerns that both Russia and Belarus might instrumentalise the Lithuanian–Belarusian border as a tool of political coercion and destabilisation.

By May 2021, Lithuania experienced a marked increase in irregular migration flows originating from Belarus. The Minister of the Interior stated that Belarus had issued explicit threats involving the use of migration as leverage and that Belarusian officials were allegedly facilitating the illegal entry of migrants into Lithuanian territory. This development was later formally characterised by Lithuanian authorities as a manifestation of *hybrid warfare* – a deliberate and coordinated strategy designed to exploit vulnerabilities within the State's border and asylum systems.

3| Judgment of the Lithuanian Constitutional Court of 7 June 2023, no. KT53-A-N6/2023, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2861/content.

As migration pressures intensified during the summer of 2021, the Lithuanian Government declared a national state of emergency on 2 July 2021 in response to the escalating crisis. The Lithuanian Armed Forces were deployed to assist the State Border Guard Service, and extensive physical security measures were implemented, including the erection of barbed-wire fencing and the commencement of permanent border barrier construction. Authorities were also granted the power to turn back irregular migrants and return them to Belarus, reflecting an increasingly securitised approach to migration management.

On 13 July 2021, the *Seimas* (Lithuanian Parliament) adopted a resolution entitled *On Countering Hybrid Aggression*, which formally asserted that hostile foreign States were conducting hybrid aggression against the Republic of Lithuania. The resolution emphasised that such actions – organising the flow of third-country nationals across Lithuania's border in breach of international law-were aimed at destabilising the internal situation and inflicting political and social harm on the Lithuanian State.

That same day, during an extraordinary session, the *Seimas* urgently adopted amendments to the Law on the Legal Status of Foreigners.[4] These legislative changes were designed to accelerate the processing of asylum applications and to restrict certain rights of asylum seekers in cases where the State could not ensure them due to the imposition of martial law, a state of emergency, or an emergency situation arising from a mass influx of foreigners. Under these amendments, migrants could be detained without a court order and were prohibited from moving freely within Lithuanian territory while the emergency situation remained in force. In accordance with these amendments, migrants were detained (and accommodated in the designated facilities) for up to six months in the absence of a court decision and were not allowed to move freely within Lithuania during the period of the declared extreme situation. These amendments to the Law on the Legal Status of Foreigners were challenged before the Constitutional Court.

4| The Law of the Republic of Lithuania No. XIV-506 of 13 July 2021 on Amendment of Articles 5, 71, 76, 77, 79, 113, 131, 136, 138, 139, 140 of the Law On the Legal Status of Foreigners, No. IX-2206 and supplementation of The Law by chapter IX (1). Available at: https://www.e-tar.lt/portal/lt/legalAct/a4780990eac111eb9f09e7df20500045.

Subsequently, on 10 November 2021, a state of emergency was declared in Lithuania's border regions adjacent to Belarus, remaining in effect until mid-January 2022. Later that year, on 23 December 2021, the Law on the Legal Status of Foreigners was further amended through the addition of a new section regulating its application during periods of martial law, a state of emergency, or in situations involving a mass influx of foreign nationals. These developments underscored Lithuania's evolving legal and policy response to hybrid threats at its eastern frontier, reflecting the intersection of migration governance, national security and international law.

2.2. The subject matter of the case

The petitioner (a natural person who had submitted an individual constitutional complaint) argued that the temporary accommodation of asylum seekers in the designated facilities, in accordance with the disputed legal regulation, amounted to the detention of a person. In his view, this followed from the fact that asylum seekers were denied freedom of movement within the territory of the Republic of Lithuania and such accommodation could last for up to six months.

According to the petitioner such a legal regulation was not in conformity with the Constitution due to the following reasons: (i) the liberty of a person was restricted without any decision of a national court or another institution; (ii) the disputed legal regulation created the preconditions for limiting the liberty of persons without assessing the individual circumstances of each situation; and (iii) it did not provide for any procedural guarantees or the possibility of filing a complaint with a court against such detention.

2.3. The ruling of the Constitutional Court and its substance

In assessing the constitutionality of the provisions of the Law on the Legal Status of Foreigners, the Constitutional Court, in its judgment of 7 June 2023, noted the following.

The provisions of the Constitution (Article 20), which enshrine the inviolability of human liberty, imply protection against arbitrary detention and any other unlawful restriction or deprivation of the liberty of a person, including measures that significantly restrict the person's freedom of movement.

However, the liberty of a person is not absolute and, where necessary, it may be limited; such a limitation may be imposed only in accordance with the conditions arising from the Constitution in relation to the limitation of the constitutional rights and freedoms of a person.

The legal regulation must create the preconditions for the authorities deciding on the limitation of the liberty of a person: (a) to assess, as far as possible, the individual situation of each person and, in view of all important circumstances, to individualise accordingly the applicable specific measures that limit the liberty of the person; (b) furthermore, where measures limiting the liberty of a person are applied, it must, in all cases, be sought that such measures are compatible with respect for human dignity.

The Constitutional Court noted that, although the declaration of a state of emergency is not, in itself, a basis for limiting the liberty of a person, nevertheless, under the Constitution, the liberty of a person may be limited for the purpose of protecting the constitutional order of the State, as well as ensuring public order, the defence and security of the State.

However, even when these objectives are sought, the liberty of a person may not be limited or restricted on general grounds, without assessing the actual threat posed by the person to the values protected by the Constitution, which would require that the liberty of the person be limited.

Under the Constitution, where it is necessary to limit the liberty of a person on the grounds and under the procedure laid down in laws, provision must be made for the possibility of verifying the lawfulness and reasonableness of such a limitation before a court.

In view of this, asylum seekers temporarily accommodated in the designated facilities under the Law on the Legal Status of Foreigners were not afforded the guarantees applicable to detainees under that law (such as the right to apply to a court or to request an alternative to detention). In addition, as emphasised by the Constitutional Court, under the Law on the Legal Status of Foreigners, foreigners who had submitted asylum applications were temporarily accommodated (for up to six months) in the designated facilities, without being granted the right to move freely within the territory of the Republic of Lithuania and in the absence of any decision issued by a competent authority. Their placement was based solely on the fact that they were in the Republic of Lithuania and that their asylum applications had not yet been examined in substance.

Thus, the legal regulation laid down in the Law on the Legal Status of Foreigners, providing for one of the most restrictive measures on the liberty of a person without a decision by a competent administrative authority, did not ensure asylum seekers the right to verify, before a court, the reasonableness and lawfulness of the measure applied to them.

Nevertheless, the Constitutional Court decided that such a measure should be assessed as one of the most stringent measures restricting the liberty of a person, which, having regard to the intensity of the limitation on the liberty of a person and the duration of its application and taking into account the circumstances of its application, could amount to the detention of a person.

In assessing the lawfulness of the limitation of the liberty of a person, the Constitutional Court held that the disputed legal regulation pursued a legitimate and constitutionally justified objective: ensuring public order and the protection of the State border during an extreme situation, a state of emergency, or martial law as well as managing the increased flow of foreigners crossing the Lithuanian border. However, under the disputed legal regulation, all asylum seekers were subject to the same measure – namely, temporary accommodation in the designated facilities without granting them the right to move freely within the territory of the Republic of Lithuania. Thus, no preconditions were created for assessing individually the situation of each person, including the actual threat posed by the person to the values protected by the Constitution and to the interests of the State and society intended to be protected by such a legal regulation. No preconditions were created for applying alternative measures that were less restrictive on the liberty of a person and that could be applied upon the detention of a person.

The sole fact that an extreme situation or a state of emergency has been declared in the State due to a mass influx of foreigners cannot, in itself, serve as a basis for subjecting all asylum seekers to the most stringent measure limiting their liberty. Such a measure, due to its duration and nature, may amount to detention and therefore, cannot be applied without assessing their individual situation and specific circumstances, including the specific threat that they may pose to the values protected by the Constitution and to the interests of the State and society.

The Constitutional Court also observed that, by the Law of 20 April 2023 on Amending the Law on the Legal Status of Foreigners, [5] the disputed provision of the law had been amended and reworded. According to the amended provision, in the event of an extreme situation declared due to a mass influx of foreigners, as well as in the event of a state of emergency or martial law, the Migration Department under the Ministry of Interior of the Republic of Lithuania is to take a decision on the temporary accommodation of asylum seekers in the designated facilities. An appeal may be filed with a district court against a decision of the Migration Department within 14 days from the date of the service of the decision. Nevertheless, as the Constitutional Court noted, in other respects disputed by the petitioner, the legal regulation laid down in the amended provision of the law remained unchanged. Therefore, the provision in question, in so far as, according to it, all asylum seekers were to be accommodated in the designated facilities without granting them the right to move freely within the territory of the Republic of Lithuania, and given that such accommodation could last for up to six months under subparagraph 5 of that article, was held to be incompatible with Article 20 of the Constitution.

2.4. Dialogue between the jurisprudence of the Constitutional Court of the Republic of Lithuania, EU law and international law

It should be noted that, in the ruling under discussion, the Constitutional Court also took into account the provisions laid down in EU law and international legal acts concerning measures limiting the liberty of asylum seekers, as well as the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. The Constitutional Court drew attention to the fact that, according to the case-law of the Court of Justice of the European Union, such an alternative to detention under the Law on the Legal Status of Foreigners – namely, accommodation in a specific place where movement is restricted to the territory of that place of accommodation and leaving that territory

5| The Law of the Republic of Lithuania No. XIV-1889 of 20 April 2023 on Amendment of Articles NR. IX-2206 4, 67, 1408, 14012 of the Law On the Legal Status of Foreigners, No. IX-2206 and Recognition of Article 14011, Article 14017 as void. Available at: https://www.e-tar.lt/portal/lt/legalAct/cf9bbb10e43611ed9978886e85107ab2.

without authorisation or unaccompanied is prohibited – essentially amounts to detention. The Court of Justice has held that such a coercive measure may be applied only where no less restrictive alternatives are available. The same position was also taken in the legal observations submitted by the United Nations High Commissioner for Refugees (UNHCR) concerning the legal regulation laid down in the Law on the Legal Status of Foreigners.

In its examination of the relevant EU legal framework in the constitutional justice case, the Constitutional Court of Lithuania emphasised several key principles derived from EU law.

First, under EU law, *detention* encompasses any measure whereby an asylum seeker is held in isolation at a specific location that deprives them of freedom of movement. Such detention involves the separation of the individual from the general population and the requirement to remain continuously within a confined and enclosed area. The accommodation of asylum seekers in a designated facility, under conditions that prohibit departure and are subject to continuous official supervision, is therefore indistinguishable from detention. This measure constitutes a form of coercion that restricts liberty and separates the individual from society.

Second, detention must be considered a measure of last resort and may be applied only after all non-custodial alternatives have been duly examined. An asylum seeker may be detained only if it is demonstrated that such detention is strictly necessary, proportionate to the legitimate aim pursued and justified on a case-by-case basis, provided that no other less restrictive or more effective alternative measures are available.

According to the interpretation of the Court of Justice of the European Union, a measure provided for in the Law on the Legal Status of Foreigners implementing the Reception Conditions Directive [6] – whereby an asylum seeker is accommodated in a designated location and allowed to move only within its boundaries, without authorisation to leave or without official accompaniment – constitutes *detention* within the meaning of EU law. [7]

6| Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (OJ L, 2024/1346, 22.5.2024).

7| According to the wording of recital 9 of Directive (EU) 2024/1346, 'detention' means the confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

Moreover, the Constitutional Court noted that a general threat to public order or internal security resulting from a mass influx of third-country nationals cannot, by itself, justify the detention of asylum seekers. Any such restriction must be based on a demonstrated and direct link between the measure and its contribution to the maintenance of public order or internal security. A threat to national security or public order may justify the imposition or continuation of detention only where the personal conduct of the individual poses an actual, present, and sufficiently serious danger to a fundamental interest of society or to the internal or external security of the Member State.

Building upon its engagement with international law – particularly the jurisprudence of the European Court of Human Rights (ECtHR) – the Constitutional Court further clarified the interaction between European and international human rights standards. Summarising the legal principles established in the European Convention on Human Rights and as interpreted by the ECtHR, as well as the provisions contained in other international instruments, the Constitutional Court emphasised the following considerations.

First, for the purposes of Article 5 of the Convention, the distinction between *deprivation of liberty* and *restriction of freedom of movement* depends on the degree and intensity of the restrictions rather than their formal classification. The accommodation of asylum seekers in designated centres, where their ability to move is limited by an administrative decision and subject to additional restrictions, may amount to deprivation of liberty irrespective of the terminology used under national law. If individuals are under constant supervision and cannot leave the accommodation facility even temporarily, such a situation may be considered de facto deprivation of liberty.

Second, according to ECtHR jurisprudence concerning the restriction of liberty of asylum seekers, the legal framework governing the detention of foreigners must be sufficiently accessible, clear, and foreseeable, enabling individuals to understand the consequences of the relevant provisions. It must also impose an obligation on public authorities to ensure that detention measures comply with the principles of necessity and proportionality and are adopted through a reasoned written decision. Furthermore, detained foreigners must have effective access to procedural safeguards, including the right to judicial review.

Third, asylum seekers who are temporarily accommodated in designated facilities without the right to move freely must be able to challenge the legality of such accommodation and the potential applicability of alternative measures before a court. Judicial oversight thus remains an essential guarantee of legality under the Convention and broader international human rights law.

Finally, in its observations – inter alia concerning the contested provisions of the Law on the Legal Status of Foreigners – the UNHCR expressed concern that these provisions effectively deprive asylum seekers of their freedom of movement within Lithuanian territory by requiring them to remain in designated accommodation facilities. According to the UNHCR, this situation constitutes detention, even though national law does not require the adoption of a formal detention decision or for an individualised assessment. The absence of sufficient legal safeguards renders such detention incompatible with Lithuania's international and domestic obligations.

Taken together, these principles demonstrate the convergence of EU and international human rights law in emphasising proportionality, necessity, and procedural safeguards in the context of asylum seekers' detention. They also highlight the Constitutional Court's role in aligning Lithuania's national legal framework with supranational standards and reinforcing the primacy of human rights protection in conditions of hybrid security challenges.

3. Conclusion

In view of this, the Constitutional Court held that although the legislature had pursued legitimate objectives and was therefore authorised to establish such a legal regulation restricting the liberty of a person. Nevertheless, it failed to comply with the requirement arising from the Constitution not to restrict the rights of a person more than necessary to achieve a legitimate objective. The Constitutional Court also emphasised that, when applying measures limiting a person's liberty, the authorities must, as far as possible, assess each individual's situation and tailor the specific restrictive measures accordingly.

In addition, the legislature failed to comply with the requirement of the Constitution, in cases where it is necessary to limit the liberty of a person on the grounds and under the procedure laid down in law, to provide for the possibility of verifying the lawfulness and reasonableness of such a limitation before a court.

In this complex case, in which the Constitutional Court had to balance several very important constitutional values, it seems to me that the unifying constitutional and common value shared by our State and Europe was the protection of human dignity and humanity. These values cannot be denied regardless of the gravity of any crisis.

Mr Luc Lavrysen
President of the Belgian Constitutional Court

The Belgian Constitutional Court in times of crisis and the (EU) rule of law

Luc Lavrysen, President of the Belgian Constitutional Court

1. Introduction

Belgium went through several episodes that were considered to be crises of some kind. From time to time we had *political crises*. The most visible were the periods when it took a long time before a federal or regional government could be formed, based on a parliamentary majority, after elections. From 2010 to 2011, it took 541 days after the parliamentary elections to form a new Federal Government. Meanwhile, the outgoing minority government took care of 'current affairs'. Research indicates that Belgium did not suffer economically from that situation. On the contrary, growth in gross domestic product *per capita* was higher than would otherwise have been expected. [1] At the time of writing, such a political crisis is occurring in the Brussels-Capital Region, where a majority in both linguistic groups is required in a situation where the electoral results in both constituencies were quite different. This situation seems, however, to have important budgetary consequences for that region. The Belgian Constitutional Court has no role to play in those types of political crises, as it only checks *the conformity of acts of parliaments* with the Constitution (as well as with international and EU law) and in those periods, legislative activity is typically very low.

We also experienced what is known as *institutional crises.* An example was the so-called 'mini-Royal question'. When it became clear, in March 1990, that a majority of the two houses of the Belgian Parliament would adopt a bill concerning the partial decriminalisation of abortion, King Baudouin wrote letters to the then Prime Minister stating that he could not bring himself to sign the bill in question due to moral remorse. However, he did not want to hinder the democratic process and therefore requested a solution whereby the law could become legally valid without him having to sign it himself.

1| Albalate, D. and Bel, G.,˝Do government formation deadlocks really damage economic growth? Evidence from history's longest period of government formation impasse", *Governance*, Vol. 33, No 1, 2020, pp. 155 to 171.

Based on a somewhat creative interpretation of certain provisions of the Constitution, Baudouin's letter was read out in the House of Representatives on 3 April 1990. Following this, the King's inability to rule was established by the Council of Ministers. As a result, the Council of Ministers became responsible for ratifying the law. After ratification by the Council of Ministers, the joint session of the House and Senate on 5 April 1990 determined by vote that the King was again able to rule. Once the law had been promulgated, it was placed under the country's seal by the Minister of Justice and published in the Belgian Official Gazette. The Constitutional Court rejected demands for suspension and annulment of that law by its judgments No 32/90,[2] No 33/90[3] and No 39/91.[4] That court reviewed, on that occasion, the law as any other law.

There have been other crises in which the Court has been more deeply involved. That was the case for instance with the so-called 'dioxin crisis',[5] the financial and banking crisis, the COVID-19 crisis and the recent energy crisis. The case-law of the Belgian Constitutional Court that is relevant for this conference is discussed below.

2. The starting point

From the outset, it should be noted that the Belgian Constitution, adopted in 1831, was not designed to deal with crisis situations. More so, the possibility of deviating from constitutional provisions, for example, in a crisis situation, is explicitly prohibited by the Constitution. According to Article 187, the Constitution cannot be suspended in part nor in full. Consequently, no state of emergency can be proclaimed to permit a suspension of rights and freedoms protected by the Constitution. Similarly, special powers decrees only fall within the jurisdiction of the Constitutional Court if they have been ratified

2| Judgment of the Belgian Constitutional Court of 24 October 1990, No 32/90, ECLI:BE:GHCC:1990:ARR.032.

3| Judgment of the Belgian Constitutional Court of 24 October 1990, No 33/90, ECLI:BE:GHCC:1990:ARR.033.

4| Judgment of the Belgian Constitutional Court of 19 December 1991, No 39/91, ECLI:BE:GHCC:1991:ARR.039.

5| Judgment of the Belgian Constitutional Court of 17 July 2003, No 100/2003, ECLI:BE:GHCC:2003:ARR.100.

by the legislature. Indeed, only rules issued by the various federal and regional legislatures (federal laws, decrees, ordinances) fall within the jurisdiction of the Constitutional Court. [6]

3. Crises and the Constitutional Court

3.1. Financial crisis (2007-2011)

Two of the country's largest banks – Fortis and Dexia – began facing severe difficulties exacerbated by the financial problems hitting other banks around the world. The value of their stocks plunged. The government responded through bailouts, the sale or nationalising of banks, the provision of bank guarantees and the extension of deposit insurance. Eventually, Fortis was split in two: the Dutch part was nationalised by the Netherlands in the autumn of 2008, while the Belgian part was sold to the French bank BNP Paribas, in which the Belgian State acquired shares. The Dexia group was dismantled in the autumn of 2011, Dexia Bank Belgium was nationalised and transformed into Belfius (100% owned by the Belgian State). Most of the measures taken to address the crisis were governmental decisions and regulations that fall outside the jurisdiction of the Constitutional Court. The review of such measures is a competence of the ordinary courts (under Article 159 of the Constitution) and the Council of State (under Article 160 of the Constitution).

The Constitutional Court nevertheless had to deal with certain consequences of that crisis.

In its judgment No 115/2011, [7] the Court partially acceded to a request for annulment, introduced by a private financial institution against an amendment of implementing provisions of the Act of 15 October 2008, containing measures to promote financial stability and, in particular, establishing a State guarantee for loans granted and other transactions in the context of financial stability, as regards the protection of deposits

6| Theunis, J., "The COVID-19 case-law of the Belgian Constitutional Court", *Paper presented at the 20th Meeting of the Joint Council on Constitutional Justice*, Sofia, 24-25 April 2023, https://www.const-court.be/public/stet/n/stet-2023-001n.pdf.

7| Judgment of the Belgian Constitutional Court of 23 June 2011, No 115/2011, ECLI:BE:GHCC:2011:ARR.115.

and life insurance. The dispute concerned the *calculation of the contribution that the financial institutions had to pay in exchange for the extended collective guarantee by the protection fund*. The Constitutional Court held that, given the objectives pursued by the deposit protection scheme, it was not, in principle, without reasonable justification that the contested contribution should be calculated considering the deposits eligible for repayment at a credit institution. When a credit institution defaults, the totality of those deposits determines the extent to which the government, by way of the Special Protection Fund and the Protection Fund, must provide financial assistance with a view to compensating the depositors. Due to the urgent necessity, the legislature limited itself at that time to that criterion. Nevertheless, in the case at hand, not only must the potential amount of financial assistance from the government be taken into account, but consideration should also be given to the risk that the government will actually be required to provide that assistance. The deposits eligible for repayment at a credit institution do not, in themselves, constitute an indicator of that risk.

That risk is determined by the extent to which a credit institution runs the risk of financial difficulties, which depends, among other things, on the way in which the institution in question is managed. The contested provision uses repayable deposits with a credit institution as the sole criterion for the contribution regulated therein and so does not consider the extent to which a credit institution is at risk of financial difficulties that could give rise to the application of the deposit protection scheme. Since all credit institutions are treated in the same way for the calculation of the contested contribution, without weighting their risk profile, credit institutions that mainly obtain financial resources by attracting deposits from the general public are disproportionately disadvantaged compared to those that primarily obtain financial resources on the capital market. The Constitutional Court therefore concluded that Articles 10 and 11 of the Constitution, in doing so, were infringed. However, in order, on the one hand, to prevent the resources collected under the deposit protection scheme from becoming insufficient to achieve the objectives of that scheme and, on the other hand, to allow the legislature to amend the contested provision so that risk-dependent elements are taken into account when calculating the contribution, the effects of the annulled provision were maintained by the Constitutional Court until the end of 2011.

In its judgment No 15/2015,[8] the Constitutional Court referred several questions for a preliminary ruling to the Court of Justice of the European Union ('the Court of Justice'). In the context of the financial crisis and, in particular, as part of the recapitalisation of the Belgian-French Dexia Bank, the Belgian authorities established, in accordance with Article 36/24 of the Law of 22 February 1998, a guarantee scheme providing for the repayment, by means of a Special Protection Fund for Deposits, up to € 100 000, of funds invested by natural persons in shares issued by financial cooperatives which were admitted to that guarantee scheme in the event of default on the part of those cooperatives. Pursuant to the Royal Decree of 14 November 2008, as amended by the Royal Decree of 10 October 2011, the cooperatives of the ARCO Group, one of Dexia's main shareholders, were admitted, by Royal Decree of 7 November 2011, to that scheme. The ARCO Group was a Belgian cooperative holding within the Christian Workers Movement (ACW), with around 800 000 private shareholders. Various parties brought actions before the Council of State seeking to have the Royal Decrees of 10 October and 7 November 2011 annulled.

To that end, they claimed, in essence, that those royal decrees infringed the principle of equality enshrined in the Belgian Constitution, in so far as they created a difference in treatment between shareholders, being natural persons, of cooperatives, who are able to benefit from the guarantee scheme established, in particular, by those royal decrees, and shareholders, being natural persons, of companies active in the financial sector, who were excluded from that scheme. Since those royal decrees had their legal basis in Article 36/24 of the Law of 22 February 1998, the difference in treatment invoked resulted from a legislative norm prompting the Council of State to refer several preliminary questions to the Constitutional Court concerning the compatibility of that article with the Belgian Constitution. The Constitutional Court, in turn, referred questions to the Court of Justice on the interpretation and validity of relevant EU law. In its judgment of 21 December 2016,[9] the Court of Justice held that Articles 2 and 3 of Directive 94/19/EC

8| Judgment of the Belgian Constitutional Court of 5 February 2015, No 15/2015, ECLI:BE:GHCC:2015:ARR.015.

9| Judgment of 21 December 2016, *Vervloet and Others*, C-76/15, ECLI:EU:C:2016:975. The General Court declared later on the action for annulment of that Commission decision by the ARCO Group as being in part manifestly inadmissible and in part manifestly lacking any foundation in law: order of 9 February 2018, *Arcofin and Others* v *Commission,* T-711/14, ECLI:EU:T:2018:80.

of the European Parliament and of the Council [10] as amended by Directive 2005/1/EC, did not require Member States to adopt a scheme to guarantee shares in recognised cooperatives operating in the financial sector, and as not precluding Member States from adopting such a scheme, in so far as that scheme does not undermine the practical effectiveness of the deposit-guarantee scheme that that directive requires Member States to establish and provided that it complies with the Treaty on the Functioning of the European Union, in particular with Articles 107 and 108 therein. Furthermore, the Court of Justice held that the validity of Commission Decision 2014/686/EU on State aid was not affected. In that decision, the Commission came to the conclusion that the cooperative guarantee scheme constituted State aid in favour of Arcopar, Arcofin and Arcoplus that Belgium had unlawfully implemented in breach of Article 108(3) TFEU and that the Belgian State should withdraw the legislation underlying the cooperative guarantee scheme and should recover the advantage from Arcopar, Arcofin and Arcoplus. Furthermore, the Court held that Article 108(3) TFEU had to be interpreted as precluding a guarantee scheme such as that at issue in the main proceedings, in so far as the latter was put into effect in breach of the obligations arising from that provision.

As a result, the Constitutional Court held in its follow-up judgment No 70/2017 of 15 June 2017, [11] that Article 36/24 of the Law of 22 February 1998 infringed Articles 10 and 11 of the Constitution, in so far as the King may provide for a system of granting a State guarantee for the repayment to partners who are natural persons of their share in the capital of cooperative companies recognised in Article 36/24, § 1, first paragraph, 3° of the Law of 22 February 1998. Following that judgment, the Council of State annulled both Royal Decrees. [12] The cooperative companies Arcopar, Arcofin and Arcoplus had already decided in 2011 to enter liquidation. This process has not been fully completed yet. Although there are still some civil cases pending, it seems that the individual shareholders in the cooperative company have definitively lost their investment.

10| Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee (OJ L 135, 31.5.1994, p. 5), schemes, http://data.europa.eu/eli/dir/1994/19/2015-07-04.

11| Judgment of the Belgian Constitutional Court of 15 June 2017, No 70/2017, ECLI:BE:GHCC:2017:ARR.070.

12| Judgments of the Belgian Council of State of 6 March 2018, *Vervloet and Others*, No 240.896, and of 12 October 2018, *Ogeo Fund and Commune de Schaerbeek*, No 242.636.

These cases illustrate that the Constitutional Court will also review crisis legislation for its compliance not only with the Constitution, but where relevant, alongside EU law, in dialogue with the Court of Justice. In the first case, in which EU law was not at stake, the Constitutional Court however took into account that the legislature acted in a crisis situation, and upheld the effects of the annulled provisions, and thus the financial contribution, till the end of the running fiscal year in view of allowing the legislature to rectify its approach from the next fiscal year onward. In the second case, a case of unlawful State aid, that issue has been addressed by the General Court [13] while checking the legality of the Commission decision [14], which ordered Belgium to terminate the aid measure as the measure was incompatible with the internal market and to recover the aid immediately.

3.2. The COVID-19 pandemic (2020-2023)

In the first period, the measures to combat the pandemic were mainly taken by decision of the Federal Minister of Security and the Interior under the Civil Security Act of 2007. Furthermore, the legislature granted the executive branch special powers to take accompanying measures. Although not competent to review those measures as such, the Constitutional Court had to rule, however, on the legal basis of such measures. In its judgment No 109/2022 of 22 September 2022, [15] the Constitutional Court ruled that the power delegated to the Minister of Security and the Interior does not infringe the principle of legality in criminal matters.

13| The General Court annulled with its judgment of 7 December 2018, *Belgium* v *Commission*, T-664/14, ECLI:EU:T:2018:890, Article 2(4) of that Commission decision. The General Court held that by ordering Belgium to refrain from making any payments to the cooperative members under the guarantee, even though it had, moreover, ordered the recovery of the advantage identified in the contested decision by means of the entry of a claim in the liabilities of the liquidation account of the ARCO companies, which are regarded as the beneficiaries of the aid at issue, the Commission imposed a disproportionate objective on Belgium and exceeded the powers conferred on it by Article 108(2) TFEU.

14| Commission Decision 2014/686/EU of 3 July 2014 on State aid SA.33927 (12/C) (ex 11/NN) implemented by Belgium – Guarantee scheme protecting the shares of individual members of financial cooperatives (OJ L 284, 30.9.2024, p. 53).

15| Judgment of the Belgian Constitutional Court of 22 September 2022, No 109/2022, ECLI:BE:GHCC:2022:ARR.109.

In a second time, a lot of legislative action was taken concerning *various temporary and structural provisions on justice in the context of the fight against the spread of COVID-19.* [16] In response to growing criticism of governing through ministerial decrees, the Federal Parliament finally passed the Pandemic Act of 14 August 2021, designed effectively to address epidemic emergencies. The Act allows the King to declare a pandemic state of emergency for up to three months, renewable for three months at a time. Parliament must ratify each declaration and renewal within 15 days. From now it is clearly stated that administrative police measures necessary to prevent or limit the consequences of the emergency for public health should be taken by royal decree and are thus a collective decision of the government. However, in case of imminent danger, the Minister of Security and the Interior can exercise these powers alone and take all necessary administrative police measures that 'do not tolerate any delay'. These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event that local circumstances so require, the governors and mayors can take – in accordance with possible instructions of the Minister of Security and the Interior – measures applicable to their own territory that are stricter than royal or ministerial decrees. [17]

In its judgment No 33/2023, [18] the Constitutional Court dismissed 10 actions for annulment of the Pandemic Act, lodged by a number of citizens, four members of parliament and some non-profit organisations. The above delegations fall within the constitutional limits outlined in judgment No 109/2022. Apart from their limitation in time, the emergency measures must be necessary, appropriate and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of possible categories of measures that can be taken (such as social distancing, restrictions for gatherings, etc.). It is clear from the general design of the Act that the legislature intended to establish a reasonable balance between, on the one hand, the protection of individual fundamental rights and freedoms and, on the other, the public interest pursued by the restrictions. However, since the Act leaves it up to the King, the Minister

16| Judgment of the Belgian Constitutional Court of 25 February 2021, No 32/2021, ECLI:BE:GHCC:2021:ARR.032; judgment of the Belgian Constitutional Court of 20 May 2021, No 76/2021, ECLI:BE:GHCC:2021:ARR.076.

17| Lavrysen, L., Theunis, J., Goossens, J., Moonen, T., Devriendt, S., Meeusen, B. and Meersschaert, V., "Belgium. Developments in Belgian Constitutional Law", in 2021 *Global Review of Constitutional Law* (I·CONnect/Clough Center 2022), p. 34.

18| Judgment of the Belgian Constitutional Court of 2 March 2023, No 33/2023, ECLI:BE:GHCC:2023:ARR.033.

of Security and the Interior, the governors and the mayors concretely to determine what administrative police measures should be taken, the Constitutional Court does not review the authorised measures but only the delegations granted by the Act. It is up to the Council of State and the ordinary courts and tribunals to verify, in concrete cases, whether a specific measure taken under the Act complies with the repartition of competences and the constitutional guarantees and fundamental freedoms. These judicial bodies will decide whether the measures comply with the principles of legality, legitimacy and proportionality. That judicial review also includes verifying whether the conditions for delegation have been met. [19]

Further cases concern *quarantine measures,* [20] *contact tracing*, [21] the *COVID Safe Ticket*, [22] *vaccination registration*, [23] *nursing* [24] and *vaccination by pharmacists.* [25]

Although crisis situations, such as the pandemic, call for exceptional measures, the case-law of the Constitutional Court in this matter illustrates that the Court – and the judiciary as a whole – nevertheless has to check whether the resulting restrictions of rights and liberties are justified or not. While in socioeconomic matters, the discretion of the legislatures might be very broad and the Court will apply restraint in its review of that action, the Court takes a stricter stand if the right to liberty, privacy, legality and proportionality in criminal matters, access to justice and fair trial requirements are at stake. In those cases, the review of the Court seems to be as intense as that of legislation issued outside crises situations. The Court also upholds EU law and will annul legislation that contradicts material and procedural requirements of EU law, as is illustrated in the cases concerning contact tracing, vaccination registration and the protection of privacy in relation to the concerned data bases.

19| Theunis, J., "The COVID-19 case-law of the Belgian Constitutional Court", *o.c*, pp. 4 and 5.

20| Judgment of the Belgian Constitutional Court of 16 February 2023, No 26/2023, ECLI:BE:GHCC:2023:ARR.026.

21| Judgment of the Belgian Constitutional Court of 22 September 2022, No 110/2022, ECLI:BE:GHCC:2022:ARR.110.

22| Judgment of the Belgian Constitutional Court of 27 April 2023, No 68/2023, ECLI:BE:GHCC:2023:ARR.068.

23| Judgment of the Belgian Constitutional Court of 1 June 2023, No 84/2023, ECLI:BE:GHCC:2023:ARR.084.

24| Judgments of the Belgian Constitutional Court of 17 December 2020, No 169/2020, ECLI:BE:GHCC:2020:ARR.169 and of 1 April 2021, No 56/2020, ECLI:BE:GHCC:2020:ARR.056.

25| Judgment of the Belgian Constitutional Court of 22 February 2024, No 25/2024, ECLI:BE:GHCC:2024:ARR.025.

Energy crisis (2022-2023)

Following the large-scale invasion of Ukraine by the Russian Federation in February 2022, the energy supply of Belgium came under pressure, with sharp increases in gas and electricity prices during 2022-2023, on top of the already high gas prices caused by various factors in 2021.[26]

Financial support of consumers and businesses

Given the exceptional rise of energy prices, the legislature took *different measures to support consumers and businesses*. The Law of 28 February 2022 granted a one-off heating premium of € 100 to every household customer who had an electricity supply contract for their place of residence on 31 March 2022. For those living at the same address and belonging to the same household, the heating premium is granted only once. The applicants before the Constitutional Court – a senior citizens' association and residents of a residential care centre – argued that the contested provision introduced an unjustified difference in treatment between persons who have a residential electricity contract and those who live in a collective housing facility, in so far as only the former category is entitled to the heating premium. The Court held in its judgment No 145/2023[27] that persons with a residential electricity supply contract and residents of residential care centres are objectively in different situations. Even if the daily price payable by residents of residential care centres covers the expenses associated with energy consumption and that the daily price increases in part due to rising energy prices, these residents, because they enjoy a global service package, do not directly pay for the energy they consume themselves, so that they are confronted with the higher energy prices in a less direct way. The legislature could, therefore, reasonably assume that these residents are not affected by the higher energy prices to the same extent as persons with a residential electricity supply contract.

26| CREG, *Study on the increase in electricity and gas prices in Belgium*, Brussels, 2021, pp. 1 to 92.

27| Judgment of the Belgian Constitutional Court of 9 November 2023, No 145/2023, ECLI:BE:GHCC:2023:ARR.145.

Furthermore, it has not been demonstrated that the contested difference in treatment has disproportionate consequences for the residents of residential care centres. Indeed, these residents are only confronted with the higher energy prices considering the combined, mitigating influence of the more favourable rates in the context of non-residential energy contracts available to care institutions, the new energy standard introduced by the law and the arrangements provided for by the communities which contain restrictions on the extent to which care institutions can pass on energy costs to their residents. Furthermore, account must be taken of the support measures granted by the Federal Government and by the partial entities to businesses and, where appropriate, to residential care centres, to help them cope with rising energy costs. In its examination of the proportionality of the measure, the Court also took into account that the contested provisions have the effect of treating certain elderly people or people with disabilities unfavourably. Given that the contested measure is part of a series of measures whereby the legislature sought to provide *a rapid initial response to the impact of the extraordinary increase in energy prices*, it can be assumed that this measure is based on particularly compelling reasons of a socioeconomic nature.

Furthermore, some provisions of the Laws of 26 June 2022, 30 October 2022 and 19 December 2022 were challenged before the Constitutional Court. The applicants, various natural persons, argued that the contested provisions infringed Articles 10 and 11 of the Constitution, by treating differently households that heat with electricity and those that heat with gas, oil or bulk propane. Families that heat with electricity would only receive a federal electricity premium, while families that heat with gas, heating oil or bulk propane would receive, in addition to that federal electricity premium, an additional premium or allowance for gas, heating oil or bulk propane. However, families belonging to both categories would consume comparable amounts of energy for heating, in different forms. The applicants considered that households that heat with electricity should be entitled to a premium equal to that granted to households that heat with gas or, at the very least, to an adjusted premium. The Court held in its judgment No 166/2023 [28] that the premiums and allowances introduced by the legislature are intended to alleviate the impact of the increase in energy prices on household bills as quickly as possible. In view of that objective, it is not unreasonable that the legislature has granted those

28| Judgment of the Belgian Constitutional Court of 30 November 2023, No 166/2023, ECLI:BE:GHCC:2023:ARR.166.

premiums and allowances on the basis of the energy source concerned, without taking into account the actual consumption of households or the specific use that they can make of the energy consumed.

This simplified approach to a variety of situations is all the more justified given that the contested measures form part of a set of ad hoc crisis measures whereby the legislature wanted to respond quickly to the impact of the extraordinary increase in energy prices. The legislature cannot therefore be criticised for failing to provide an additional premium for households that heat with electricity.

Protection of tenants

Another type of measure has been taken on at regional level, *to protect tenants against the financial consequences of the crisis*. A decree of the Walloon Region of 22 September 2022 *suspended the execution of all judicial and administrative decisions ordering an eviction of tenants from 1 November 2022 to 15 March 2023*. By way of exception, judicial and administrative decisions ordering an eviction for reasons of public safety, immediate danger to the physical and mental health of the residents or intentional damage to the home may be executed. The Court, confronted with a demand of annulment introduced by the National Owners and Co-owners Syndicate, held in its judgment No 147/2023, [29] that the Walloon legislature was entitled to adopt the contested measure within the framework of its jurisdiction in the matter of housing. A temporary postponement, in exceptional circumstances, of the execution of eviction judgments does not undermine the fundamental principle according to which judgments can only be modified following the application of a legal remedy.

To be compatible with the conventional and constitutional provisions on the protection of property, the contested decree must pursue a legitimate aim consistent with the public interest, strike a fair balance between the general interest and the rights of the individual, in this case, between the interests of the tenant and those of the landlord, and be proportionate to that aim. The Court held that *the objective of preventing the most vulnerable people from being left homeless during the coldest months of the year as a result of eviction, given the exceptional circumstances created by the energy price crisis and very*

29| Judgment of the Belgian Constitutional Court of 9 November 2023, No 147/2023, ECLI:BE:GHCC:2023:ARR.147.

high inflation, is a legitimate objective in the general interest. While it is true that the contested decree limits the right to the protection of property, it also contributes to the implementation and protection of several other fundamental rights (the right to the protection of the home and the right to lead a life worthy of human dignity, which includes, in particular, the right to decent housing, the right to the protection of health, and the right to life). The Court notes that, through the contested decree, the Walloon Region is addressing certain effects of an unforeseen and urgent situation. In these exceptional circumstances, *the Walloon legislature had broad discretion to take appropriate measures to protect the health and housing of a category of people who, even under normal circumstances, are in a precarious situation.* The duration of the contested measure – four and a half months – was furthermore limited to the coldest months of the year. Finally, it will be for the ordinary judge to determine, taking into account the specific circumstances of each case, whether compensation should be granted to the owner on the basis of the principle of equality of citizens before public burdens.

A Flemish decree of 3 October 2022 contained two measures that *limited the possibility of indexing the rents of homes without an energy performance certificate* (EPC) *or with an EPC of D, E or F.* For one year (from 1 October 2022 to 30 September 2023), the indexation possibility for rental homes with an EPC level D was limited to 50%, while for rental homes with an EPC level E or F, and for rental homes whose energy level was unknown, any indexation of the rent was excluded. In addition, from 1 October 2023, a correction factor is applied for the indexation of all these homes to protect the tenant. The applicants, non-profit organisations that represent the interests of property owners, argued that the contested decree infringed the right to the peaceful enjoyment of property of landlords whose dwellings lacked an EPC or had an EPC level D, E or F. According to the Court, in its judgment No 32/2024,[30] the Flemish legislature could, in the light of the objectives of the contested decree, consider *that the disadvantage suffered by landlords due to the restriction of the possibility of rent indexation does not outweigh the advantage for tenants. Tenants are, in general, in a more precarious financial situation than landlords and the increase in inflation and energy prices have far-reaching consequences, particularly for tenants. In addition, in the light of the climate objectives set by the Flemish Region, the need to ensure the energy efficiency of the rental housing stock may justify the Flemish legislature expecting additional efforts from landlords of low-efficiency dwellings.*

30| Judgment of the Belgian Constitutional Court of 21 March 2024, No 32/2024, ECLI:BE:GHCC:2024:ARR.032.

The Court therefore rejected this complaint holding that the contested decree infringed the principle of equality and non-discrimination, in so far as that provision did not apply the decree to rental agreements for student housing lasting more than one year or which are concluded successively with the same tenant. In its judgment No 63/2024, [31] the Court took a similar view in a case concerning the ordinance of the Brussels-Capital Region of 13 October 2022, amending the Brussels Housing Code with a view to changing the rent indexation and in its judgment No 64/2024, [32] concerning the decree of the Walloon Region of 19 October 2022 modifying Article 26 of the decree of 15 March 2018 relative to the bailout of the habitat and limiting the indexation of rent in function of the energy performance certificate of buildings.

In order to support commercial tenants in the context of the economic crisis caused by the war in Ukraine, the Brussels legislature provided for a measure limiting the indexation of commercial rents that was applicable for one year, starting on 22 December 2022. Various organisations of landlords (single owners and co-owners) requested the annulment of this measure. The Court dismissed the appeal in its judgment No 59/2024. [33] The Court ruled that the Brussels-Capital Region was indeed competent to adopt the contested measure and that the principle of equality and non-discrimination had not been infringed. The Brussels legislature could reasonably assume that the income of commercial tenants was more affected by the extraordinary increase in inflation than that of landlords. According to the Court, the contested measure achieves a fair balance between landlords and tenants. Furthermore, various measures have been taken to make the energy sectors – believed to have benefited from windfall profits during the crises – contribute to financing the support schemes for households and businesses.

31| Judgment of the Belgian Constitutional Court of 20 June 2024, No 63/2024, ECLI:BE:GHCC:2024:ARR.063.

32| Judgment of the Belgian Constitutional Court of 20 June 2024, No 64/2024, ECLI:BE:GHCC:2024:ARR.064.

33| Judgment of the Belgian Constitutional Court of 30 May 2024, No 59/2024, ECLI:BE:GHCC:2024:ARR.059.

Taxation of windfall profits

It was believed that energy companies had generated *windfall profits* during the energy crisis.

The Law of 16 December 2022 introduced a temporary solidarity contribution for registered oil companies active in the refining sector and with refining capacity in Belgium, as well as for registered oil companies designated as primary participants for diesel, gas oil and petrol products in 2022. Five companies brought actions before the Constitutional Court seeking the annulment of this law. With this solidarity contribution, the legislature sought to ensure that energy companies that had benefited from excess profits as a result of the energy crisis and the price increases since the beginning of 2022 would contribute to supporting households facing the social and economic consequences of those developments. With this measure, the legislature aimed partially to implement Regulation (EU) 2022/1854. [34]

Articles 14 to 18 of that regulation provided for the introduction of a mandatory temporary solidarity contribution for the financial year 2022 and/or 2023, to address surplus profits of EU companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to mitigate exceptional price developments in the energy markets for Member States, consumers and companies, by using the proceeds thereof for the financial support measures provided for in Article 17.

The Constitutional Court found in its judgment No 46/2024 [35] that the temporary solidarity contribution is a tax, so that the federal legislature has competence to introduce it, and that there is no evidence that the temporary solidarity contribution has made it impossible or excessively difficult for the communities and regions to exercise their powers and that the law does not regulate how the proceeds from the temporary solidarity contribution should be spent. Finally, the Court found that the Federal Government was not obliged to conclude a cooperation agreement or to be consulted. The Court therefore declared the criticism unfounded. Before ruling on the merits on the other

34| Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261I, 7.10.2022, p. 1).

35| Judgment of the Belgian Constitutional Court of 25 April 2024, No 46/2024, ECLI:BE:GHCC:2024:ARR.046.

pleas, the Court considered it necessary to refer nine questions to the Court of Justice for a preliminary ruling, both on validity and interpretation of Regulation 2022/1854.

In this case, known as Case C-358/24, *Varo Energy Belgium and Others*, the Constitutional Court first asked the Court of Justice on the validity of the provisions of the regulation in so far as they were adopted under Article 122(1) TFEU. If those provisions are valid, the Constitutional Court then asked whether the temporary solidarity contribution introduced by the Law of 16 December 2022 constitutes an 'equivalent national measure' within the meaning of Regulation 2022/1854, the reason being that Belgian law has a broader personal scope and another calculation basis of the contribution than the regulation: per tonne of crude oil or per cubic metre of oil products processed, instead of on the surplus taxable profits, in the fiscal year 2022 and/or 2023.

The Court asks, *inter alia*, whether the regulation infringes the principle of equality and non-discrimination in so far as it allows the adoption of a national measure applicable both to registered oil companies operating in the crude oil and refining sectors and in the distribution sector, and in so far as it allows the adoption of a national measure applicable to registered oil companies designated as primary participants in 2022 for diesel, gas oil and petrol products, whereas that measure does not apply to non-primary participants, to primary participants for other product categories, such as lamp oil and kerosene, or to undertakings operating in the coal and natural gas sectors. Furthermore, the question raised as to whether the regulation is compatible with the freedom to conduct a business, the right to property, as well as the freedom of establishment and the freedom to provide services in so far as it authorises a national measure which fixes the amount of the temporary solidarity contribution on the basis of a flat-rate amount per cubic metre of products released for consumption between 1 January 2022 and 31 December 2023, and with the general principle of legal certainty and non-retroactivity of laws by allowing the amount of the contribution to be calculated on products released for consumption between 1 January 2022 and 31 December 2023, whereas the regulation and that law only entered into force on 8 October 2022 and 22 December 2022 respectively.

In addition, the Constitutional Court asked whether the temporary solidarity contribution under the Law of 16 December 2022 constitutes a prohibited charge having equivalent effect to a customs duty, a discriminatory internal tax or new State aid that had to be notified to the European Commission. Finally, the Constitutional Court asked whether it can definitively maintain the effects of the law if, on the basis of the answers

given by the Court of Justice, it were to conclude that the contested law infringes EU law, in order to avoid budgetary difficulties and to achieve the objectives of Regulation 2022/1854.

That same law also introduced a *cap on revenues from the electricity producers' market*, through a levy for the benefit of the State on excess revenues generated between 1 August 2022 and 30 June 2023. The levy was equal to 100% of excess revenues, i.e., the positive difference between market revenues and the market revenue cap as set by the law. Also in this case, known as Case C-467/24, *Valorise Ham and Others*, the Constitutional Court found it necessary, in its judgment No 67/2024, [36] to refer questions on interpretation and validity – 15 in total – to the Court of Justice.

The type of review exercised by the Constitutional Court

This case-law illustrates that crisis situations, such as the energy crises, call for rapid action that implies wide discretion for the legislature to ease socioeconomic consequences resulting in the Constitutional Court exercising restraint in its review of that action. Differences in treatment that would, in normal circumstances, be the object of stricter scrutiny of the Constitutional Court, escape its criticism. The Constitutional Court will nevertheless uphold EU law and, as in the case of the banking crises, engage in dialogue with the Court of Justice on the validity and interpretation of EU crisis legislation, as is illustrated by the windfall profit cases.

3.3. Energy security and floods

Following the climate change-induced floods of July 2021, [37] the Walloon legislature, by decree of 3 February 2022, granted the Walloon Government with an *extensive authorisation to guarantee the right to energy for affected residential consumers in the context of future crises.* The Federation of Belgian Electricity and Gas Companies requested the annulment of this authorisation. The Constitutional Court notes in its judgment

36| Judgment of the Belgian Constitutional Court of 20 June 2024, No 67/2024, ECLI:BE:GHCC:2024:ARR.067.

37| Tradowsky, J.S., Philip, S.Y., Kreienkamp, *F. et al.* "Attribution of the heavy rainfall events leading to severe flooding in Western Europe during July 2021", *Climatic Change*, Vol. 176, No 90, 2023.

No 63/2023, [38] that the contested decree falls within the right to decent housing guaranteed in Article 23 of the Constitution. The Court points out that Article 23 of the Constitution requires the competent legislature to guarantee the right to decent housing and to determine the conditions for the exercise of that right.

That article does not prohibit the granting of authorisations to the government, provided that they relate to the implementation of measures the subject of which has been specified by the legislature. However, where it is impossible for the legislature itself to determine the subject of the measures to be taken because compliance with the parliamentary procedure would not allow it to achieve an objective of general interest, it may authorise the government to do so. To that end, the legislature must determine the subject of that authorisation expressly and unambiguously and the legislature must ratify the measures taken by the government within a relatively short period, laid down in the authorisation regulation. It is not prohibited for such an authorisation to take place in anticipation of exceptional circumstances, nor for the government itself to determine, at a given moment, that such circumstances exist, provided that the legislature has defined those circumstances in advance with sufficient precision and that the authorisation is strictly limited to the measures necessary to deal with those exceptional circumstances.

The Court notes that the Walloon legislature has expressly and clearly defined the subject of the authorisation granted to the government and that the measures taken must be ratified within a relatively short period of six months. The legislature has also defined with sufficient precision the exceptional circumstances in which the government is authorised to act. In addition, the authorisation is strictly limited to the measures necessary to deal with those circumstances. Thus, the derogations may only concern residential consumers affected by the crisis circumstances, in order to guarantee their right to energy. Furthermore, the measures must be justified and proportionate in the light of the circumstances, and their duration is limited to a maximum period of one year. Finally, when drawing up these measures, the government must consult with various stakeholders.

38| Judgment of the Belgian Constitutional Court of 13 April 2023, No 63/2023, ECLI:BE:GHCC:2023:ARR.063.

4. Conclusion

The Belgian Constitutional Court has consistently upheld its crucial role as guardian of the constitutional and European legal order, even – or especially – during times of crisis. Whether confronted with financial turmoil, public health emergencies, or socioeconomic shocks caused by energy disruptions, the Court has shown a careful balance between judicial restraint and firm constitutional review. It respects the broad discretion granted to the legislature in socioeconomic matters, particularly where urgent and exceptional legislative action is required. Yet, this deference does not amount to abdication. The Court draws a clear line where fundamental rights such as personal liberty, privacy, legality in criminal matters, and the right to a fair trial are at stake.

Moreover, the Constitutional Court's approach is marked by its readiness to engage in judicial dialogue with the Court of Justice, ensuring the full application of EU law and safeguarding procedural and substantive rights under the Treaties. The Court's rulings reveal a commitment to proportionality, legal certainty, and the principles of equality and non-discrimination, even amid the pressures of crisis-driven governance.

These patterns underscore that constitutional adjudication remains both possible and necessary in exceptional times. Far from hindering emergency action, the Court's jurisprudence demonstrates how legal oversight can enhance legitimacy, protect democratic values, and secure fundamental rights, thereby contributing to a resilient rule of law.

3rd panel

Different national constitutional law constellations relevant for EU law

Mr Thomas von Danwitz
Vice-President of the Court of Justice
of the European Union

How to identify discretion under EU law – On the merits of direct dialogue and the duty to refer

Thomas von Danwitz, Vice-President of the Court of Justice of the European Union

The circumstances under which national constitutional courts interact with EU law vary, as does the place they reserve for that law in their review of constitutionality.

In some Member States, even ordinary EU law can be the benchmark for that review.[1] In others, this privilege is limited to the Charter and subject to further conditions.[2] Then again, in some, EU law is examined, first and foremost, in opposition to constitutional guarantees.[3]

In this context, it is important to bear in mind that, under EU law, there is no obligation to make its provisions a parameter of constitutional review. Choosing to do so, however, triggers the duty of sincere judicial cooperation under Article 4(3) TEU. That duty comprises not only the obligation to interpret, 'as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law',[4] but also to make preliminary ruling references under the conditions set out in Article 267(3) TFEU.

1| As concerns, for example, Croatia, its Constitution obliges to protect individual rights arising from EU law, see judgment of 16 January 2025, *Ministarstvo financija (Erasmus+ grant)*, C-277/23, ECLI:EU:C:2025:18, paragraph 21.

2| See, for example, the cases of Austria where the Verfassungsgerichtshof (Constitutional Court) subjects Charter review to the equivalence principle, see judgment of 14 March 2012, U 466/11-18 U 1836/11-13, https://t1p.de/l6n1u) and the cases of Germany where the Bundesverfassungsgericht (Federal Constitutional Court) applies the Charter in situations of 'full harmonisation', see order of 6 November 2019, 1 BvR 276/17, DE:BVerfG:2019:rs20191106.1bvr027617 – *Right to be forgotten II,* https://t1p.de/6q78f,

3| As regards Romania, see the Constitutional Court's jurisprudence leading to the judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99.

4| Judgment of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 31.

A brief look at the cases in which national constitutional courts or their jurisprudence were involved before they reached the Court of Justice also shows a panoply of procedures allowing EU law matters to be raised at the domestic constitutional level. Abstract [5] as well as incidental [6] review proceedings, direct actions [7] brought by both institutions and private parties, [8] individual constitutional complaints, [9] and dispute resolution proceedings between constitutional bodies [10] have all led, in one way or another, to preliminary ruling references under Article 267 TFEU.

It thus may not seem to matter in which constellation and by whom the judicial dialogue under that provision is engaged, as long as all decisive questions of EU law are effectively referred. But this consideration is not essential to the need for – and the merits of – direct dialogue with national constitutional courts, which are not only the authentic interpreters of constitutional provisions, fundamental rights guarantees and the national constitutional identity of their respective Member States, but also apply EU law as domestic courts of last instance.

In my contribution, I will underline how critical this direct dialogue is for the identification of Member State discretion under EU law.

5| See, for example, judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:638 (action brought by members of Parliament, for another example of a request of constitutionality review, brought by a group of members of Parliament, see judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, ECLI:EU:C:2019:962), judgment of 10 July 2025, *INTERZERO and Others*, C-254/23, ECLI:EU:C:2025:569.

6| See, for example, judgment of 4 October 2024, *1Dream and Others*, C-767/22, C-49/23 and C-161/23, ECLI:EU:C:2024:823

7| See, for example, judgment of 29 July 2024, *Belgian Association of Tax Lawyers and Others*, C-623/22, ECLI:EU:C:2024:639.

8| See, for example, judgment of 27 February 2025, *AEON NEPREMIČNINE and Others*, C-674/23, ECLI:EU:C:2025:113

9| See, for example, judgment of 16 January 2025, *Ministarstvo financija (Erasmus+ grant)*, C-277/23, ECLI:EU:C:2025:18.

10| See, for example, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400.

I.

The most recent judgments on references from national constitutional courts show the added value of those references in which constitutional courts assume the role of EU law judges by including that law among the parameters of constitutional review and complying with the duty to refer questions of interpretation to the Court of Justice.

1)

In turn, these references have allowed our Court to clarify the scope of application of Directive 2014/42 [11] on the freezing and confiscation of instrumentalities and proceeds of crime [12] and to confirm that Articles 20 and 21 TFEU on the free movement of Union citizens preclude Member State legislation under which EU 'Erasmus+' support to a dependent child diminishes the parent's entitlement to a basic personal allowance. [13]

In the judgment in *AEON,* [14] we provided an interpretation of Directive 2006/123/EC (the Services Directive) [15] in the light of Articles 16 (freedom to conduct a business) and 38 (consumer protection) of the Charter, which the Slovenian Constitutional Court had requested in the course of reviewing the constitutionality of national legislation on property intermediation. [16]

11| Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39).

12| Judgment of 4 October 2024, *1Dream and Others*, C-767/22, C-49/23 and C-161/23, ECLI:EU:C:2024:823. Upon three references from the Latvian Constitutional Court, we held that national legislation pursuant to which a national court rules on the confiscation of the proceeds of crime in separate and preliminary proceedings, but based on materials taken from the criminal case file, does not fall within the scope of Directive 2014/42 or of Framework Decision 2005/212. Seised with an incidental review of constitutionality in the light of EU law, the Latvian Constitutional Court had asked for an interpretation of the scope and provisions of these acts so as to determine whether limiting the right of access to the case file in such proceedings is compatible with EU law, including the Charter.

13| Judgment of 16 January 2025, *Ministarstvo financija (Erasmus+ grant),* C-277/23, ECLI:EU:C:2025:18.

14| Judgment of 27 February 2025, *AEON NEPREMIČNINE and Others*, C-674/23, ECLI:EU:C:2025:113.

15| Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

16| We held that Article 15(3) of the Services Directive on the evaluation of access requirements, read in the light of Articles 16 and 38 of the Charter, does not preclude legislation providing for a cap on the commission charged for property intermediation services at 4% of the value if that legislation does not go beyond what is necessary to attain the objectives which it pursues and that there are no other less restrictive measures allowing the same result to be achieved (paragraph 83).

Finally, in cooperation with the Slovenian Constitutional Court, the judgment in *INTERZERO*[17] clarified that, subject to compliance with the principle of proportionality, national legislation creating a non-profit monopoly for the collective fulfilment of extended producer responsibility obligations is compatible with Articles 16 (freedom to conduct a business) and 17 (right to property) of the Charter, the Treaty provisions on the fundamental freedoms[18] and services of general economic interest (Article 106(2) TFEU), as well as the Waste[19] and Services Directives.

Currently, 14 preliminary ruling references from constitutional courts are pending.[20] This promising number, however, needs to be put into perspective, as these references come from only three Member States.[21] Be that as it may, constellations of indirect dialogue, under which the Court is apprised of constitutional jurisprudence by means of references from ordinary courts, can also contribute to the effective application of EU law.

2)

Indeed, such references may show not only that EU law has been correctly applied by a national constitutional court,[22] but also that domestic constitutional

17| Judgment of 10 July 2025, *INTERZERO and Other*s, C-254/23, ECLI:EU:C:2025:569.

18| *In casu*, Articles 49 (establishment) and 56 (provision of services).

19| Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ L 312, 22.11.2008, p. 3), as amended by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 (OJ L 150, 14.6.2018, p. 109).

20| Seven from Belgium (C-519/25, C-58/25, C-796/24, C-663/24, C-661/24, C-467/24, C-358/24), three from Italy (C-153/25, C-653/24, C-151/24) and from Latvia (C-309/25, C-242/25, C-798/24) respectively, as well as one from Slovakia (C-393/25).

21| It may also be of interest that, up until now, 15 out of the 20 constitutional courts existing in the EU have made at least one reference, namely those of Austria, Belgium, Croatia, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia and Spain.

22| Judgment of 14 March 2024, *Újpesti Polgármesteri Hivatal*, C-46/23, ECLI:EU:C:2024:239 – confirming the correct application of Article 17 of the GDPR (right to erasure/to be forgotten) by the Hungarian Constitutional Court, which was contested in a preliminary ruling reference made by an ordinary court.

and EU law guarantees can lead to identical *substantive* results, as confirmed in our judgment in *Deldits*. [23]

They can also establish that domestic guarantees further the effective application of EU law by underscoring its *procedural* obligations. A case in point is the duty for ordinary courts of last instance to refer questions for a preliminary ruling under Article 267(3) TFEU.

In this regard, our recent case-law contains references to decisions of the German, [24] Czech [25] and Slovenian [26] Constitutional Courts.

23| Judgment of 13 March 2025, *Deldits,* C-247/23, ECLI:EU:C:2025:172: after the Hungarian Constitutional Court had already found the absence of a gender entry change procedure to be unconstitutional, we clarified – upon reference from an ordinary court – that the impossibility to change the entry also infringes Article 16 of the GDPR.

24| Judgment of 18 June 2024, *Generalstaatsanwaltschaft Hamm (Request for the extradition of a refugee to Türkiye)* C-352/22, ECLI:EU:C:2024:521. The referring court had seen its first decision allowing an extradition to Türkiye annulled by the *Bundesverfassungsgericht* (Federal Constitutional Court) for having infringed the fundamental right to a lawful judge under Article 101(1) of the *Grundgesetz* (German Basic Law) by failing to refer to the Court of Justice the decisive and novel question of whether, under EU law, the final recognition by a Member State of a third-country national as a refugee is binding for the purposes of an extradition procedure conducted by the competent authority of another Member State. In our judgment, we found that the requested Member State cannot authorise extradition unless it has initiated an exchange of information with the authority that granted the requested individual refugee status and has not revoked it.

25| Judgment of 4 May 2023, *ALD Automotive,* C-78/22, ECLI:EU:C:2023:379. The Prague High Court made a reference for a preliminary ruling only after the Czech Constitutional Court had set aside its first judgment in a case concerning late payments in commercial transactions, on the ground that it infringed the company's right to a fair trial, guaranteed by the Czech Constitution. The Prague High Court had failed to examine whether it was necessary to refer a question for a preliminary ruling to the Court of Justice under Article 267 TFEU, even though the claimant had raised the need to interpret national legislation in accordance with EU law. In our reply to the reference made, we confirmed the claimant's view that Article 6(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions indeed requires the fixed minimum sum for compensation to be paid in respect of each late payment.

26| Judgment of 15 October 2024, *KUBERA*, C-144/23, ECLI:EU:C:2024:881. In our judgment, we decisively leaned upon and expressly endorsed a judgment of the Slovenian Constitutional Court which had clarified that the Slovenian Supreme Court is indeed required to examine a request to make a preliminary ruling reference under Article 267 TFEU and must, in its decision refusing leave to appeal, state the reasons for not making such a reference, so as to enable the Slovenian Constitutional Court to verify whether the conditions for derogating from the obligation to make a reference under Article 267(3) TFEU (paragraph 24). In view of the constitutional court's decision, we noted that an interpretation of the Slovenian procedural legislation at issue in conformity with EU law appeared possible and confirmed that the Slovenian Supreme Court was indeed obliged to assess its duty to refer under Article 267(3) TFEU (paragraph 60).

Sometimes, an indirect dialogue becomes a direct one when constitutional courts embrace the interpretation given by the Court of Justice and engage in sincere cooperation.

3)

This is the encouraging message of our judgments in *Melki and Abdeli* [27] and *F.* [28] In the first judgment, the Court held that an obligation for ordinary courts to refer questions of constitutionality to the national constitutional court does not conflict with EU law, provided that the following conditions are met: provisional judicial protection of EU rights must be guaranteed, ordinary courts must, before and after making a reference to the constitutional court, remain free to make a reference under Article 267 TFEU and a finding of constitutionality may not prevent the disapplication of the legislation concerned when it is found to be contrary to EU law. The Court of Justice signaled that the *Conseil constitutionnel* (Constitutional Council, France) may find itself obliged to make a reference under Article 267(3) TFEU in the course of its review of constitutionality.

Three years later, that constitutional court asked for an interpretation of Framework Decision 2002/584/JHA on the European arrest warrant. [29] In the judgment, which was delivered in less than two months, thereby respecting the relevant timeframe under French law, the Court held that the strict procedural obligations of that Framework Decision did not, in principle, prevent the possibility of providing an appeal suspending decisions regarding a European arrest warrant. [30]

This example of procedural diversity leads me to the question of how to determine when Member States have discretion to establish or preserve diverging national standards within the scope of EU law.

27| Judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, ECLI:EU:C:2010:363.

28| Judgment of 30 May 2013, *F.,* C-168/13 PPU, ECLI:EU:C:2013:358.

29| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

30| Ibid., paragraph 75.

II.

As you recall, the judgments in *Åkerberg Fransson* and *Melloni* have specified that, in situations where Member State action is not entirely determined by EU law, national authorities and courts remain free to apply national standards for the protection of fundamental rights, as long as the level of protection provided for by the Charter, and as interpreted by the Court, as well as the primacy, unity and effectiveness of EU law, are not thereby compromised. [31]

Identifying the existence of Member State discretion under EU law is a complex exercise of interpretation. It requires not only looking at the mere wording of an applicable legal act, but also using the full range of classical methods of interpretation. It is necessary to determine on a case-by-case basis [32] whether a particular normative aspect is exhaustively regulated by EU law, thus precluding discretion of Member States in that respect. This difficulty may arise for rules of primary and of secondary law alike.

1)

As regards primary law, the Treaty of Lisbon and the now binding Charter of Fundamental Rights have created a number of new autonomous rules of EU law that must be observed, in particular, in the context of the consistent interpretation of secondary EU law. These primary law provisions tend to operate in a way that limits the scope for normative differences between Member States.

Still, the Court's interpretation of EU law does not aim at uniformity and leaves room for normative diversity where the provisions at issue allow for it. In our recent judgment in *Curtea de Apel Bucureşti (Abolition of severance payment made to judges upon retirement)*, [33] for example, we found that the principle of judicial independence does not preclude the repeal of a severance payment to judges with 20 years' continuous

31| Judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, paragraph 29, and of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, paragraph 60.

32| See judgment of 29 July 2019, *Spiegel Online*, C-516/17, ECLI:EU:C:2019:625, paragraph 25.

33| Judgment of 5 June 2025, *Curtea de Apel Bucureşti (Abolition of severance payment made to judges upon retirement)*, C-762/23, ECLI:EU:C:2025:400.

service in the judiciary, after it had been suspended for more than a decade for budgetary reasons. The Bucharest Court of Appeal had raised doubts in this regard under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU, after the Romanian Constitutional Court had found that the right to a severance bonus did not constitute a fundamental right and that Romanian law allowed for the immediate repeal of a provision that has been suspended. [34]

It should also be recalled that the Treaties allow for opt-outs, [35] enhanced cooperation, [36] differentiation and derogations. [37] Finally – and importantly – the provisions of Article 4(2) and (3) TEU [38] and Article 52(4), (6) and (7) of the Charter [39] require EU law and its interpretation to respect, on the one hand, the equality of the Member States before the Treaties and, on the other, legal traditions, characteristics and particularities of the Member States, as well as their national identities.

While there may be a myriad of 'constellations' for the application of the first sentence of the second subparagraph of Article 4 TEU, the obligation laid down therein, requiring the European Union to respect the national identities of Member States does

34| Ibid., paragraph 49.

35| Schengen Agreement: Ireland; Economic and Monetary Union: Denmark; Defence: Denmark; EU Charter of Fundamental Rights: Poland; Area of freedom, security and justice: Denmark and Ireland.

36| Article 27(2) TFEU.

37| See, in particular, Article 20 TEU and Articles 326 to 334 TFEU.

38| Article 4(2) states that: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'
Article 4(3) states that: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

39| Article 52(4) states that: 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'
Article 52(6) states that: 'Full account shall be taken of national laws and practices as specified in this Charter.'
Article 52(7) states that: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

not create a power for Member States or their constitutional courts [40] to decide unilaterally on a derogation from EU law. Rather, the obligation it entails is addressed to the European Union itself and, as any provision of EU law, is subject to interpretation by the Court of Justice.

If a constitutional court of a Member State considers that a provision of secondary EU law, in particular one that has already been interpreted by the Court, infringes the obligation to respect the national identity of that Member State, it must stay the proceedings and make a reference for preliminary ruling under Article 267 TFEU, thereby affording the Court the possibility to assess the validity and the interpretation of that provision in the light of Article 4(2) TEU. This all flows from the obligation of sincere cooperation between the European Union and the Member States enshrined in Article 4(3) TEU.

Concerning the content and scope of Article 4(2) TEU, there is of course still much to be clarified, beginning with how national identity relates to the 'equality of the Member States before the Treaties'. The same holds true in the field of fundamental rights protection for the triad of reservations established in the judgments in *Åkerberg Fransson* [41] and *Melloni* [42]. Whether and, if so, to what extent those reservations might be applicable in the context of Article 4(2) TEU, [43] is, of course, a wholly new endeavour for the judicial dialogue between constitutional courts and the Court of Justice.

But the necessary clarifications will certainly be provided by our Court once asked to do so.

40| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99, paragraph 70.

41| Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.

42| Judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

43| Article 4(2) states that: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

2)

With regard to secondary law, the task of identifying 'full determination' of Member State action or, instead, the existence of 'discretion' may be facilitated by the very wording of the act concerned. For example, a number of consumer protection directives [44] expressly state the fact that, within their scope of application, they fully harmonise the relevant substantive law. Conversely, an act of secondary law may point to the intention of the EU legislature to leave the Member States sufficient latitude to achieve their constitutional, legal and/or policy aims. For example, the Animal Protection Regulation [45] expressly states that a 'certain degree of subsidiarity' [46] or 'flexibility' [47] is granted to the Member States.

a)

Accordingly, in the judgment concerning the Flemish ban on ritual slaughter without stunning, [48] the Court noted that the regulation does not itself establish the necessary balance between the protection of animals granted in Article 13 TFEU and the freedom of religion according to Article 10(1) of the Charter. It merely 'provides a framework for the reconciliation which Member States must achieve between those two values', [49] a framework within which they enjoy 'broad discretion'. [50]

44| Such as Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66); judgment of 9 March 2023, *Sogefinancement*, C-520/22, ECLI:EU:C:2023:177, paragraph 27; or Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L 326, 11.12.2015, p. 1); judgment of 8 June 2023, *UFC – Que choisir and CLCV*, C-407/21, ECLI:EU:C:2023:449, paragraph 59.

45| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ L 303, 18.11.2009, p. 1).

46| Recital 18 of Regulation 1099/2009.

47| Ibid., recital 57.

48| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, ECLI:EU:C:2020:1031.

49| Ibid., paragraph 47.

50| Ibid., paragraph 71. We specified, nevertheless, that the margin of discretion thus afforded to the Member States must go hand in hand with supervision, by the EU judicature, consisting in determining whether the measures taken at national level were justified in principle and proportionate (paragraph 67).

The Court transposed these considerations in the 2021 judgment in WABE and MH concerning employers' bans on the visible form of expression of political, philosophical or religious beliefs in the workplace, affecting, in particular, the Islamic headscarf. Unlike the Animal Protection Regulation, Directive 2000/78 on equal treatment in employment and occupation [51] does not expressly refer to 'flexibility' or 'subsidiarity'. However, the Court noted that according to its character as a 'framework directive', it merely establishes a general framework, which leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective legal systems and traditions. [52]

b)

Whether Member States enjoy discretion under an act of secondary law may also vary from one provision to another and according to the specific legal aspect being subject to harmonisation. This holds true, in particular, for the Copyright Directive 2001/29 [53] which, in the case of hip-hop sampling (the judgment in Pelham), has been keeping German courts [54] and the Court of Justice [55] busy for over 15 years. The directive contains certain measures of full harmonisation [56] whilst otherwise granting a degree of discretion to the Member States. [57] Within the system of the directive, however, that discretion is not unbounded. Rather, it is circumscribed in several regards, [58] among which count

51| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

52| Judgment of 15 July 2021, *WABE and MH Müller Handel*, C-804/18 and C-341/19, ECLI:EU:C:2021:594, paragraph 86.

53| Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

54| Litigation is still ongoing and a constitutional complaint is pending before the German Federal Constitutional Court – 1 BvR 948/23.

55| See the judgment of 29 July 2019, *Pelham and Others*, C-476/17, ECLI:EU:C:2019:624, as well as the pending Case C-590/23, *Pelham and Others*.

56| Judgment of 29 July 2019, *Pelham and Others*, C-476/17, ECLI:EU:C:2019:624, paragraphs 84 and 85.

57| Ibid., paragraph 82.

58| Judgment of 29 July 2019, *Spiegel Online*, C-516/17, ECLI:EU:C:2019:625, paragraph 30.

the directive's objectives, the general principles of EU law,[59] as well as the need to interpret the directive in a way that allows for a fair balance to be struck between the various fundamental rights protected by the EU legal order.[60]

c)

Conversely, a balance of that nature may have already been struck by the EU legislature in the adoption of a specific secondary law provision. This is the case with Article 4a(1) of the Framework Decision on the European arrest warrant[61] at stake in the judgment in *Melloni*.[62] It precludes the execution of a European arrest warrant issued for the purpose of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State. In essence, we thus decided that the Spanish Constitutional Court was not entitled to apply national guarantees affording a higher level of protection.

3)

But even where the provisions of an act of secondary law do not fully determine Member State action and the necessary level of fundamental rights protection, the conditions set out in the judgments in *Åkerberg Fransson*[63] and *Melloni*[64] for a parallel applicability of EU and national fundamental rights may still exclude an application of the latter. Indeed, even in those circumstances, the application of national fundamental rights must not compromise the primacy, unity and effectiveness of EU law.

59| Ibid., paragraph 34.

60| Ibid., paragraph 38.

61| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ L 81, 27.3.2009, p. 24).

62| Judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

63| Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105.

64| Judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

For a recent example of how these conditions play out, I would point to the order in the Romanian case *Unitatea Administrativ Teritorială Judeţul Braşov*[65] confirming the earlier judgment in *Lin*.[66] In view of the need to weigh the national standard of *lex mitior* against the provisions of the post-accession conditionality Decision 2006/928,[67] the primacy, unity and effectiveness of EU law can be compromised if the limitation period for criminal liability is not interrupted by certain[68] acts.[69]

III.

Given the complexity of identifying Member State discretion under EU law provisions, which is a question of their interpretation, constitutional courts seeking to apply national standards might find themselves obliged under Article 267(3) TFEU to refer a question for a preliminary ruling.

As the judgment in *Consorzio*[70] has confirmed, one of the three exceptions to the obligation to refer under Article 267(3) TFEU (*acte clair*) is that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union.

In the absence of Court of Justice jurisprudence on a specific question (*acte éclairé*), the correct interpretation is indeed rarely obvious – particularly in the sense that

65| Order of 9 January 2024, *Unitatea Administrativ Teritorială Judeţul Unitatea Administrativ Teritorială Judeţul Braşov*, C-131/23, ECLI:EU:C:2024:42, paragraph 84.

66| Judgment of 24 July 2023, *Lin*, C-107/23 PPU, ECLI:EU:C:2023:606.

67| Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ L 354, 14.12.2006, p. 56).

68| Specifically, by procedural acts which took place before 25 June 2018, the date of publication of Decision No 297/2018 of the *Curtea Constituțională* (Constitutional Court).

69| Reference is made to judgment of 24 July 2023, *Lin*, C-107/23 PPU, ECLI:EU:C:2023:606, paragraph 123.

70| Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799, paragraph 66.

it is equally obvious for the courts of other Member States as well. [71] In order to pass that test, constitutional courts, seeking to examine exclusively national fundamental rights in situations of parallel applicability, [72] should establish, *in concreto*, that EU law, seen as a whole and including the Charter, does not fully determine the question at hand. It does not suffice either, in my opinion, to state that, in any event, the standard of protection required under national and EU fundamental rights is equivalent, [73] without having sought an interpretation of the latter rights by the Court of Justice. The same goes for the question of whether there are specific secondary law requirements beyond the remit of the EU act the transposition of which constitutes the subject matter of the proceedings. [74]

It may well be that, in all these situations, the standard applied is perfectly in line with EU law. Nevertheless, the absence of sufficient reasoning underscoring that assumption does not enable other courts to side knowingly with the position taken.

71| Ibid., paragraph 40.

72| Where the applicability of national fundamental rights is based exclusively on the wording of a secondary law provision without looking at possible EU fundamental rights requirements while stipulating, moreover, a presumption that the protective content of national fundamental rights guarantees the protection required under the Charter, the requirements for identifying Member State discretion are not fully respected. However, see order of the German Federal Constitutional Court of 6 November 2019, 1 BVerfGE 152, 152, DE:BVerfG:2019:rs20191106.1bvr001613, paragraph 55 et seq. – *Right to be forgotten I.*

73| See order of the German Federal Constitutional Court of 27 April 2021, 2 BvR 206/14, DE:BVerfG:2021:rs20210427.2bvr020614, paragraph 69 et seq. – *Ökotoxdaten*. The Second Chamber considered that the relevant criteria of Paragraph 12(1) of the Basic Law and Article 16 of the Charter were essentially identical. There may, however, be an argument that the Charter freedom to conduct a business should have been interpreted by the Court of Justice before the German Federal Constitutional Court could conclude that the application of one or another guarantee would not lead to different results.

74| See order of the German Federal Constitutional Court of 24 June 2025, 1 BvR 2466/19, DE:BVerfG:2025:rs20250624.1bvr246619, paragraph 83, referring to the German Federal Constitutional Court 155, 119 (165, paragraph 88).

The Court of Justice is by no means looking for more cases. But since the question of whether a provision of EU law allows for normative heterogeneity will arise, eventually, in other Member States as well, it is only rational to answer it, once and for all, at the earliest convenience. Engaging in a direct dialogue on the matter allows the national constitutional courts and the Court of Justice to discharge their mutual duty of 'sincere' or *loyal* cooperation under Article 4(3) TEU.

Mr Elias Georgiou
Judge at the Supreme Constitutional Court of Cyprus

Different national constitutional law constellations relevant for EU law – The case of Cyprus

Elias Georgiou, Judge at the Supreme Constitutional Court of Cyprus

The dialogue between national courts and the European Court of Justice is not limited to the preliminary ruling mechanism under Article 267 of the Treaty on the Functioning of the European Union. There is also an informal dialogue which is of great importance.

The Constitution of Cyprus is a detailed document that regulates virtually every aspect of the country's administration and prescribes the rules for exercising the powers entrusted to State organs. It is founded on the principle of the separation of powers. Each of the three powers of the State – the legislature, the executive, and the judiciary – is vested to act within the full scope of its respective domain, except where the Constitution provides otherwise.

Part II of the Constitution, entitled 'Fundamental Rights and Liberties', enshrines and guarantees the rights of the individual, which are substantially aligned with those contained in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

In the landmark case *Yiallouros v Nicolaou*,[1] the Supreme Court of Cyprus recognised the direct effect of fundamental rights, applying them even in disputes between private parties. The appellant alleged that the defendant had infringed his rights to privacy and correspondence, as safeguarded under Part II of the Constitution. The Court emphasised that a remedy must exist for such a wrong and held that remedies for breaches of such rights are not confined to those expressly listed in statutory tort law. It accordingly awarded the appellant compensation for non-pecuniary damages.

1| Judgment of the Supreme Court of Cyprus of 8 May 2001, *Takis Yiallouros v Evgeniou Nicolaou* [2001] 1 C.L.R. 558.

Following the accession of Cyprus to the European Union in 2004, the Constitution was amended to reflect the principle of the supremacy of EU law.

It is noteworthy that EU law is suspended in the parts of the Republic of Cyprus over which the government does not exercise effective control, namely, the areas occupied by Türkiye following its 1974 invasion.

The Constitution of Cyprus is the supreme law of the Republic of Cyprus, subject to the provisions of Article 1A, which was introduced after accession, and states that no provision of the Constitution shall be construed as invalidating laws enacted, acts carried out, or measures adopted by the Republic in fulfilment of its obligations as a Member State of the European Union. Furthermore, it affirms that regulations, directives, or other binding legislative measures adopted by the European Union shall have full legal effect in the Republic, irrespective of conflicting constitutional provisions.

Article 179.2 of the Constitution provides that no law or decision of the House of Representatives, nor any act or measure taken by any organ, authority, or person exercising executive power or performing an administrative function, shall be repugnant to or inconsistent with any provision of the Constitution or any obligation arising from the Republic's membership in the European Union.

This constitutional arrangement affirms the binding nature of EU law and ensures its direct applicability, even in cases of conflict with national constitutional norms. The legal framework thus enshrines the principle of supremacy of EU law, a cornerstone of the European legal order.

A fundamental principle of the Cypriot legal system, which is based on the English common law, is the doctrine of binding precedent. However, in a recent judgment,[2] the Supreme Constitutional Court emphasised the principle of supremacy of EU law, as embedded in Article 1A of the Constitution. It held that any consideration of the necessity for a derogation from the rule of binding precedent must take into account whether the error stems from a failure to observe EU law. Also, it was pointed out that the binding judgments of the higher courts are applied only if they conform with EU law.

2| Judgment of the Supreme Constitutional Court of Cyprus of 31 October 2023, *Nicosia Municipality v Joint Venture Cybarco Ltd-A Aristotelous Constructions Ltd*, A.A.C.19/2017; see also judgment of the Supreme Court of 15 January 2019, *Republic v Panipsos Ltd*, A.A. 227/2012.

Accordingly, the jurisprudence of the European Court of Justice is of significant interpretative value and serves as an authoritative reference for the Cypriot judiciary. Domestic courts are bound to interpret national legislation in conformity with the principles and judgments of the European Court of Justice.

The Constitution of Cyprus also provides mechanisms for reviewing legislative acts and decisions to ensure compliance with both constitutional and EU law. This dual-layered oversight includes both pre-emptive and remedial (or incidental) review mechanisms.

Article 140 of the Constitution establishes a mechanism for the pre-emptive review of compliance with constitutional and EU law. It empowers the President of the Republic, prior to the promulgation of any law or decision adopted by the House of Representatives, to refer to the Supreme Constitutional Court the question of whether such law, decision, or any specific provision thereof contravenes any provision of the Constitution or EU law.

This referral must be submitted within 15 days from the date the contested law or decision is transmitted to the President for promulgation. If the Supreme Constitutional Court finds that such law or decision is repugnant or inconsistent with any provision of the Constitution or EU law, it must not be promulgated and therefore does not acquire legal force.

In a recent case,[3] the President of the Republic referred legislation to the Supreme Constitutional Court concerning a provision that imposed an obligation on the Independent Social Support Authority to store and publish the names of both individual and legal entities who made donations exceeding € 5 000. The Supreme Constitutional Court held that the storing and publication of personal data of individuals who make such contributions constituted an interference with their right to the protection of personal data and their right to respect for private life.

The Supreme Constitutional Court then examined whether such interference could be justified in light of the conditions required for the lawful limitation of a fundamental right. It was pointed out that the legislative authority, which bears the relevant burden of proof, failed to demonstrate the existence of an immediate and compelling social need justifying such interference with the fundamental right to private life.

3| Judgment of the Supreme Constitutional Court of Cyprus of 11 April 2025, *President of the Republic v House of Representatives*, Referral 6/2024.

Referring to the case-law of the European Court of Justice, the Supreme Constitutional Court emphasised that legal persons may invoke the protection of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union on behalf of individuals in cases and to the extent that the name of the legal entity identifies one or more natural persons. On that basis, the Supreme Constitutional Court held that the indiscriminate storage and publication of the names of legal persons, as provided for in the law under reference, infringed the right to private life and personal data of natural persons where their identity could be directly or indirectly identified.

The Supreme Constitutional Court concluded that the legislative provisions under reference were in breach of the Constitution, the Charter of Fundamental Rights of the European Union, and Regulation (EU) 2016/679 of the European Parliament and of the Council.[4]

In another referral[5] by the President of the Republic, the Supreme Constitutional Court pointed out that Cyprus, as a Member State of the European Union, is subject to binding obligations concerning the conduct of its economic and fiscal policy.

This preventive mechanism of Article 140 of the Constitution serves as a critical safeguard, ensuring that domestic legislation remains consistent with both national constitutional norms and supranational obligations.

Article 144 of the Constitution provides for what may be termed a remedial or sequential review of the constitutionality of laws or decisions, or any part thereof, within the context of judicial proceedings. A party to any judicial proceedings may, at any stage, raise the question of the unconstitutionality of a law or decision or any of their provisions, where the issue is material to the determination of the case.

4| Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

5| Judgment of the Supreme Constitutional Court of Cyprus of 12 June 2023, *President of the Republic v House of Representatives,* Referral 1/22(i- justice).

The court before which the question is raised may refer to the Supreme Constitutional Court for a decision, and in such a case, stay the proceedings until the Supreme Constitutional Court hands down its decision.

If the referral is made by a court other than the Supreme Court, the Supreme Constitutional Court has the discretion to accept or reject the question. If the referral is not accepted, the question is determined by the court that raised it. However, in the case of a referral by the Supreme Court, the Supreme Constitutional Court is obligated to hear and decide on the matter.

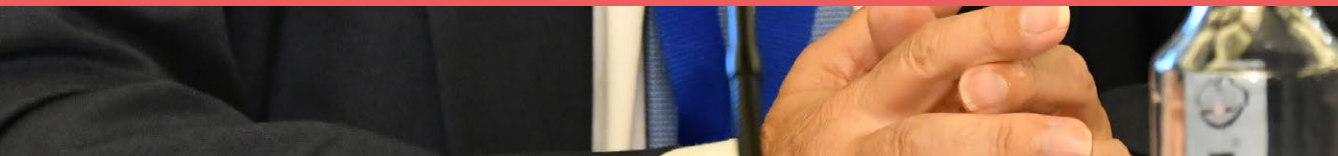
The decision of the Supreme Constitutional Court binds both the referring court and the parties to the proceedings. Thus, the judgment operates *inter partes* rather than *erga omnes.* The decision, under Article 144, only applies to the particular case under reference. However, there is nothing preventing a trial court in a similar case from being guided by this decision.

Importantly, the review of the constitutionality of any law, decision, act or omission, as well as their compatibility with EU law, is of a diffuse nature. A litigant may raise such a matter before any court at any stage of the proceedings, provided that it is material to the determination of the case.

The Supreme Constitutional Court plays a vital role in upholding the rule of law. It serves as the guardian of constitutional order, ensuring the lawful and harmonious functioning of the State. Moreover, it acts as a guardian of fundamental rights as defined not only by the national constitutional framework but also by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

The Cypriot legal system, through its mechanisms, reaffirms its commitment to the rule of law, the protection of fundamental rights, and the integrity of the European legal order.

Mr José João Abrantes
President of the Constitutional Court of Portugal



Different national constitutional law constellations relevant for EU Law

José João Abrantes, President of the Constitutional Court of Portugal

1. Since we were given a rather broad and eclectic set of topics to cover in our panel discussion, I shall focus my attention on the concept of *constitutional identity* (Article 4(2) TEU) and the principle of *consistent interpretation* as tools of constitutional dialogue within the EU constitutional system.

As an analytical and normative concept, the idea of constitutional identity has slowly been shaping both the constitutional landscape of the European project and the constitutional systems of each Member State. It is an axis for the relation between the EU and its Member States. Some doctrines highlight links between the idea of constitutional identity and that of constitutional conflict. Conflict is also at the core of the sort of constitutional pluralism that the EU constitutional project entails. But the fact that the EU is a constitutional project is no longer contested.

2. There is an established tradition of dialogue between the Portuguese constitutional order – via the jurisprudence of the Portuguese Constitutional Court – and other national apex courts, as well as with the European Court of Human Rights and the Court of Justice of the European Union (CJEU). Such dialogue is supported by Article 16(1) of the Portuguese Constitution, which incorporates international human rights standards into the Portuguese constitutional order, and by the constitutional duty to interpret fundamental rights provisions in light of the Universal Declaration of Human Rights (Article 16(2)).

Yet the relationship between the constitutional sphere of each Member State and that of the EU is distinctive and cannot be equated with 'orthodox' international law. There is a clear push for uniformity in EU law which cannot be ignored.

Uniform interpretation of EU law by courts in each Member State is key to ensuring its 'consistency, full effect, and autonomy'.

3. The first time the Portuguese Constitutional Court took a stand on the issue of the terms on which EU law is brought to bear on the court's reasoning process in incidental review proceedings was in Ruling No. 422/2020, in which as a preliminary question, the Constitutional Court considered that it was necessary to determine whether, in the light of Article 8(4) of the Portuguese Constitution, 'the court is responsible (or rather, under what conditions and presumptions it is responsible) for assessing whether EU law is in conformity with the Constitution'.

The judgment highlights the inevitability of a degree of friction or tension between the national constitutional orders and EU law and stresses the need for a dialogical approach to constitutional issues within the EU, between Member States and the EU, and within the constitutional system of each Member State. The key words are *interconstitutionality* and *constitutional dialogue*. There is a clear effort by the Court to interpret Article 8(4) in light of the specificities of EU law, including the principles of *direct effect* and *primacy*. Nonetheless, an inevitable tension remains between the idea of constitutional identity, as a potential means of limiting the primacy of EU law, and the push for coherence required by the cooperative relationship which 'organically' ties together the national courts and the CJEU. Such a push for coherence is inherent to the definition of the constitutional identity of the EU itself. A balance must be struck.

4. An important role of constitutional courts is to interpret each jurisdiction's legal standards in light of EU law and to interpret the very concept of constitutional identity. They are not alone in fulfilling such a role (ordinary courts do, too, and so do legislators and the executive branch), but constitutional courts doubtless have a special kind of interpretative authority. EU institutions, too, make an important contribution to the interpretation and development of the concept of constitutional identity. The concept of constitutional identity, which plays out at both Member State level and EU level, grounds one of three types of review on the basis of which Member State courts assess or evaluate EU law. The other two are *fundamental rights review* and *ultra vires review*. Ultimate interpretative authority over the identity clause of Article 4(2) TEU is shared between Member State courts and the CJEU. The principles of *sincere cooperation* and *mutual trust* inform the way in which national constitutional systems interact with the EU and may colour different interpretations of constitutional identity as a legal concept.

5. The most significant means of constitutional dialogue between Member State courts and the CJEU is the *preliminary reference procedure* (PRP) (Article 267 TFEU).

The PRP is a tool for the uniform application of EU law across the European Union. It is designed to cover questions of interpretation and validity of EU law provisions, including questions about the content and limits of the concept of constitutional identity for the purposes of Article 4(2) TEU. The need to balance the primacy of EU law with the particular constitutional identities, interests and needs of the legal order of each Member State is made all the more acute given the direct access national courts have to the CJEU through the preliminary reference procedure.

It is perhaps not surprising that references by national apex courts are relatively few and recent: 2008 (Corte costituzionale, Italy); 2011 (Tribunal Constitucional, Spain); 2013 (Conseil constitutionnel, France); and 2014 (Bundesverfassungsgericht, Germany). It is particularly important for ordinary courts to be proficient in using the preliminary reference procedure as a more fluent and regular dialogue reinforces the trust and cooperation among courts. The ultimate aim of the preliminary reference procedure is to provide a more effective protection of individual rights recognised under EU law. This is achieved through uniform interpretation.

The first referral by the Portuguese Constitutional Court of a question for preliminary ruling by the CJEU, recognising the CJEU's exclusive competence in interpreting and assessing the validity of EU law standards, was made in 2020 (Ruling No. 711/2020).

In this case, a Portuguese company selling second-hand cars imported from other Member States sought, before the Centre for Administrative Arbitration, the partial annulment of a tax assessment notice and the reimbursement from the Portuguese Tax Authority of part of the amounts paid under the Vehicle Tax Code. It argued that Article 11 of said Code was in breach of Article 110 TFEU *('no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products')* and should therefore be disapplied by the national tribunal. Under Article 11 of the Vehicle Tax Code, pertaining to the taxable value of second-hand cars imported from other Member States, depreciation is applied only to the cylinder component used to calculate the value of a used vehicle. Differently, when it comes to vehicles sold on national territory, depreciation is also applied to the environmental component. Second-hand imported

vehicles are thus subject to a less favorable tax treatment when compared to similar domestic vehicles, allegedly infringing Article 110 TFEU.

The Arbitral Tribunal decided in favour of the claimant, finding that the internal tax calculation of second-hand cars was in breach of the anti-discrimination principle under EU tax law (Article 110 TFEU). Accordingly, it refused to apply the national provision at stake.

The Tax Authority filed a request for review before the Constitutional Court, on the grounds that the appealed decision wrongly refused to apply a national provision due to its incompatibility with an international treaty (Article 70(1)(i) of the Law of the Constitutional Court). To support its request, the Tax Authority argued that Article 110 TFEU should be read in combination with Article 191 TFEU, which provides for environmental protection. In the appellant's view, Article 11 of the CISV is based on the 'polluter-pays' principle and seeks to discourage consumers from buying vehicles with high carbon dioxide emissions. Consequently, since it also attempts to comply with EU objectives, namely Article 191 TFEU, it should not be deemed contrary to EU law.

6. There are, however, other recent examples of constitutional dialogue in the jurisprudence of the Portuguese Constitutional Court:

- Rulings No. 268/2022 and No. 800/2023 (*metadata*). The court affirmed that the normative conflict at stake, between Portuguese law provisions and EU law provisions, did not affect the validity of the former. Pushing aside the possibility of assessing the validity of Portuguese law by reference to EU law, the court stressed the need to interpret Portuguese law in light of EU law (*principle of consistent interpretation*). Six of the 13 justices dissented on this point, jointly defending that the EU law standard of proportionality control ought to be incorporated into the Portuguese Constitutional Court's reasoning in constitutional review proceedings.

- Ruling No. 198/2023. The court affirmed the *sui generis* character and the special autonomy of EU law, which occupies its own space, between international law and constitutional law.

The main takeaway from those rulings is that the Portuguese Constitutional Court has been consolidating a non-hierarchical, dialogical view of the relationship between EU law and Portuguese law. However, the court interprets the *principle of primacy* as subject to constitutionally imposed counter-constraints, including 'respect for the fundamental principles of a democratic state based on the rule of law' (Article 8(4) of the Portuguese Constitution). The court retains the power to interpret and assess the validity of EU law provisions in cases of conflict with rule-of-law requirements which are part of the 'constitutional identity of the Republic'. Beyond such cases, the CJEU has the final word.

The Portuguese Constitutional Court is thus aligned with the CJEU's *teleological approach* to interpretation. On such an approach, 'preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to it being incompatible with the Treaty' [1]. Such an alignment makes a harmonious, collaborative relationship between the national courts and the CJEU more likely. It enhances the mutual trust on which the EU constitutional order rests and on the basis of which the concepts of *primacy* and of *constitutional identity* can be brought together under the umbrella of the principle of *consistent interpretation*.

1| See judgment of 13 December 1983, *Commission* v *Council*, 218/82, ECLI:EU:C:1983:369, paragraph 15.

Ms Irēna Kucina
President of the Constitutional Court of the Republic of Latvia

The duty of loyalty towards EU law in the constellation of protection of individual fundamental rights

Irēna Kucina, President of the Constitutional Court of the Republic of Latvia

The duty of loyalty in EU law is more than a written provision in a treaty. The obligation of sincere or loyal cooperation derives from membership of the European Union and not merely from compliance with agreed commitments. It goes beyond the conventional framework set out today in the Article 4(3) of the Treaty on European Union, providing that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

The Court of Justice of the European Union has pointed out already in 1996, in the judgment in *Brasserie du pêcheur* [1] that the principle of loyal cooperation is a doctrine 'inherent' in the EU legal order – perhaps it hinted at the autonomous character [2] of this principle which would apply even in the absence of a written provision. [3] The principle of loyal cooperation characterises the legal order of the European Union, endowing it with its 'identity'. [4]

1| Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/96 and C-48/93, ECLI:EU:C:1996:79, paragraph 39.

2| Klamert, M., "Article 4 TEU", in Kellerbauer, M., Klamert, M. and Tomkin, J., *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, Oxford University Press, Oxford, 2019, p. 47.

3| Pescatore, P., "Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen", *Europarecht*, 1970, p. 322.

4| On the 'transformative' nature of this principle, see Klamert, M., *The Principle of Loyalty in EU*, Oxford University Press, Oxford, 2014.

The principle of mutual or loyal cooperation functions in three dimensions – first, the European Union, in drafting its legal acts and enforcing its policy, must respect the interests of Member States, must abide by the limits of its competence and may not implement measures that cause harm to the Member States. [5]

Secondly, Member States must refrain from any actions that might jeopardise the aims of the European Union [6] and must actively participate in the implementation of EU law – including national courts which are required, in conformity with this principle, to enable the effective judicial protection of the individuals in relation to EU acts. [7]

Thirdly, the Court of Justice of the European Union has applied this principle also to the horizontal relationships between Member States. They must cooperate and refrain from any steps that might hinder any other Member State in attaining its aims within the European Union. Cross-border cooperation in judicial matters can be mentioned as an example. [8]

What should be the reaction of a constitutional court when the national interests diverge from the aims of the European Union? To date, the Constitutional Court of the Republic of Latvia ('the Constitutional Court') has applied the general principle of sincere cooperation on several occasions, in the constellation of protection of fundamental rights of the individual.

One of the core duties of the Constitutional Court is to uphold the fundamental rights of private persons. [9] I will provide two examples, where compliance with the principle of loyal cooperation was central to the dispute, and where absence of intervention by the Constitutional Court could infringe Latvia's obligations under EU law and equally lead to an infringement of an individual's fundamental rights.

5| Judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, ECLI:EU:C:2020:530, paragraph 73.

6| Judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, ECLI:EU:C:2024:235.

7| Judgment of 1 April 2004, *Commission* v *Jégo-Quéré*, C-263/02 P, ECLI:EU:C:2004:210, paragraph 32.

8| Judgment of 29 July 2024, *Breian*, C-318/24 PPU, ECLI:EU:C:2024:658, paragraph 93.

9| Judgment of the Latvian Constitutional Court of 19 October 2011, 2010-71-01, paragraph 14.

In both cases, the Constitutional Court applied directly [10] the principle of loyal cooperation, recognising it not only as being an evident component of EU law but also as a shining element within the constellation of domestic constitutional law.

The first case concerned the obligation of public disclosure of the salaries paid to employees of State and local government institutions. [11] According to the contested national provisions, every salary paid in the public sector had to be published and made accessible on the internet. There was an underlying matter – what this case was *really* about. May the national Parliament adopt a text knowing that, after the national law is voted, there will be a new EU regulation [12] with higher requirements for data protection?

The Constitutional Court recognised that even though the contested law pursued the legitimate aim of ensuring transparency, it was nevertheless at odds with the basic principles of EU law. [13]

The moment when the contested law was being debated in the Parliament coincided with the period when the General Data Protection Regulation (GDPR) was adopted. The law entered into force during the transitional period during which the Member States had been given time to take the necessary legislative measures to align their national legal provisions with the provisions of the GDPR. Thus, the Constitutional Court observed that the Parliament, abiding by the principle of loyal cooperation, had to take into account that the principles laid down in forthcoming GDPR will become applicable *inevitably*. [14]

The Constitutional Court recognised that, from the moment when the GDPR entered into effect, individuals had the right to expect that that regulation would become applicable in the set term.

10| Judgment of 5 February 1963, *van Gend & Loos*, 26/62, ECLI:EU:C:1963:1.

11| Judgment of the Latvian Constitutional Court of 6 March 2019, 2018-11-01.

12| Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

13| Judgment of the Latvian Constitutional Court of 6 March 2019, 2018-11-01, paragraph 18.4.1.

14| Judgment of the Latvian Constitutional Court of 6 March 2019, 2018-11-01, paragraph 18.4.1.

The Constitutional Court, in the aforementioned judgment on the obligation of public disclosure of the salaries for employees in State and local government institutions, pointed out that an obligation of a Member State to refrain from taking such measures that could seriously hinder attaining the results, envisaged in an EU legal act, followed from the principle of loyal cooperation. This obligation, as the Constitutional Court underlined, is especially applicable during the period when a regulation has already entered into force but has not yet become applicable. Therefore, the Latvian legislature had the legal obligation to take into account that the imminent applicability of the GDPR.

An important precision in this judgment concerns the role of the legislature in respecting the EU law that stems from the principle of good legislation developed in the case-law of the Constitutional Court. This principle allows the Court to sanction substantial breaches and procedural infringements in the legislative procedure. As a result, the contested norms are regarded, by the Constitutional Court, as not duly adopted and, consequently, as incompatible with the Constitution. Pursuant to this principle, good legislation also means that, in adopting new legal provisions, the legislature must examine compliance of the provisions with the binding EU law. [15] Such an assessment is necessary for allowing anyone to gain confirmation that the measure, chosen by the Parliament, is not such that would obstruct attaining the objectives of the European Union.

The second case, a recent one, [16] affects many private individuals in the context of fluctuations in Euribor rates. The case is still pending, as the Constitutional Court has referred several preliminary questions to the Court of Justice of the European Union. [17] The duty of loyal cooperation, in this case, relates to the obligation of the legislature to consult the European Central Bank, [18] before legislating on matters falling within the competence of that EU institution, irrespective of whether advice given by the European Central Bank will be taken into account.

15| Judgment of the Latvian Constitutional Court of 6 March 2019, 2018-11-01, paragraph 18.1.

16| Decision of the Latvian Constitutional Court of 31 March 2025 to refer a question to the Court of Justice of the European Union for a preliminary ruling, 2024-09-01.

17| Pending case, *SEB Banka*, C-242/25; see the English summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice.

18| Article 127(4) TFEU.

Even though the Latvian legislature had sought advice from the European Central Bank, it was argued that it did so at such a late stage of the legislative procedure that there was no realistic possibility to hold a meaningful debate on the opinion provided by the EU institution. [19]

There is little doubt for the Constitutional Court that the principle of sincere cooperation may also impose a negative obligation upon Member States to refrain from taking any actions that might be detrimental to the interests of the European Union. However, the Constitutional Court is of the opinion that there should be further clarifications as to whether the general case-law of the Court of Justice on notification obligations – particularly the consequence that a failure to notify may result in the inapplicability of a national act – should also apply in the case of consultations with the European Central Bank. [20]

These two examples indicate that we strive to strike a fair balance between effectiveness of a national regulation and the highest realistic level of protection for individual fundamental rights. This involves, in my opinion, an array of different stakeholders at both national and EU level. It is possible only if all 'players' within national legal systems and the shared legal space of the European Union, however invisible they may seem to one another, operate within a common and harmonious constellation of loyal cooperation.

19| Opinion of the European Central Bank of 11 December 2023 on a temporary mortgage loan borrower protection fee payable by credit institutions, (CON/2023/42).

20| Judgment of 6 June 2002, *Sapod Audic*, C-159/00, ECLI:EU:C:2002:343, paragraphs 49 and 50.

4th panel

Application and interpretation of EU law: Constitutional Courts and the Court of Justice

Ms Ineta Ziemele

Judge at the Court of Justice of the European Union

Interpretation methods of the Court of Justice and Constitutional Courts

Ineta Ziemele, Judge at the Court of Justice of the European Union

The questions that this panel will aim to answer appear to be technical. The panelists are required to discuss and compare the methods of interpretation of EU law and national constitutional law. We also need to consider whether the methods applied to constitutional law provisions – such as primary EU law – differ from those applied to statutory provisions, meaning secondary EU law.

Interpretation methods of EU law – shared responsibility

I begin with the proposition that judicial interpretation is not a purely technical matter. The way we interpret the law that we are mandated as judges to apply and to explain not only solves the legal dispute in a given case and enforces subjective rights as well as responsibilities as the case may be, but it also ensures coherence and internal unity of a legal system. Such coherence and unity, in turn, strengthen legal certainty and legitimacy of that legal system. I have also argued elsewhere that the consistent use of the interpretation methods of a legal norm, reflected in the structure of a judgment, is an element of the readability of that judgment making it more accessible.[1] Such consistency of approach enables the audience to anticipate how we proceed. It therefore contributes, among other elements, to the trust placed in the hands of the judges. In other words, how we approach the interpretation of legal norms and how we actually proceed is just as important as the result itself.

Secondly, within the space of cohabitation of 27 legal orders and 1 common legal order which is a unique and complex legal reality, the tools, we – as judges – have to make

1| See, e.g., Ziemele, I., "Readability of the judgments of the Court of Justice", in Cour de Justice de L'U.E., *Une justice proche du citoyen*, Forum des magistrats et Audience solennelle, Luxembourg, 4, 5 and 6 December 2022, pp. 87 to 95.

sense out of this reality, are the general principles of law that we ought to apply and the methods of interpretation. Within the EU, not only are the judges of both the Court of Justice and of the General Court EU judges, but each national judge is also an EU judge because EU law is common to us all based on shared values. This definition of the nature of the EU legal system was recently reaffirmed by the Court of Justice in the so-called conditionality judgments of 16 February 2022 in which the Court of Justice explained that: 'The values contained in Article 2 TEU … are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.'[2] Thereby, we all share and have responsibility for this common legal order and the shared values and thus the interpretation of law emerges as a major tool to ensure that the general principles of EU law that structure this legal system, such as primacy, autonomy, effectiveness and equivalence, and direct effect, are upheld.

It is this understanding of the shared responsibility that the Court of Justice reiterated in the judgment in *RS (Effects of the decisions of a constitutional court)*, when it underlined that 'any national rules or practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to disregard a national provision or practice which might prevent directly effective EU rules from having full force and effect would be incompatible with the requirements [of the EU Treaties] which are the very essence of EU law.'[3]

It is the Court of Justice, as agreed by the Member States and provided in the EU Treaties, that has the ultimate and final responsibility for the interpretation of EU law. However, it can only exercise this mandate in conjunction with national courts. It is therefore that, as the Court of Justice has reiterated over time starting from the judgment in *Simmenthal*, 'the national court which exercised the discretion or complied with its obligation to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU cannot be prevented from forthwith applying [EU] law in accordance with the decision or the case-law of the Court, since otherwise the effectiveness of that

2| Judgment of 16 February 2022, *Hungary* v *Parliament and Council,* C-156/21, ECLI:EU:C:2022:97, paragraph 127.

3| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99, paragraph 63.

provision would be impaired … It must be added that the power to do everything necessary, when applying [EU] law, to disregard national rules or a national practice which might prevent [EU] rules from having full force and effect is an integral part of the role of a Court of the European Union which falls to the national court responsible for applying, within its jurisdiction, the EU rules, and therefore the exercise of that power constitutes a guarantee that is essential to judicial independence as provided for in the second subparagraph of Article 19(1) TEU.'[4]

It is with a view to this shared responsibility in the application of EU law that the national courts must also master the methods of interpretation of EU law used by the Court of Justice.

There are at least two further subsidiary reasons. First, in order to establish whether a national court is under the obligation to submit a preliminary reference or avails itself of a discretion to do so, the reading of the EU legal provision should follow EU law interpretation methods. To discard the EU law as irrelevant to the dispute at hand or to consider it as being clear in its application to the case at issue, as per the criteria in the judgment in *Cilfit*,[5] it is important to understand this legal norm similar to how the Court of Justice would. Second, if a true shared responsibility for the common legal order is to work, the methods of work should also be shared. Moreover, such an approach is also part of judicial independence in the EU.

There is, however, another side of that coin to which I shall turn briefly. There is no doubt that national constitutional courts must uphold the supremacy of national Constitutions. Respect for the hierarchy of norms in our democracies is an element of the rule of law and as such is important to the European Union as well. Moreover, I submit that it is protected by Article 4(2) TEU as an element of constitutional identities. The Court of Justice in the judgment in *RS* upheld this principle, when it found that 'Article 2 TEU [in its rule of law element], the second subparagraph of Article 19(1) TEU [and Decision

4| Judgment of 9 March 1978, *Simmenthal*, 106/77, ECLI:EU:C:1978:49. See also judgment of 21 December 2021, Euro Box Promotion and Others (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034), paragraph 257.

5| Judgment of 6 October 1982, *Cilfit*, 283/81, ECLI:EU:C:1982:335.

2006/928 [6]] do not preclude national rules or a national practice under which the decisions of the [national constitutional court] are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive, as required by those provisions. …'. [7] This does not mean that, within the common legal order, national judges are free to disregard EU law where it is relevant and applicable.

In other words, since national traditions, as reflected in national law and its application, coexist with a common legal order that strives on its uniform understanding and application throughout the 27 national legal orders, methods of interpretation and the choices we make when applying these methods become crucial for a harmonious advancement of the goals that, at times, may appear to go in opposite directions. EUnited in Diversity is a complex multilayered constitutional landscape.

The Court of Justice: Methods

How is the Court of Justice interpreting primary and secondary EU law? Over the years, there has been plenty of debate and academic writings arguing that the Court prioritises teleological interpretation over the letter of the law to achieve what has been termed simply as 'closer integration' of the Union. Apart from the fact that the Treaty of the European Union in its preamble provides – as its goals – both a closer Union among European citizens alongside further integration, such aims do not disclose and reflect the very complex nature of the EU legal order, whose nature is very much part of the interpretative work carried out ultimately by the Court of Justice, but also by all courts in the EU. In the concept paper for our conference, the organisers have summed up the interpretative work carried out by the Court of Justice: 'When interpreting the terms of a provision, which are not specifically defined in EU law, the Court of Justice looks at the letter of law, by reference to the usual, literal meaning in everyday language

6| Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ L 354, 14.12.2006, p. 56).

7| Judgment of 22 February 2022, *RS*, C-430/21, ECLI:EU:C:2022:99, paragraph 44.

of the words used. However, since the EU has 24 official languages, the Court must look at the usual meaning of the terms in a multi-linguistic environment. … Where the linguistic divergences exist, or the meaning of a provision is not clear from its wording, it must also look at the context in which the provision being interpreted is set and the objectives that it pursues.'[8]

Two examples of the recent case-law of the Court of Justice are on point. The first concerns the constitutional treaties and the second concerns secondary legislation. In two direct actions[9] brought by the European Commission, the question at issue concerned the right of an EU citizen residing in a Member State of which they are not a national to become a member of a political party or a political movement and thereby stand as a candidate in municipal and European Parliament elections. Eminently a human rights question, a constitutional question, but what about EU law? The determination of the outcome of the dispute between the Commission and the Member States depended on the interpretation of Article 22 TFEU.

The Court of Justice began by recalling its settled case-law concerning the methods of interpretation of a provision of EU law, thereby outlining the structure of its judgments.

In the first place, by looking at the wording of Article 22 TFEU which provides that EU citizens residing in a Member State of which he or she is not a national shall have the right to vote and to stand as a candidate in municipal and European Parliament elections under the same conditions as nationals of that Member State, and that those rights are to be exercised subject to detailed arrangements adopted by the Council. The Court of Justice determined that the article 'contains no reference to the conditions for acquiring membership of a political party or political movement'. However, that article refers to the enjoyment of the right 'under the same conditions' as nationals of the Member State in which they reside. The Court of Justice deduced that Article 22 TFEU thereby prohibits a Member State from making the exercise of that right

8| Concept paper, page 13

9| Judgments of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962; and of 19 November 2024, *Commission* v *Poland,* C-814/21, ECLI:EU:C:2024:963.

by an EU citizen subject to conditions other than those applicable to its own nationals.[10] This reading of the term 'under the same conditions' engaged the principle of non-discrimination and thus brought into consideration Article 18(1) TFEU which was addressed by the opposing parties during the preliminary proceedings. That article was relevant in understanding the scope of the term 'under the same conditions'. The Court of Justice pointed out that Article 18 TFEU has general application, including in relation to the rights provided for in Article 22 TFEU.

Next, the second element of the wording of Article 22 TFEU refers to detailed arrangements adopted by the Council.[11]

It is true that Directive 93/109 and Directive 94/80[12] do not provide for an exhaustive harmonisation of Member States' electoral systems, nor do they contain provisions relating to the conditions under which EU citizens residing in a Member State of which they are not nationals may acquire membership of a political party or political movement.

However, the scope of those directives cannot, even implicitly, limit the scope of the rights and obligations arising under Article 22 TFEU. Indeed, it would be strange if the legal norm of a lower legal ranking could affect a constitutional norm or a general principle of law.

The Court of Justice pointed out that the determination of the conditions of access and membership in political parties falls within the competence of the Member States. However, it emphasised that, when exercising that competence, Member States are required to comply with their obligations under EU law, in particular, that such conditions do not discriminate against EU citizens, otherwise the effectiveness

10| Judgments of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962, paragraphs 93 to 95; and of 19 November 2024, *Commission* v *Poland*, C-814/21, ECLI;EU:C:2024:963, paragraphs 92 to 94.

11| Judgments of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962, paragraphs 102 to 105; and of 19 November 2024, *Commission* v *Poland*, C-814/21, ECLI:EU:C:2024:963, paragraphs 101 to 104.

12| Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ L 329, 30.12.1993, p. 34); Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ L 368, 31.12.1994, p. 38).

of the principle of non-discrimination on grounds of nationality, enshrined in Article 18 TFEU, would be undermined.

The wording of Article 22 did not support the conclusion that the right to become a member of a political party or a political movement falls outside the scope of Article 22 TFEU.

As regards, in the second place, the context of Article 22 TFEU, the Court of Justice explains that reference should be made both to other provisions of the Treaties and to provisions of the same rank, contained inter alia in the Treaty on European Union and in the Charter of Fundamental Rights ('the Charter'). As to how the Court of Justice determines the context of the legal provision that it interprets, and where its objectives are to be found, the answer is shaped by the general principles of EU law already mentioned, such as the coherence of the legal system and its *effet utile*, and the uniform protection of rights stemming from EU law. [13]

It was relevant, first, that Article 22 TFEU is in Part Two of the TFEU Treaty, containing provisions on non-discrimination and citizenship of the Union. The Court of Justice explained that, in accordance with Article 20 TFEU, citizenship is a fundamental status created by the constitutional development of the EU. There is a connection between, on the one hand, the right to freedom of movement and residence, a fundamental freedom underpinning the very idea of the European Union and, on the other hand, the right of EU citizens residing in a Member State of which they are not nationals to vote and to stand as candidates in municipal and European Parliament elections.

I submit that, secondly, one of the most significant contextual elements in which Article 22 TFEU was interpreted stemmed from Article 10(1) TEU, which provides that the functioning of the EU is to be founded on representative democracy, which gives concrete expression to democracy as a value. Article 10(2) and (3) TEU, as noted by the Court of Justice, confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the EU. In view of the right to freedom

13| Judgments of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962, paragraphs 108 to 110, 112 and 113; and of 19 November 2024, *Commission* v *Poland*, C-814/21, ECLI:EU:C:2024:963, paragraphs 107 to 111.

of movement, which is the aim of the Union, equal participation in democratic life of the European Union cannot be undermined by the exercise of that freedom.

Thirdly, Article 12(1) of the Charter, which enshrines the right to freedom of association at all levels, in particular in political, trade union and civic matters, lends further support to the reading of Article 22 TFEU as it had emerged until then in the judgment. [14]

The fundamental role of political parties in expressing the will of EU citizens is recognised, as regards political parties at European level, in Article 10(4) TEU and Article 12(2) of the Charter.

Political parties, one of whose essential functions is to nominate candidates for election (see, by analogy, *Georgian Labour Party v. Georgia)*, [15] thus fulfil an essential function within the system of representative democracy on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU.

The Court therefore established that membership of a political party or a political movement contributes significantly to the effective exercise of the right to stand for election, as conferred by Article 22 TFEU.

The Court identified three aspects of the objectives pursued by Article 22 TFEU, that is to say, participation in democratic processes of the Member State of residence; equal treatment of EU citizens irrespective of their place of residence; and the promotion of the gradual integration of EU citizens into the society of the Member State of residence. These objectives reinforced the Court's interpretation of that article.

For all these reasons and following all the above steps, the Court of Justice held that 'Article 22 TFEU, interpreted in the light of Articles 20 and 21 TFEU, Article 10 TEU and Article 12 of the Charter, requires that, if EU citizens residing in a Member State of which they are not nationals are to be able to exercise effectively their right to vote and to stand as a candidate in municipal and European Parliament elections in that

14| Judgments of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962, paragraphs 120 and 121; and of 19 November 2024, *Commission* v *Poland*, C-814/21, ECLI:EU:C:2024:963, paragraphs 118 to 120.

15| Judgment of the ECtHR of 8 July 2008, *Georgian Labour Party* v. *Georgia* (ECLI:CE:ECHR:2008:0708JUD000910304 § 142).

Member State, they must be afforded equal access to the means available to nationals of that Member State for the purpose of exercising those rights effectively.'[16]

In the judgment in *Kwantum*,[17] the question referred was whether the condition of material reciprocity in the protection of works of applied art provided for in the Berne Convention but not expressly set out in Article 2(a) and Article 4(1) of Directive 2001/29[18] should nevertheless be permitted under this directive.

The Court held that such a condition would be contrary to the very wording of that directive. The judgment also examined the context in which the provisions concerned are situated and took into account the objectives of the directive, such as harmonisation of the protection of copyright in the EU. In terms of methodology, there is coherence with the judgments referred to above regarding Article 22 TFEU which, as explained, was also silent on the matter. In terms of substance, the judgment in *Kwantum* explains that different protection regimes arising from bilateral regimes set out in the Berne Convention appear to go against the harmonisation of the protection of copyright across the EU as a common legal order.

However, the judgment also places the condition of material reciprocity within the scheme of analysis of a limitation on intellectual property, the protection of which is set out in Article 17(2) of the Charter and goes through the steps of the assessment of limitations with regard to Article 17 in accordance with the methodology provided for in Article 52 of the Charter. The analysis was a result of the referring court's request that the Court of Justice interpret Directive 2001/29 in the light of the Charter.

The question arises as to why there might be a limitation on the right to intellectual property in a situation in which the directive does not contain a criterion, that is to say, in a situation where the law is silent on the matter. The reason for this approach is based in the nature of EU law as a common legal order. If the point of departure is the objective of ensuring equal protection of works protected under the Directive

16| Judgment of 19 November 2024, *Commission* v *Czech Republic*, C-808/21, ECLI:EU:C:2024:962, paragraph 127.

17| Judgment of 24 October 2024, *Kwantum Nederland and Kwantum België*, C-227/23, ECLI:EU:C:2024:914.

18| Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

2001/29 in the European Union, any difference in such protection based on bilateral reciprocal protection regimes between a Member State and a third country can be seen as a limitation on the harmonised protection of intellectual property in the European Union.

In the judgment in *Kwantum*,[19] the Berne Convention and Directive 2001/29 could not receive a consistent interpretation. The material reciprocity criterion as part of international intellectual property law and its relevance to EU law could only be settled by the EU legislature.

The examples of the Court's reasoning in the abovementioned cases amply exemplify the importance of each step of its reasoning, taking into account the distinctive nature of EU law as a common legal order. It is this characteristic of EU law that oftentimes provides for such a reading of an EU law provision that within a single legal system would indeed be different.

Constitutional Courts compared

When constitutional courts interpret the highest law of the land, there is no doubt that this work reflects the variety of constitutional texts and traditions, yet certain foundational approaches recur across jurisdictions.

Like the Court of Justice, constitutional courts begin with the text. National constitutional courts, however, are not faced with the task of bearing in mind the meaning of the term in multiple languages unless, of course, these courts apply international or EU law. This is a very important difference in the work of the Court of Justice and national constitutional courts, and one that underscores the need to preserve and respect the principle of multilingualism, which remains fundamental to the EU's identity.

The traditions of drafting constitutions are different. For example, those constitutions that have been adopted in the 1990s after the demise of the three federations (one of them being the Soviet empire) have a tendency to have rather detailed provisions, while there are other traditions, such as the Latvian Constitution of 1922 (*Satversme*), which contains

19| Judgment of 24 October 2024, *Kwantum Nederland and Kwantum België*, C-227/23, ECLI:EU:C:2024:914.

more open-ended provisions requiring interpretation. This has allowed such texts to be applied over time without the need to amend them on a regular basis. [20]

Similarly, Bills of Rights would generally be formulated in rather abstract terms giving more space for the interpretation that ensures the effectiveness of fundamental rights over time.

On the other hand, given, in many cases, the long-standing traditions and the importance of legal certainty, national courts may not be in a position to resort to the teleological interpretation of their own Constitution and statutory law. Furthermore, the intentions and purpose of national legislature are, most of the time, rather clear, while the EU legislature can leave a certain ambiguity for the Court of Justice to fill in. These are only a few highlights as to differences between the contexts within which interpretation carried out by national constitutional courts and the Court of Justice takes place.

Conclusion

Differences exist both as to the importance attributed for historical reasons to various methods of interpretation and to their content as well as in view of the difference between a single legal system and a common legal system. These differences most likely relate to the systemic and teleological interpretation of a legal provision in EU law and national law, respectively. The context and purpose may and do differ and it is here that the different historical experiences of European nations and geographical realities enter the picture. Is there a place for different historical experiences of our societies? The case-law of the Court of Justice shows that there is, but it is a matter of finding the right balance so that the four freedoms at the heart of the internal market would not be undermined in their very essence and in conjunction with the fundamental rights set forth in the EU Charter.

20| Pleps, J., Pastars, E. and Plakane I., "Konstitucionālās tiesības", *Rīga: Latvijas Vēstnesis*, 2021, p. 46 et seq.

Mr Lawrence Mintoff
Judge at the Court of Appeal and at the First Hall of the Civil Court of Malta

The primacy of EU Law and the supremacy of the Constitution of Malta

Lawrence Mintoff, Judge at the Court of Appeal and at the First Hall of the Civil Court of Malta

In this brief presentation, I will dwell on how Maltese law and Maltese courts interpret and apply the primacy of EU law, within the context of the 'supremacy' of the Constitution of Malta which, according to Article 6 thereof, is considered to be the supreme law of the land.[1] It lays down, as a general rule, that any other law is void to the extent that it is inconsistent with the Constitution. Moreover, amendment of Article 6 requires a two-thirds majority of all the members of parliament.

Given the political situation prevailing in the 1990s when Malta was preparing to join the European Union, it was inconceivable that a qualified two-thirds majority of all members of parliament would agree to amend Article 6 of the Constitution. Consequently, Article 6 was left untouched. To this day, Article 6 refrains from explicitly asserting the precedence of EU law in the event of a conflict with the Constitution of Malta.

1| 'Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

Malta's accession to the European Union

Malta's prospective membership in the European Union was a source of open conflict between Malta's two major political parties since the 1980s. The matter was finally settled in 2004 by a referendum and a subsequent general election that reaffirmed the referendum result.

On 16 July 1990, Malta formally applied for European Economic Community membership. The membership debate reflected deep political divides, with public opinion often split along party lines. On 8 March, 2003, a referendum on Malta's EU membership was held, wherein over 90% of the voters participated, and 53.65% voted in favour. The referendum was consultative only and did not in any way affect the legal standing of the Constitution of Malta. A subsequent general election in April 2003 reaffirmed the mandate of the governing party, effectively endorsing the referendum result.

On 16 April 2003, Malta signed the Treaty of Accession in Athens, formalising its path to EU membership. Malta became a full EU member on 1 May 2004, as part of the EU's largest single enlargement. Today, this issue has, by and large, been settled once and for all: political consensus has been reached between the two main political parties, and Malta's EU membership now enjoys the support of more than 80% of the population.

Although this short historical political overview may, at first glance, appear to be out of place, with such a background one would hopefully be able to understand better the situation prevailing in Malta, the smallest Member State of the European Union, with regards to the application and interpretation of the primacy of EU law in situations of potential conflict with the Constitution of Malta.

The European Union Act 2003

Malta adopts the dualist doctrine regarding the internal application of international norms, according to which international treaties do not have any legal effect in the municipal sphere unless they are 'transplanted' into national law through legislation enacted by Parliament. Hence, the Treaty whereby Malta acceded to the EU was made legally enforceable through the European Union Act promulgated by the Maltese Parliament on 16 July 2003. The Act provides for Malta's accession to the European Union and makes provision consequential on and ancillary thereto.

As stated in the beginning of this paper, the European Union Act left Article 6 of the Constitution untouched. Instead, it amended Article 65 of the Constitution, which refers to the powers of the House of Representatives to make laws, and which unlike Article 6, could be amended by a simple majority of votes in the House of Representatives. [2] Article 65 now states that 'subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on [16 April 2003]'. [3]

It would appear at first sight that the supremacy of EU law does not stem from this provision, but from the European Union Act, which is an ordinary Act of Parliament. [4]

2| The most important provisions of the Maltese Constitution are entrenched by a two-thirds majority. Article 66 of the Constitution lists the articles that require such a qualified majority to be changed. Articles of the Constitution not listed in Article 66 require only an absolute majority to be amended, that is 50%+1 of all those eligible to vote in the House of Representatives.

3| Article 65(1) of the Constitution of Malta.

4| Promulgated on the 16 July, 2023 and with effect from the 1 May, 2004.

According to the Act:

1. From 1 May 2004, the European Treaty and existing and future acts adopted by the European Union became binding on Malta and became part of the domestic law thereof under the conditions laid down in the Treaty. [5]

2. Any provision of any law in Malta which from the said date was incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty, shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights, be without effect and unenforceable. [6]

3. All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty, and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, [7] shall be recognised and available in Law, and be forced, allowed and followed accordingly. [8]

Whilst the Act declares that EU law is supreme vis-à-vis any other ordinary statute in Malta, it does not, and cannot, declare such supremacy over the Constitution.

However, the Constitutional Court has ruled that Article 65 effectively grants constitutional supremacy status to the obligations consequent to the Treaty of Accession to the European Union, and therefore a law which is in breach of such obligations is inconsistent with the Constitution. [9] Thus Article 65 makes it easier for the Maltese courts to give priority to EU law in cases of conflicting national legislation.

5| Article 3(1) of the European Union Act (Cap. 460 of the Laws of Malta).

6| Article 3(2) of the European Union Act (Cap. 460 of the Laws of Malta).

7| Namely EU regulations. EU directives and decisions become part of Maltese law by ministerial order, subject to a negative annulment parliamentary procedure in terms of the Interpretation Act (Cap. 249 of the Laws of Malta).

8| Article 4(1) of the European Union Act (Cap. 460 of the Laws of Malta).

9| Judgment of the Maltese Constitutional Court of 3 March 2014, *Vodafone Malta Ltd v Attorney General*, 361/05.

Article 6 of the Constitution

As Article 6 of the Maltese Constitution shows, Parliament cannot pass any law that conflicts with the Constitution. Yet an important question arises: what would happen if a provision of EU law – ordinarily superior to the domestic law of Member States – were to conflict with the Maltese Constitution?

EU law is implemented in Malta through the European Union Act of 2003. As a law passed by the Maltese Parliament, it must align with and remain subordinate to the Constitution, which holds supreme authority. Consequently, it has been theoretically possible that Malta's Constitution could be interpreted as taking precedence over EU law, given that EU law derives its effect in Malta from ordinary legislation.[10] Indeed, from a strictly domestic perspective, while an ordinary law can assert the primacy of EU law over other ordinary laws in Malta, it cannot claim supremacy over the Constitution unless the Constitution itself is amended specifically to state so.[11] To date, however, no such amendment has been made to the Constitution.

A recent case

The case of *Michael Christian Felsberger et v TSG Interactive Gaming Europe Ltd*[12] attempted to resolve the dilemma between constitutional supremacy and conflicting EU law. The case dealt with the enforcement of an Austrian court's judgment, which issued a garnishee order against a Maltese gaming company, pursuant to an EU regulation. A key issue was whether the Austrian law underlying the judgment complied with EU law, as it allowed individuals who lost money through gambling to recover their losses, potentially restricting Maltese online gaming companies from operating in Austria, in breach of the EU principle of free movement of services. Given the principle of the supremacy of EU law,

10| Stanton, J., "In search of constitutional supremacy in Malta", City Research Online, City Law School, City, University of London, 2023.

11| Borg, T., "A Commentary on the Constitution of Malta", Kite Group 2nd ed., 2022.

12| Judgment of the Maltese First Hall of the Civil Court of 21 July 2023, 1316/2023, ECLI:MT:CIVP:2023:143026.

one might expect the enforcement of the Austrian court's judgment to be upheld. However, the Maltese court prevented its enforcement, relying on recent amendments to the Gaming Act, which permit Maltese courts to reject the recognition and enforcement of such foreign judgments.

In outlining the rationale behind the decision, the court referred to Article 825A of the Maltese Code of Organization and Civil Procedure, which states:

> 'Where regulations of the European Union provide … in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matters not falling within the ambit of such regulations.'

However, the court went on to emphasise another perspective, stating:

> 'It is true that these legal provisions affirm the supremacy of Union laws. But there is another supremacy which we often forget: that of the Constitution of Malta, which is the highest law in the country, and which surely must not be considered … an ordinary law.'

Indeed, the judgment concludes by affirming that the court's ultimate allegiance lies with the Constitution of Malta, even over supranational laws that may conflict with it. Whether this ruling will be overturned by the Constitutional Court on appeal remains to be seen. Nonetheless, it is a striking decision, as it explicitly prioritises the Maltese Constitution over the well-established primacy of EU law.

Judicial proceedings

According to the European Union Act, for the purposes of any proceedings before any court or other adjudicating authority in Malta, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising therefrom or thereunder, shall be treated as a question of law, and if not referred to the Court of Justice of the European [Union], be for determination as such in accordance

with the principles laid down by, and any relevant decision of, the Court of Justice of the European [Union] or any court attached thereto. [13]

In one of its recent judgments, [14] the Maltese Court of Appeal held that a national court, having been the recipient of a judgment of the European Court of Justice pursuant to a request for a preliminary ruling, is bound by the interpretation given by the European Court of Justice, when delivering its own judgment. The judgment of the European Court of Justice binds all the other national courts of all the Member States, which may subsequently be requested to decide upon an identical matter. The Maltese Court of Appeal cites the judgment in *Cilfit* [15] in explaining the justification for the existence of the preliminary ruling procedure:

> 'That obligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177.' [16]

Furthermore, in the judgment quoted above, the Maltese Court of Appeal referred to two exceptions to the application of the preliminary ruling procedure, based on the legal maxim *clara non sunt interpretanda* – a principle in EU law where a national court, when interpreting EU law, does not need to refer a case to the European Court of Justice for a preliminary ruling, if the correct application of EU law is so obvious that there is no reasonable doubt. This doctrine stems from the judgment in *Cilfit* cited above,

13| Article 5(1) of the European Union Act [Cap. 460 of the Laws of Malta].

14| Judgment of the Maltese Court of Appeal of 9 January 2024, *Jasmin Buchegger debitament rappreżentata mill-mandatarja speċjali tagħha l-Avukat Sarah Sultana v Rabbit Entertainment Limited*, C-66436.

15| Judgment of 6 October 1982, *Cilfit*, 283/81, ECLI:EU:C:1982:335; 'the judgment in Cilfit'.

16| Ibid., paragraph 7.

which set out conditions under which a national court can avoid making a reference to the European Court of Justice. The second exception refers to the *acte éclairé* doctrine, a principle in legal interpretation, which emphasises that it is not necessary to make a reference to the European Court of Justice if it results that the required interpretation of the EU law had already been given in a previous preliminary reference in a similar case.

Moreover, the Maltese Court of Appeal cited favourably the judgment in *Georgiou v. Greece* delivered by the European Court of Human Rights on 14 March 2023, [17] where it was held that the Greek Court of Cassation was obliged to give reasons for its refusal to refer a question to the Court of Justice for a preliminary ruling, since the decision was not subject to appeal under domestic law. The Greek Government contended that a preliminary reference was unnecessary for the Greek Court of Cassation to reach its final judgment since it was based on an assumption that the relevant EU law provisions in question were clear. However, the European Court of Human Rights found that the Greek Court of Cassation had not provided any reasons for its refusal to seek a preliminary ruling and had not even mentioned the applicant's request. This lack of reasoning and justification amounted to a violation of Article 6 § 1 of the European Convention on Human Rights.

Jurisdiction of the Maltese courts

The jurisdiction of the Maltese courts is, according to an explicit provision in the Code of Organization and Civil Procedure ('the COCP'), subordinate to European law. Thus its rules of jurisdiction cannot conflict with EU law regarding the jurisdiction of courts of Member States. [18]

The Maltese rules regarding recognition and enforcement of foreign judgments are also subordinate to EU regulations, which take precedence. [19]

17| The European Court of Human Rights, 14 March 2023, CE:ECHR:2023:0314JUD005737818.

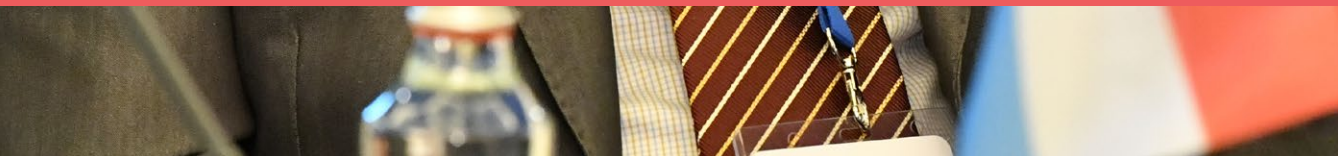
18| Article 742(6) of the COCP.

19| Article 825A of the COCP.

Concluding remarks

The Maltese Parliament has taken substantial measures to ensure the seamless alignment of Maltese law with EU principles and its legal order. Nevertheless, the failure to tweak the supremacy clause in the Constitution is in stark contrast to other Member States, such as the Netherlands, which explicitly states in its Constitution that international law prevails over Netherlands law, and Cyprus, where the supremacy provision in Article 179 of its Constitution was purposefully amended following EU accession. Considering the consensus prevailing today in Malta on EU membership along all political divides, a review of Article 6 of the Constitution may be more than opportune.

M. Thierry Hoscheit
Président de la Cour constitutionnelle
du Grand-Duché de Luxembourg



L'expérience de la Cour constitutionnelle du Grand-Duché de Luxembourg

Thierry Hoscheit, Président de la Cour constitutionnelle du Grand-Duché de Luxembourg

L'interaction entre les cours constitutionnelles, et plus spécifiquement la Cour constitutionnelle du Luxembourg et la Cour de justice de l'Union européenne, au regard de l'application et de l'interprétation du droit de l'Union européenne est ici traitée sous deux angles, distincts mais complémentaires.

1er thème : Comment la Cour constitutionnelle du Luxembourg interprète les textes.

Éléments de contexte : la structure institutionnelle

Comparativement à d'autres cours constitutionnelles, la Cour constitutionnelle luxembourgeoise se distingue par un certain nombre de caractéristiques qui influent sur la façon dont elle travaille, notamment au regard de l'interprétation des textes. Il importe de retracer certaines de ces caractéristiques [1] [2].

1| Pour un exposé détaillé des particularismes de la Cour constitutionnelle luxembourgeoise, voy. L. Heuschling, « Une cour constitutionnelle différente des autres. Étendue, raisons & avenir de l'originalité de la Cour constitutionnelle luxembourgeoise », in *Les dossiers de la Pasicrisie luxembourgeoise, Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?*, 2018, p. 55 et ss., spéc. p. 58 – 95.

2| Pour la bonne compréhension des références constitutionnelles dont il est fait usage dans la présente contribution, il importe de souligner que la Constitution luxembourgeoise a fait l'objet d'une refonte à travers quatre lois constitutionnelles du 17 janvier 2023, entrées en vigueur le 1er juillet 2023. Il est fait référence aux nouvelles dispositions par l'utilisation des termes « Constitution révisée ». Sans constituer une révolution constitutionnelle, cette réforme a essentiellement modernisé la loi fondamentale, qui reste fondamentalement celle adoptée en 1868.

1/ La Cour constitutionnelle du Luxembourg est une Cour non-permanente. Elle n'est pas composée de magistrats exerçant à plein temps et procède exclusivement au contrôle de constitutionnalité des lois. Le législateur a pris l'option lors de la création de la Cour constitutionnelle en 1997 de ne pas confier le contrôle de constitutionnalité à des spécialistes dédiés, mais à des magistrats ordinaires, provenant pour partie des juridictions judiciaires (*de lege lata* au moins 3 sur 9 ; en pratique 7 sur 9) et pour partie des juridictions administratives (*de lege lata* au moins 1 sur 9 ; en pratique 2 sur 9), en précisant expressément que du fait de leur nomination à la Cour constitutionnelle, ils ne cessent pas pour autant leurs fonctions d'origine.

2/ En pratique, la Cour constitutionnelle se compose de magistrats accusant une longue expérience professionnelle. Cette composition fait que les réflexions de la Cour constitutionnelle sont nourries par des horizons divers en fonction des carrières des magistrats qui y sont nommés, mélangeant non seulement les approches des magistrats de droit privé avec celles des magistrats de droit public[3], mais encore les diverses orientations du droit privé (civiliste, commercialiste, pénaliste, ...). À cela s'ajoutent les contacts réguliers que ces magistrats entretiennent du fait de leurs fonctions ordinaires avec le droit international, notamment les droits fondamentaux garantis par la Convention de sauvegarde des droits de l'homme et des libertés fondamentales[4], et le droit de l'Union européenne.

3/ La Cour constitutionnelle siège en principe en formation de 5 magistrats[5], et ces 5 magistrats sont désignés au cas par cas, de sorte que la composition de la Cour constitutionnelle varie d'affaire en affaire.

4/ En ce qui concerne la compétence et le mode de saisine de la Cour constitutionnelle, il convient de préciser qu'elle exerce seulement un contrôle *a posteriori* de la conformité de la loi à la Constitution sur saisine préjudicielle par une autre juridiction. Le chemin pour

3| Le caractère stimulant et enrichissant de ce mélange des genres a été mis en exergue par F. Delaporte, « Un bilan relationnel : le dialogue avec les juridictions administratives », in *Les dossiers de la Pasicrisie luxembourgeoise, Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?,* 2018, p33 et ss., spéc. p. 35 et 36.

4| Sur l'influence de cette Convention, voy. G. Ravarani, « L'impact de la Convention et de la Cour européenne des droits de l'homme », in *La défense des droits et libertés au Grand-Duché de Luxembourg*, 1re édition, Bruxelles, Larcier, 2020, p. 279-287.

5| Ce n'est qu'à titre exceptionnel qu'elle siège en formation solennelle réunissant les 9 magistrats.

y arriver est donc particulièrement étroit, ce qui est illustré par les chiffres : depuis l'entrée en exercice de la Cour constitutionnelle le 1er octobre 1997 jusqu'au mois de septembre 2025, elle a été saisie de 201 affaires, soit en chiffres arrondis de 7 affaires par an.

Approche pratique : considérations générales

Comment s'y prend alors la Cour constitutionnelle pour interpréter la Constitution (la norme de référence) et en cas de besoin la loi (la norme soumise au contrôle) ?

Face aux différentes méthodes d'interprétation possibles (littérale, téléologique, logique, historique, etc.), la doctrine s'accorde pour dire qu'on ne peut pas dégager de méthode d'interprétation immuable et continue dans la pratique de la Cour constitutionnelle [6]. Il est même question d'une approche casuistique de la Cour constitutionnelle, ayant recours tantôt à telle méthode, tantôt à telle autre méthode [7].

Ce flottement peut s'expliquer par les points relevés en guise d'introduction et qui peuvent former un frein au développement d'une théorie générale du contrôle constitutionnel :

- absence de magistrats spécialisés et dédiés uniquement au contrôle constitutionnel ;
- variation dans les compositions d'une affaire à l'autre ;
- faible volume d'affaires à traiter.

Mais n'y a-t-il pas, néanmoins, moyen de trouver une ligne générale dans la pratique de la Cour constitutionnelle ?

6| C. Sauer, *Contrôle juridictionnel des lois au Luxembourg*, Larcier, 2019, n° 429 + ss. L. Heuschling, « Pourquoi la Cour constitutionnelle devrait s'intéresser à l'histoire, ou audaces apparentes et réelles de l'arrêt n° 146/2019 relatif à "l'État de droit" », in *Journal des tribunaux Luxembourg*, 3 septembre 2019, n° 64, 2019, Larcier.

7| L. Heuschling, op. cit., « Pourquoi … »

Un dénominateur commun peut être trouvé dans ce qu'on a pu appeler le pragmatisme, du Luxembourgeois en général et du juriste luxembourgeois en particulier, thème qui revient de façon récurrente dans la littérature [8]. Il s'agirait d'une stratégie d'adaptation du pays, due à sa petite taille, qui chercherait à dégager au cas par cas la meilleure solution possible. Ou, autrement dit, à assurer l'effet utile de la décision à rendre par la Cour constitutionnelle [9].

Il est vrai qu'une telle approche ne se soucie guère, en règle générale, de l'application de grands principes, bien qu'elle ne l'exclue pas. Et il est vrai aussi qu'une telle stratégie comporte de façon inhérente certains risques, notamment celui de l'excès ou de l'inclination à l'opportunisme, surtout si la prise de décision se situe dans la sphère politique [10].

8| S. Menétrey, « L'exécution des sentences arbitrales au Luxembourg entre pragmatisme et efficacité », in *JurisNews Arbitrage et Procédure Civile*, 2017/3-4, p. 89-96.
P. Kinsch, « Le droit commun et l'avenir du droit luxembourgeois », in *Actes de la Section des sciences morales et politiques de l'Institut grand-ducal*, Volume 21, 2018, pp. 119 et ss.
L. Heuschling, « Une cour constitutionnelle différente des autres. Étendue, raisons & avenir de l'originalité de la Cour constitutionnelle luxembourgeoise », in *Les dossiers de la Pasicrisie luxembourgeoise, Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?,* 2018, p. 55 et ss., spéc. p. 104.
J. Gerkrath, « Conclusion générale : la Cour en tant qu'instance de dialogue », in *Les dossiers de la Pasicrisie luxembourgeoise, Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?*, 2018, p. 138 et ss., spéc. p. 139.

9| La notion d'effet utile a été théorisée dans le cadre des relations entre les questions préjudicielles portées devant la Cour constitutionnelle et celles portées ou à porter devant la Cour de justice de l'Union européenne :
- Cour constitutionnelle, 19 juin 2015, affaire n° 119, 1er arrêt : « *[…] dès lors, y compris pour des raisons d'effet utile quant à la solution à dégager finalement au fond, la Cour constitutionnelle est amenée à […]* ».
- Cour constitutionnelle, 16 juin 2017, affaire n° 119, 2e arrêt : « […] dans le cadre ainsi tracé, toujours pour des raisons d'effet utile, la Cour, sans renvoyer d'abord l'affaire à la juridiction de renvoi afin de déterminer plus en avant les éléments de fait et de droit, entend répondre à la question préjudicielle posée dans les limites […] ».
- Cour constitutionnelle, 17 janvier 2025, affaire 194 : « En raison du principe de primauté du droit de l'Union européenne, l'effet utile des questions préjudicielles de constitutionnalité actuellement déférées à la Cour est notamment conditionné, en amont, par la vérification de la conformité de la loi au droit de l'Union européenne ».

10| Pour une critique d'une approche estimée trop hardie au regard de la déférence due aux règles de droit dans un arrêt de la Cour administrative ayant adopté une approche basée sur les « principes généraux supérieurs par essence, à la fois de réalisme, de cohérence et de sécurité juridique », voy. P. Kinsch, « Exception d'illégalité, méthodes d'interprétation et hiérarchie des normes, Observations sous Cour administrative, 27 octobre 2016 », in *Journal des tribunaux Luxembourg*, 5 décembre 2016, n° 48, p. 186-188, Larcier.

Ce risque est toutefois, en ce qui concerne la Cour constitutionnelle, contenu en raison de son contexte institutionnel :

- La variation dans les compositions de la Cour empêche le développement de toute prédominance idéologique ;
- Le fait que la Cour soit composée exclusivement de magistrats de carrière, désignés aussi bien pour leur fonction ordinaire que pour leur fonction constitutionnelle d'après une procédure dépolitisée, écarte toute influence politique partisane ;
- La composition, comportant seulement des magistrats de carrière, garantit une réflexion basée sur le droit et expliquée par un raisonnement cohérent et structuré [11].

La validité de cette approche se vérifie dans l'interprétation aussi bien de la Constitution que de la loi. Le phénomène peut être illustré à travers trois exemples tirés de la pratique jurisprudentielle.

Approche pratique : exemples concrets

Exemple 1 : La délimitation de la norme de référence : Cour constitutionnelle, 28 mai 2019, affaire n° 146, 1er arrêt

L'article 112, paragraphes 1 et 2, de la Constitution révisée dispose que « [l]a Cour Constitutionnelle statue, par voie d'arrêt, sur la conformité des lois à la Constitution. La Cour Constitutionnelle est saisie, à titre préjudiciel, suivant les modalités à déterminer

11| Si on voulait caractériser l'approche pragmatique adoptée par la Cour constitutionnelle, on pourrait dire qu'elle se distingue par un pluralisme méthodologique, approche dans laquelle la Cour constitutionnelle met en œuvre une pluralité de méthodes d'interprétation en mettant en balance les résultats, éventuellement contradictoires, obtenus par chacune d'elles afin de justifier la solution retenue qui lui paraît la plus appropriée. En tout cas, la pratique de la Cour constitutionnelle ne semble pas avoir trop mal réussi à l'évolution de la pensée constitutionnelle au Luxembourg, tant il est vrai qu'elle a su insuffler un vent de modernité dans l'application de la Constitution, modernité qui a par la suite été reprise par le pouvoir constituant dans le cadre de réformes constitutionnelles.

par la loi, par toute juridiction pour statuer sur la conformité des lois, à l'exception des lois portant approbation de traités, à la Constitution » (ancien article 95ter).

L'article 2, paragraphe 1, de la loi modifiée du 27 juillet 1997 portant organisation de la Cour Constitutionnelle répète que « [l]a Cour Constitutionnelle statue, suivant les modalités déterminées par [ladite] loi, sur la conformité des lois à la Constitution, à l'exception de celles qui portent approbation de traités ».

La norme de référence est ainsi définie comme étant la « Constitution », sans autre précision, ajout ou retranchement.

Par contre, l'article 8, alinéa 1, de la loi du 27 juillet 1997, traitant de la procédure à observer, dispose que « [la question préjudicielle] indique avec précision les dispositions législatives et constitutionnelles sur lesquelles elle porte ».

Les auteurs ont relevé que la notion de *« disposition »* employée par cette règle légale pouvait être interprétée comme renvoyant à un texte écrit, et que selon cette interprétation, la norme de référence à considérer par la Cour constitutionnelle serait limitée au texte écrit de la Constitution [12], de sorte que la disposition légale se trouverait en contradiction avec la disposition constitutionnelle, qui parle de *« Constitution »* au sens large, ce qui permettrait d'y inclure des principes non écrits. Le débat se compliquait par ailleurs du fait de l'absence, à l'époque de la création de la Cour constitutionnelle en 1997, d'une tradition de principes constitutionnels non écrits.

L'apparente contradiction est résolue par la Cour constitutionnelle par une approche qualifiée expressément de *« pragmatique »* [13] en interprétant l'article 8 de la loi du 27 juillet 1997 comme visant non pas une disposition particulière écrite, mais une norme

12| P. Kinsch, « Le principe de l'État de droit comme principe constitutionnel luxembourgeois non écrit, Observations sous Cour constitutionnelle, 28 mai 2019, affaire n° 146/2019 », in *Journal des tribunaux Luxembourg,* 3 septembre 2019, n° 64, 3 septembre 2019, p. 111 à 113.
C. Sauer, op. cit., n° 445 et ss.
L. Heuschling, op. cit., « Pourquoi … »

13| P. Kinsch, op. cit., « Le principe … »
L'auteur souligne que l'approche non-pragmatique aurait consisté à interpréter l'article 8 de la loi de 1997 comme ne visant que le texte écrit de la Constitution, de le considérer de ce fait comme étant contraire à l'article 95*ter*, paragraphes 1 et 2, de la Constitution en vigueur à l'époque (soit l'article 112, paragraphes 1 et 2, de la Constitution révisée) et ainsi de le laisser inappliqué.

constitutionnelle au sens large. La Cour constitutionnelle a par ce biais fait entrer la catégorie des principes généraux du droit à valeur constitutionnelle non écrits dans le champ de la norme de référence.

Exemple 2 : Le Luxembourg soumis au régime de la séparation des pouvoirs : Cour constitutionnelle, 1er octobre 2010, affaire n° 57

Depuis les réflexions de John Locke et de Montesquieu, la séparation des pouvoirs s'est cristallisée comme une garantie essentielle pour éviter l'arbitraire et garantir la liberté politique. Bien que la notion fût largement théorisée déjà en 1868 lors de l'adoption de la Constitution luxembourgeoise, elle n'y est pas mentionnée.

La Cour constitutionnelle a été saisie d'une question préjudicielle qui appelait à s'interroger sur l'existence de ce mode d'organisation de l'État dans l'agencement institutionnel du Luxembourg. La question présupposait son existence, dès lors qu'elle s'interrogeait sur la question de savoir si une disposition légale particulière était conforme, entre autres, *« à la règle de la séparation des pouvoirs, qui transcende l'ensemble des dispositions constitutionnelles »* [14].

Pour affirmer l'existence de ce principe, absent du dispositif rédactionnel, la Cour constitutionnelle emploie deux méthodes. D'une part, elle procède par induction : à partir de plusieurs applications de la règle (sans les mentionner expressément), elle en déduit l'existence (« un certain nombre de dispositions de la Constitution constituent une application directe de cette règle »). D'autre part, elle en tire implicitement l'existence à partir du régime d'organisation de l'État (« l'article 51, paragraphe 1er, de la Constitution, [article 2, alinéa 1er de la Constitution révisée] qui énonce que le Grand-Duché de Luxembourg est placé sous le régime de la démocratie parlementaire, consacre implicitement, mais nécessairement, la règle constitutionnelle de la séparation des pouvoirs »).

14| La question qui se posait était celle de savoir si le législateur n'avait pas empiété sur les compétences du pouvoir exécutif en adoptant une loi qui emportait des conséquences directes et personnelles pour un fonctionnaire individualisé.

La solution était évidente, car comment aurait-on pu imaginer que le Luxembourg ne réponde pas aux critères basiques d'une organisation moderne de l'État [15] ? Mais en l'absence de consécration textuelle, la Cour constitutionnelle cherche à l'adosser pragmatiquement à d'autres règles constitutionnelles.

Exemple 3 : Le Luxembourg en tant qu'État de droit : Cour constitutionnelle, 28 mai 2019, affaire n° 146, 1er arrêt

Le concept d'État de droit a fait son chemin tout au long du XXe siècle comme fondement essentiel d'un régime étatique garantissant les droits et libertés individuelles, en ce qu'il affirme la prééminence de la règle de droit et le contrôle du respect de la règle de droit par le juge.

La Constitution luxembourgeoise datant de l'année 1868 ne comportait pas, malgré d'innombrables révisions ponctuelles depuis cette date, de référence à ce principe. La question de son existence, sous l'aspect de l'accès à la justice et de l'effectivité du recours juridictionnel, se posait à la Cour constitutionnelle dans une affaire toisée en 2019, à tel point que la question préjudicielle portée devant la Cour constitutionnelle débutait explicitement par l'interrogation de savoir si « [l]e principe de l'État de droit ainsi que le principe de la légalité se dégagent [...] des dispositions constitutionnelles [...] ? ».

La Cour constitutionnelle, tout en constatant que le concept d'« État de droit » n'apparaît pas littéralement dans la Constitution, répond par l'affirmative à la question, d'une part, par induction à partir d'autres dispositions constitutionnelles qui garantissent le principe d'égalité et la soumission des normes juridiques inférieures (actes administratifs) aux normes juridiques supérieures (la loi) et, d'autre part, en retenant que le principe fondamental de l'État de droit est inhérent à l'affirmation constitutionnelle selon laquelle le Luxembourg est un *« État démocratique »* (article 1er dans la version d'avant 2023 et dans la version révisée) et que « [le] Luxembourg est placé sous le régime de la démocratie parlementaire » (article 51, paragraphe 1er dans la version antérieure

15| Il est vrai que quelques années auparavant, la Cour constitutionnelle avait encore hésité à franchir le cap de l'affirmation de l'existence du principe de la séparation des pouvoirs : Cour constitutionnelle, 17 novembre 2006, aff. n° 37.

à 2023 ; article 2, alinéa 1er de la Constitution révisée). À partir du principe de l'État de droit, la Cour constitutionnelle reconnait les droits à valeur constitutionnelle d'accès au juge et du recours effectif qui y sont inhérents [16].

Ainsi, la Cour constitutionnelle affirme que le Luxembourg non seulement est un État de droit, mais encore qu'il est soumis aux contraintes en découlant, en déclarant anticonstitutionnelle une disposition légale qui privait les justiciables dans une situation particulière de tout accès à la justice [17].

Là encore, la solution était évidente, car comment aurait-on pu imaginer que le Luxembourg ne fût pas qualifié d'État de droit ? Mais à nouveau, par une démarche pragmatique, la Cour constitutionnelle en déduit l'existence à partir des écrits [18].

Ces deux derniers exemples illustrent que la Cour constitutionnelle n'hésite pas à reconnaître des principes constitutionnels non écrits [19], en prenant soin toutefois de les rattacher à un autre concept constitutionnel qui trouve son ancrage dans la Constitution écrite. L'influence du droit de l'Union européenne lui permet cependant d'aller plus loin dans sa démarche.

16| Des auteurs ont pu critiquer l'équivalence ainsi établie entre *« démocratie »* et *« État de droit »* : P. Kinsch, op. cit., « Le principe … » ; P. Heuschling, op. cit., « Pourquoi la Cour constitutionnelle … ».

17| Pour une décision se référant expressément à cet arrêt pour aboutir à la même solution au regard des principes, sans que le droit de l'Union européenne ne fût applicable : Cour constitutionnelle, 18 décembre 2024, affaire n° 193.

18| Depuis la révision constitutionnelle de 2023, l'affirmation que le Luxembourg est un État de droit est inscrite dans la Constitution, à l'article 2, alinéa 2 : « [Le Luxembourg] est fondé sur les principes d'un Etat de droit et sur le respect des droits de l'Homme ».

19| Pour une présentation plus globale de l'accueil des principes généraux du droit en droit luxembourgeois, voy. P. Kinsch, « Les principes généraux du droit comme éléments de l'ordre juridique luxembourgeois », in *Journal des tribunaux Luxembourg*, juin 2022, n° 81, p. 69, Larcier.

2e thème : Comment la Cour constitutionnelle du Luxembourg traite le droit de l'Union européenne.

Précisions sur le droit luxembourgeois

Le Luxembourg est, en ce qui concerne les relations entre le droit national et le droit international, un pays de pure tradition moniste : le droit international, et tout le droit international, constitue une norme juridique de valeur supérieure au droit interne, et de tout le droit interne, y compris le droit constitutionnel [20]. La jurisprudence, la doctrine et le discours politique sont (à de très rares exceptions près) unanimes à ce sujet [21].

De ce fait, le droit de l'Union européenne influe sur le droit interne luxembourgeois et sur la façon dont la Cour constitutionnelle traite les questions préjudicielles qui lui sont soumises. Cette influence est illustrée à travers trois domaines.

20| Voy., entre autres, L. Heuschling, « Les origines au XIXe siècle du rang supra-constitutionnel des traités en droit luxembourgeois : l'enjeu de la monarchie », in I. Riassetto, L. Heuschling, G. Ravarani (dir.), *Liber Amoricum Rusen Ergeç*, Pasicrisie 2017, p. 157 – 213.
P. Kinsch, « Le rôle du droit international dans l'ordre juridique luxembourgeois », in *Pasicrisie luxembourgeoise,* tome 34, p. 399 – 415, traduit en anglais dans D. Shelton (dir.), *International Law and Domestic Legal Systems*, Oxford, OUP, 2011, p. 385 et ss.
C. Sauer, op. cit, n° 198 et ss.
Une illustration textuelle de cette suprématie peut encore être recherchée dans l'article 112, alinéa 2, de la Constitution (ancien article 95*ter*, paragraphe 2) et dans l'article 2, paragraphe 1, de la loi de 1997, qui excluent du contrôle de constitutionnalité les lois d'approbation des traités.

21| On peut longuement débattre de la question de savoir si cette caractéristique découle de la taille réduite du pays et du manque de masse critique pour développer une jurisprudence et une doctrine solides dans tous les domaines, ce qui a pu amener les juristes à chercher à adosser leurs réflexions à un autre ordre juridique et à le qualifier de supérieur, ou si l'influence qu'exerce le droit international en interne est la conséquence de la supériorité préexistante de sa valeur juridique. Une autre cause, historique, peut être recherchée dans les origines même du Grand-Duché de Luxembourg en tant que pays : il n'existe en tant que tel que du fait des accords conclus en 1815 lors de la convention de Vienne, ce qui expliquerait que le juriste luxembourgeois soit particulièrement déférent à l'égard du droit international.

Applications pratiques

1er domaine : L'influence du droit de l'UE sur l'identification de principes constitutionnels

- Sécurité juridique, confiance légitime et non-rétroactivité des lois : Cour constitutionnelle, 22 janvier 2021, affaire n° 152

Dans cette affaire se posait la question de savoir si une loi fiscale pouvait produire un effet rétroactif sur la situation des contribuables concernés.

La Cour constitutionnelle rappelle d'abord qu'elle a déjà jugé que le Luxembourg était un État de droit, et comme tel soumis aux exigences qui en découlent (dans l'arrêt du 28 mai 2019, affaire n° 146, 1er arrêt, cité supra, où était en cause le droit d'accès au juge).

Elle relève ensuite que la question préjudicielle lui soumet la connaissance d'un autre aspect fondamental de la protection des droits des justiciables, à savoir la sécurité juridique, avec ses sous-aspects que sont la protection de la confiance légitime et la non-rétroactivité des lois. Elle précise que ces droits et garanties ne figurent pas dans le texte de la Constitution.

Pour en affirmer enfin la valeur de principes constitutionnels, elle prend appui notamment sur la jurisprudence de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme qui « reconnaissent le principe de sécurité juridique comme principe général inhérent à leurs ordres juridiques respectifs ainsi que les principes de confiance légitime et de non-rétroactivité des lois comme principes généraux ou fondamentaux, en tant qu'expressions de la sécurité juridique » ce dont il résulte que « le principe de la sécurité dans les rapports juridiques constitue, dès lors, un des éléments fondamentaux de la prééminence du droit » et que « [l]e principe de sécurité juridique, et ses expressions, tels les principes de confiance légitime et de non-rétroactivité des lois » se rattachent à la notion d'État de droit.

- Principe de proportionnalité : Cour constitutionnelle, 22 janvier 2021, affaire n° 152, et Cour constitutionnelle, 19 mars 2021, affaire n° 146, 2e arrêt

Le contrôle de proportionnalité a été développé assez tôt par la Cour constitutionnelle dans le cadre du reproche de violation du principe d'égalité devant la loi pour vérifier si la différence de traitement opérée par la loi répondait à une différence objective entre les situations à régler[22].

La Cour constitutionnelle en a encore fait un principe constitutionnel général, d'abord en termes voilés en procédant à une analyse de proportionnalité en dehors d'une allégation de traitement inégalitaire (Cour constitutionnelle, 22 janvier 2021, affaire n° 152), et ensuite de façon plus explicite en disant que « [l]a réponse à la question préjudicielle requiert la recherche d'un équilibre entre, d'un côté, les objectifs majeurs de [...] et, d'un autre côté, le respect des droits des contribuables visés, en tant que citoyens, [...] » pour finir par affirmer, en se référant à l'arrêt cité de 2021, rendu 2 mois plus tôt, que « [l]'équilibre à trouver doit résulter d'une juste mise en balance, le principe de proportionnalité étant un principe à valeur constitutionnelle » (Cour constitutionnelle, 19 mars 2021, affaire n° 146, 2e arrêt)[23].

22| Depuis la révision constitutionnelle entrée en vigueur le 1er juillet 2023, le test de proportionnalité dans le cadre du principe d'égalité se trouve inscrit dans la Constitution lorsqu'elle dispose en son article 15, paragraphe 1er, que « [l]es Luxembourgeois sont égaux devant la loi. La loi peut prévoir une différence de traitement qui procède d'une disparité objective et qui est rationnellement justifiée, adéquate et proportionnée à son but. ».

23| Depuis la révision constitutionnelle entrée en vigueur le 1er juillet 2023, le test de proportionnalité en tant que règle générale applicable à tous les droits fondamentaux et libertés publiques se trouve inscrit dans la Constitution lorsqu'elle dispose en son article 37 que « [t]oute limitation de l'exercice des libertés publiques doit être prévue par la loi et respecter leur contenu essentiel. Dans le respect du principe de proportionnalité, des limitations ne peuvent être apportées que si elles sont nécessaires dans une société démocratique et répondent effectivement à des objectifs d'intérêt général ou au besoin de protection des droits et libertés d'autrui. ».

2e domaine : La prise en compte du droit de l'UE pour interpréter la norme soumise au contrôle

La Cour constitutionnelle s'efforce de donner à la question qui lui est posée un effet utile pour permettre à la juridiction de renvoi de progresser utilement dans l'analyse du litige au fond. L'utilité de cet effet peut tenir à la validité de la norme législative dont la conformité à la Constitution est soumise à l'examen de la Cour constitutionnelle.

Cette question de la validité de la norme législative se pose notamment lorsqu'il s'agit d'une norme de transposition d'une directive européenne, et que sa conformité avec la directive européenne ou d'autres dispositions du droit de l'Union européenne est mise en question.

Pour résoudre ce dilemme, la Cour constitutionnelle a eu trois approches différentes (il est vrai que ces différences sont en grande partie dictées par les circonstances particulières auxquelles la Cour constitutionnelle se trouvait confrontée).

- Cour constitutionnelle, 19 juin 2015, affaire n° 119, 1er arrêt

Dans une première affaire, elle a argué que l'effet utile nécessitait la vérification de la conformité de la loi de transposition au droit de l'Union européenne. Elle a donc posé une question préjudicielle à la Cour de justice de l'Union européenne pour interroger celle-ci sur la façon dont il fallait interpréter la directive à transposer, notamment au regard de la protection du droit de propriété [24] [25].

24| Après que la Cour de justice de l'Union européenne (arrêt du 8 mars 2017, *ArcelorMittal Rodange et Schifflange*, C-321/15, ECLI:EU:C:2017:179) a précisé le sens de la directive en question en intégrant dans son raisonnement le respect dû au droit de propriété (garanti par l'article 17 de la charte des droits fondamentaux de l'Union européenne) pour écarter toute atteinte à ce droit du fait du mécanisme mis en place, la Cour constitutionnelle répond finalement à la question préjudicielle qui lui était posée en écartant toute contrariété de la disposition légale en discussion au droit de propriété (garanti par l'article 16 de la Constitution) (Cour constitutionnelle, 16 juin 2017, affaire n° 119, 2e arrêt).

25| Pour une présentation plus détaillée de cet arrêt, voy. F. Delaporte, « Un bilan relationnel : le dialogue avec les juridictions administratives », in *Les dossiers de la Pasicrisie luxembourgeoise, Les 20 ans de la Cour Constitutionnelle : Trop jeune pour mourir ?*, 2018, p. 33 et ss., spéc. p. 39 et 40.

- Cour constitutionnelle, 28 mai 2019, affaire n° 146, 1er arrêt

Dans cette deuxième affaire se posait la question de savoir si une loi luxembourgeoise de transposition d'une directive de l'Union européenne, en ce qu'elle excluait dans un cas de figure déterminé toute possibilité de contester en justice une décision d'une administration nationale, était conforme au droit d'accès à la justice.

La Cour constitutionnelle constate que la conformité de la loi de transposition à un droit garanti dans le droit de l'Union européenne, et notamment à la charte des droits fondamentaux (et le cas échéant par ricochet au droit constitutionnel), faisait l'objet, dans une affaire similaire, d'une question préjudicielle posée par la Cour administrative à la Cour de justice de l'Union européenne.

Estimant que *« la réponse de la Cour de justice de l'Union européenne à cette question préjudicielle est susceptible de conditionner celle à donner par la Cour constitutionnelle dans la présente affaire »*, la Cour constitutionnelle sursoit à statuer en attendant la décision de la Cour de justice de l'Union européenne [26].

- Cour constitutionnelle, 17 janvier 2025, affaire n° 194

Dans une affaire récente, la Cour constitutionnelle a retenu, dans la même logique de l'effet utile de la réponse à la question constitutionnelle, que la question de la conformité de la disposition législative au droit de l'Union européenne devait être vérifiée préalablement à sa conformité à la Constitution, mais a renvoyé le dossier devant le juge du renvoi estimant qu'il lui appartenait de vérifier au préalable la conformité de la disposition légale au droit de l'Union européenne, le cas échéant par renvoi préjudiciel à la CJUE.

Ces trois arrêts interpellent sur la question de savoir si la conformité de la disposition légale au droit de l'Union européenne doit être évacuée avant celle de sa conformité à la Constitution. En commentant l'arrêt du 17 janvier 2025 et en se référant à un arrêt

26| Après l'arrêt de la Cour de justice de l'Union européenne (arrêt du 6 octobre 2020, *État luxembourgeois (Droit de recours contre une demande d'information en matière fiscale)*, C-245/19 et C-246/19, ECLI:EU:C:2020:795), la Cour constitutionnelle clôt la procédure par un arrêt du 19 mars 2021, cité supra.

de la Cour de justice de l'Union européenne du 22 juin 2010[27], un auteur conclut qu'il n'y a pas de priorité juridique d'un contrôle sur l'autre, mais qu'il relève des pouvoirs du juge de renvoi de décider quelle problématique il entend traiter en premier lieu[28][29].

Exemple 3 : Prise en compte du droit de l'UE pour interpréter la Constitution

La Constitution, comme probablement la grande majorité des textes écrits, est susceptible de plusieurs interprétations dans ses différentes dispositions[30]. À partir de là se pose la question de son agencement par rapport aux normes juridiques de valeur supérieure, dont concrètement le droit de l'Union européenne.

- Protection du droit de propriété : Cour constitutionnelle, 16 juin 2017, affaire n° 119, 2e arrêt

La Cour constitutionnelle a interprété le droit constitutionnel à la lumière du droit de l'Union européenne. Concernant la protection du droit de propriété, après avoir obtenu la réponse à la question préjudicielle qu'elle avait posée à la Cour de justice de l'Union européenne[31], la Cour retient que « les garanties relatives au droit de propriété prévues

27| Arrêt du 22 juin 2010 (grande chambre), *Melki et Abdeli*, C-188/10 et C-189/10, ECLI:EU:C:2010:363.

28| P. Kinsch, *Journal des tribunaux Luxembourg*, juin 2025, n° 99, p. 71-72, Larcier. Voy. aussi C. Sauer, op. cit., n° 238 et ss.

29| Cette discussion sur le séquencement entre le contrôle de conformité au droit de l'Union européenne et au droit constitutionnel mérite attention, et interpelle sur un certain nombre d'aspects. Ainsi, l'analyse est-elle le cas échéant différente selon que le juge appelé à statuer est un juge qui statue sans recours possible, soumis en tant que tel à une obligation de saisir la Cour de justice de l'Union européenne, ou un autre juge ? Est-ce que la réponse à la problématique varie selon que les deux contrôles de conformité s'opèrent par rapport à la même norme de droit, respectivement au même droit protégé ou que les deux contrôles se situent dans des sphères différentes ?

30| Pour une critique de la théorie de l'acte clair, voy. P. Hurt, « Attendu que la loi est claire … Propos irrévérencieux sur l'utilisation de l'argument du sens clair en jurisprudence luxembourgeoise », in *Journal des tribunaux Luxembourg*, 31 décembre 2010, n° 12, p. 193, Larcier ; P. Kinsch, « Les usages des travaux préparatoires des lois au Luxembourg (le bon, le mauvais et l'indicible) », in *Pasicrisie luxembourgeoise*, Tome 39, p. 763 et ss, spéc. p. 767 à 770 ; P. Hurt, « *Quamvis clara lex sit, interpretanda est* – La Cour administrative condamne la doctrine du sens clair des lois », in *Journal des tribunaux Luxembourg*, 5 juin 2013, n° 27, p. 65-73, Larcier.

31| La question avait été posée par un arrêt du 19 juin 2015, affaire n° 119, 1er arrêt, cité supra.

à l'article 16 de la Constitution correspondent essentiellement, quant à leur substance, à celles prévues par l'article 17 de la Charte, de sorte que ces dispositions sont à qualifier d'équivalentes et que leur interprétation est à effectuer en des termes concordants ».

- Autonomie communale : Cour constitutionnelle, 8 décembre 2017, affaire n° 131

La même approche a encore prévalu dans une affaire qui touchait à l'autonomie communale, où la Cour constitutionnelle a considéré qu'elle est « amenée à appliquer les dispositions de l'article 107[32] de la Constitution, et plus particulièrement son paragraphe 1 consacrant le principe de l'autonomie communale, à l'aune des dispositions claires et précises de la Charte [charte européenne de l'autonomie locale faite à Strasbourg le 15 octobre 1985], en ce qu'elles se recouvrent avec celles de la Constitution »[33][34].

32| Article 121 dans la version en vigueur à partir du 1er juillet 2023.

33| Il n'est pas question ici d'application du droit de l'Union européenne, mais d'une convention internationale (conclue sous l'égide du Conseil de l'Europe). Le raisonnement est toutefois le même dans les deux cas de figure.

34| Dans des arrêts postérieurs, la formulation employée par la Cour varie légèrement pour venir s'affiner, mais la position reste la même :
- 2 arrêts du 13 novembre 2020, affaire 156 et affaire 157 : « La Cour est amenée à appliquer les dispositions de l'article 107 de la Constitution, et plus particulièrement son paragraphe 1 consacrant le principe de l'autonomie communale, à l'aune des dispositions afférentes de la Charte qui lui correspondent et se recouvrent avec lui en le corroborant. »
- 4 arrêts du 17 novembre 2023, affaire n° 186, affaire n° 187, affaire n° 188 et affaire n° 189 : « la Cour est amenée à appliquer les dispositions de l'article 107 de la Constitution, et, plus particulièrement, son paragraphe 1 consacrant le principe de l'autonomie communale, à l'aune des dispositions afférentes de la Charte qui lui correspondent et se recouvrent avec lui en le corroborant. »

Mots conclusifs

D'un point de vue théorique, on peut imaginer une situation dans laquelle la portée d'une disposition constitutionnelle serait ouvertement contraire au droit de l'Union européenne, auquel cas se poserait la question de la solution à apporter à cette contradiction. Si la question a pu se poser dans certains pays, elle n'a pas à ce jour émergé au Luxembourg. L'absence de survenance de cette hypothèse au Luxembourg réside probablement dans une prise en compte de la valeur normative du droit international, ce qui amène le juge luxembourgeois à interpréter la Constitution à la lumière de la portée du droit international [35].

Ainsi, la suprématie incontestée du droit international, et donc du droit de l'Union européenne, amènerait certainement la Cour constitutionnelle pour le moins à laisser inappliquée une disposition constitutionnelle qu'elle considérerait comme étant contraire à une norme internationale. Mais la Cour constitutionnelle préférera probablement, par pragmatisme et dans toute la mesure du possible, interpréter la norme constitutionnelle à la lumière de la norme internationale afin de faire se correspondre les deux normes et écarter toute contrariété. Ainsi, la Cour constitutionnelle a pu écrire que « [l]a CEDH et la Charte forment avec le principe fondamental de l'État de droit et les principes d'accès au juge et de recours effectif un socle commun » [36].

En définitive, on peut sans réserve retenir que la Cour constitutionnelle accorde une large place au droit de l'Union européenne dans sa démarche méthodologique et dans sa jurisprudence.

35| Voy. C. Sauer, op. cit., n° 427 et ss.

36| Cour constitutionnelle, 19 mars 2021, affaire n° 146, 2e arrêt.
De même, dans une affaire qui n'appelait pas l'application du droit de l'Union européenne, la Cour constitutionnelle a retenu que le principe fondamental du droit à valeur constitutionnelle de l'État de droit, avec les principes généraux de valeur constitutionnelle de l'accès au juge et du recours effectif en découlant, se trouvaient réunis en un socle commun, formé par les dispositions constitutionnelles pertinentes et notamment avec les articles 6 et 13 de la CEDH (Cour constitutionnelle, 18 décembre 2024, affaire n° 193).

M. Atanas Semov
Juge à la Cour constitutionnelle de la République de Bulgarie

Le dialogue est-il vivant ?

Atanas Semov, Juge à la Cour constitutionnelle de la République de Bulgarie

Exemples de l'engagement de la Cour constitutionnelle bulgare en faveur du droit de l'Union européenne et de la distanciation de la Cour de justice de l'Union européenne vis-à-vis de l'identité constitutionnelle nationale

Je considère opportun, à la fin de ce colloque dont l'utilité ne fait aucun doute, de présenter brièvement la jurisprudence du Konstitutsionen sad (ci-après la « Cour constitutionnelle ») consacrant le droit de l'Union, ainsi que de soulever à nouveau la question, à mon avis absolument capitale, de l'efficacité du dialogue entre la Cour de justice de l'Union européenne (ci-après « la Cour de justice ») et les juridictions constitutionnelles nationales.

Hier et aujourd'hui, il a été souligné à plusieurs reprises, sur un ton critique, que le Cour constitutionnelle est l'une des trois juridictions constitutionnelles qui n'ont pas saisi la Cour de justice d'une demande de décision préjudicielle. Or, un autre point a également été soulevé : les juridictions constitutionnelles allemande, française et italienne ont, quant à elles, mis plus de 60 ans pour s'adresser à la Cour de justice. Par ailleurs, les juridictions bulgares sont particulièrement actives dans le renvoi de demandes préjudicielles et la Cour constitutionnelle bulgare les y encourage énergiquement. Je puis vous assurer que si la Cour constitutionnelle bulgare n'a jusqu'à présent pas renvoyé de demande de décision préjudicielle à la Cour de justice, ce n'est pas par réticence mais parce qu'il ne s'est pas trouvé de raison ou occasion concrète dans une affaire constitutionnelle donnée. Dans la plupart des dossiers, nous nous sommes trouvés dans l'hypothèse d'un acte clair ou d'un acte éclairé, au regard des critères de la jurisprudence CILFIT.

En tant que professeur de droit européen, je serais personnellement enchanté si une telle occasion devait se présenter à nous d'ici la fin de mon mandat dans deux ans.

Il est toutefois important de savoir que la Cour constitutionnelle bulgare a donné des signes évidents de respect du droit de l'Union et de la jurisprudence de la Cour de justice. Peut-être serez-vous surpris d'apprendre que, ces dernières années, la Cour constitutionnelle bulgare est l'une des juridictions constitutionnelles les plus favorables au droit de l'Union européenne. Elle est pleinement consciente que la Cour de justice joue un rôle déterminant dans la construction de l'architecture constitutionnelle de l'Union.

I. L'affirmation du droit de l'UE dans la jurisprudence de la Cour constitutionnelle bulgare

La Cour constitutionnelle est la seule juridiction constitutionnelle à avoir inscrit dans son règlement de procédure une obligation expresse pour le juge national de clarifier s'il existe un lien avec le droit de l'Union et quelles seront les conséquences de son application [1]. Et dans sa jurisprudence déjà abondante, elle a explicitement énoncé ces conséquences, que le juge doit prendre en compte (respecter) dans chaque affaire, qu'il saisisse ou non la Cour constitutionnelle. La Cour constitutionnelle fait cela d'une manière qui n'a sans doute pas d'équivalent dans la jurisprudence d'autres juridictions constitutionnelles.

1| Article 18, paragraphe 3 (en vigueur depuis le 6 novembre 2021, modifié ; DV nº 48/2025) : La demande fondée sur l'article 150, paragraphe 2, de la Constitution doit contenir une appréciation motivée du droit applicable, y compris en ce qui concerne les effets de l'application du droit de l'Union européenne lorsque la disposition ou l'acte attaqué relève de son champ d'application.

1) L'article 4, paragraphe 3, de la Constitution dispose : « La République de Bulgarie participe à la construction et au développement de l'Union européenne. »

Selon la Cour constitutionnelle, il s'agit là d'un des principes fondateurs du noyau de valeurs de l'ordre constitutionnel bulgare [2], qui introduit la dimension européenne dans l'action de l'État [3] et crée une base juridique pour l'intégration et l'application du droit de l'Union dans le système juridique national et pour l'assujettissement à l'acquis juridique de l'Union, avec toutes les conséquences qui en découlent.

La Cour constitutionnelle émet toute une série de postulats importants :

2) « Cet engagement se traduit également par l'obligation pour les juridictions nationales de contribuer à l'application pleine et effective du droit de l'Union (conformément aux principes d'effectivité et de coopération loyale consacrés à l'article 19, paragraphe 1, deuxième alinéa et à l'article 4, paragraphe 3, du traité sur l'Union européenne – TUE) dans le respect des principes fondateurs de l'ordre juridique de l'Union que sont la primauté, l'applicabilité immédiate et l'effet direct des dispositions du droit de l'Union, un engagement que chaque État membre a librement accepté de mettre en œuvre et d'appliquer. » C'est aux juridictions qu'il incombe de plein droit (ipso jure), lors de l'examen des affaires, de préciser s'il y a application du droit de l'Union et quels en sont les effets [4].

3) Le fait qu'une loi soit en contradiction avec le droit de l'Union européenne ne constitue pas un motif suffisant pour la déclarer inconstitutionnelle [5] : « l'appréciation de la conformité de la législation nationale avec le droit de l'Union européenne ne relève pas de la compétence de la Cour constitutionnelle » [6].

2| Arrêt n° 3 du 8 février 2024 dans l'affaire constitutionnelle n° 13/2023 (au rapport de S. Yankulova) et arrêt n° 7 du 16 mai 2024 dans l'affaire constitutionnelle n° 14/2023 (au rapport de M. Karagiozova-Finkova).

3| Ordonnance du 18 juin 2019 dans l'affaire constitutionnelle n° 4/2019 (au rapport de M. Karagiozova-Finkova). Voir également arrêt n° 3 du 8 février 2024 dans l'affaire constitutionnelle n° 13/2023 (au rapport de S. Yankulova) et arrêt n° 7 du 16 mai 2024 dans l'affaire constitutionnelle n° 14/2023 (au rapport de M. Karagiozova-Finkova).

4| Ordonnance du 14 septembre 2021 dans l'affaire constitutionnelle n° 13/2021 (au rapport de A. Semov).

5| Arrêt n° 1 du 28 février 2008 dans l'affaire constitutionnelle n° 10/2007 (au rapport de Vl. Slavov) et arrêt n° 5 du 27 mars 2018 dans l'affaire constitutionnelle n° 11/2017 (au rapport de B. Velchev).

6| Arrêt n° 8 du 30 juin 2020 dans l'affaire constitutionnelle n° 14/2019 (au rapport de A. Anastasov) et ordonnance n° 2 du 29 avril 2021 dans l'affaire constitutionnelle n° 6/2021 (au rapport de Kr. Vlahov).

4) La Cour constitutionnelle est compétente pour « protéger l'identité constitutionnelle nationale »[7] en tant que « principe de l'Union européenne » et ce, notamment, « *en interprétant la Loi fondamentale à la lumière du droit de l'Union* »[8].

5) « **La clarification du droit applicable relève de la responsabilité de la juridiction du pouvoir judiciaire** qui examine l'affaire ; cette clarification constitue un élément obligatoire de l'appréciation visant à déterminer si la disposition légale dont la constitutionnalité est contestée devant la Cour constitutionnelle est pertinente pour l'affaire dont la juridiction est saisie. Cela suppose que le requérant **précise,** inter alia :

- si l'affaire présente un **lien avec le droit de l'Union ;**
- si le droit de l'Union contient des **dispositions susceptibles d'être appliquées ;**
- si tel n'est pas le cas, quelles sont les dispositions pertinentes du droit de l'Union ;
- si celles-ci **imposent une teneur spécifique** devant figurer dans la réglementation interne applicable ;
- si des **dérogations** sont prévues ;
- surtout, quelle est **l'interprétation conforme au droit de l'Union** des normes de droit interne applicables ;
- et si cette interprétation ne permet pas de **dissiper d'éventuels doutes** quant à la conformité de ces normes avec la Constitution ;
- enfin, si ces normes ne sont pas **incompatibles avec le droit de l'Union** européenne »[9].

En 2020[10], la Cour constitutionnelle a **clairement réitéré son intention de tenir compte du droit de l'Union,** y compris – si ce n'est même en premier lieu – d'interpréter les dispositions constitutionnelles et/ou d'autres dispositions juridiques en conformité avec le droit de l'Union. Partant, elle a, à plusieurs reprises, opéré une interprétation des normes constitutionnelles ou légales conforme au droit de l'Union européenne.

7| Voir également ordonnance n° 2 du 29 avril 2021 dans l'affaire constitutionnelle n° 6/2021 (au rapport de Kr. Vlahov).

8| Ibid.

9| Ordonnance du 14 septembre 2021 dans l'affaire constitutionnelle n° 13/2021 (au rapport de A. Semov).

10| Arrêt n° 9 du 14 juillet 2020 dans l'affaire constitutionnelle n° 3/2020 (au rapport du juge F. Dimitrov).

II. Quelques particularités du dialogue entre le juge de l'Union et les juridictions constitutionnelles nationales

Je ne puis m'empêcher d'exprimer notre étonnement quant au fait que, dans ce contexte, la Cour de justice a, dans l'affaire C-490/20 *Pancharevo* [11], refusé de tenir compte d'un élément de l'identité constitutionnelle bulgare (au sens de l'article 4, paragraphe 2, TUE) et ce, quelques mois seulement après que la Cour constitutionnelle bulgare s'est expressément prononcée sur la notion de « sexe » [12]. L'affaire a été examinée non seulement avec la participation de l'avocate générale, mais de surcroît devant la Grande chambre de la Cour de justice. Or, certaines de ses particularités n'en sont que plus déconcertantes.

a) Caractéristiques générales

1) Les faits, certes connus, ont leur importance. Deux femmes – l'une de nationalité bulgare, l'autre de nationalité britannique – se sont mariées légalement en Espagne, où elles résident. Elles ont une fille [13], née et vivant avec elles en Espagne. Son acte de naissance délivré par les autorités espagnoles désigne la ressortissante bulgare comme « mère A » et la ressortissante britannique comme « mère ». La mère bulgare a demandé à la commune de Sofia (quartier de Pancharevo, où elle a son adresse permanente) de délivrer un acte de naissance à l'enfant afin de lui permettre d'obtenir un document attestant de sa nationalité bulgare. La commune a demandé « des preuves relatives à la filiation de l'enfant, concernant l'identité de sa mère biologique » [14], le modèle approuvé d'acte de naissance ne prévoyant qu'une seule case pour la « mère » et une seule pour le « père », dans chacune desquelles un seul nom peut

11| Arrêt de la Cour de justice (Grande chambre) du 14 décembre 2021, *Stolichna obshtina,* rayon *« Pancharevo »*, C-490/20, ECLI:EU:C:2021:1008.

12| Arrêt du 2 octobre 2021 dans l'affaire constitutionnelle nº 6/2021 (au rapport de Kr. Vlahov).

13| Force est de noter que la Cour de justice indique explicitement le sexe de l'enfant (voir points 2, 19, 39 et autres de son arrêt précité).

14| Point 21 de l'arrêt précité de la Cour de justice.

figurer. La ressortissante bulgare a refusé de fournir l'information requise ; la commune de Sofia a rejeté sa demande tendant à la délivrance d'un acte de naissance en raison de l'absence d'informations concernant l'identité de la mère biologique de l'enfant concerné et au motif que la mention dans un acte de naissance de deux parents de sexe féminin **était contraire à l'ordre public bulgare, lequel n'autorise pas le mariage entre deux personnes de même sexe.** La mère a formé un recours contre cette décision de rejet devant l'Administrativen sad Sofia-grad (tribunal administratif de Sofia), qui a saisi la Cour de justice d'une demande préjudicielle [15].

2) Contrairement à ce qu'elle avait fait dans un certain nombre d'autres affaires, la Cour de justice **n'a pas reproduit** l'exposé détaillé de la juridiction nationale de renvoi et n'a pas du tout mentionné les arguments des parties, qui avaient présenté des observations dans cette affaire conformément à l'article 23 du statut de la Cour de justice.

3) Dans sa présentation du « cadre juridique » pris en compte par la Cour de justice, celle-ci cite l'article 25 de la Constitution de la République de Bulgarie *(qui régit l'acquisition de la nationalité bulgare)* ; en revanche, **elle ne mentionne pas du tout** la disposition citée en premier lieu par l'Administrativen sad Sofia-grad au nombre des « dispositions juridiques applicables » – à savoir l'article 46, paragraphe 1, de la Constitution aux termes duquel « le mariage est une union volontaire entre un homme et une femme » – et ce, malgré l'importance indéniable de cette disposition pour l'affaire, même abstraction faite du point de savoir si elle exprime l'identité constitutionnelle nationale.

En outre, la Cour de justice considère (au point 17) que les dispositions applicables seraient celles de l'article 60, paragraphes 1 et 2, du Code de la famille (relatives à la détermination de la filiation de l'enfant et à l'identification de la mère), mais **pas les dispositions citées par l'Administrativen sad Sofia-grad** (et considérées par l'avocate générale comme une réglementation applicable [16]) à savoir celles de l'article 61, paragraphes 1 à 4, et surtout le paragraphe 1, qui dispose que « l'époux de la mère est réputé être le père de l'enfant né au cours du mariage », ce qui pourrait

15| Administrativen sad Sofia-grad (tribunal administratif de Sofia), 2e section, 22e chambre, affaire no 3654 au rôle de 2020, juge Desislava Kornezova, ordonnance no 7424 du 2 octobre 2020 (ci-après : « la demande préjudicielle » ou « l'ordonnance de renvoi »).

16| Conclusions présentées le 15 avril 2021 par l'avocate générale Juliane Kokott dans l'affaire *Stolichna obshtina,* rayon *« Pancharevo »*, C-490/20, ECLI :EU:C:2021:296, point 14.

avoir une incidence significative sur la situation des parents de l'enfant dans la présente affaire. La Cour de justice omet aussi totalement de mentionner les dispositions de droit interne manifestement pertinentes pour l'objet de l'affaire au principal qui sont citées par l'Administrativen sad Sofia-grad et qui (ainsi qu'il ressort des motifs de la demande préjudicielle – pages 14 et 15) sont **directement liées à l'identité constitutionnelle nationale,** en ce qu'elles complètent les normes constitutionnelles relatives à la nationalité et au mariage, et sont donc directement liées à l'un des trois problèmes les plus importants de l'affaire (deuxième question préjudicielle posée par l'Administrativen sad Sofia-grad).

4) La question de l'identité constitutionnelle nationale est soulevée – de manière non seulement explicite, mais aussi particulièrement motivée – dans la demande préjudicielle de l'Administrativen sad Sofia-grad (pages 13 à 16). Celui-ci indique que le mariage traditionnel est considéré comme faisant partie intégrante de l'identité constitutionnelle bulgare et que cette conception constitutionnelle trouve son expression dans le code de la famille et dans d'autres textes du droit interne relatifs à la filiation et aux modalités de délivrance d'un acte de naissance, et insiste sur le fait que la jurisprudence existante de la Cour de justice ne répond pas aux questions posées et que l'affaire se distingue, en substance, de l'arrêt Coman [17] cité à plusieurs reprises.

Cela aurait dû être plus que suffisant *pour la Cour de justice, comme le montre son approche dans d'autres affaires où elle s'est prononcée sur l'identité constitutionnelle nationale d'un État membre sur la base d'une argumentation beaucoup plus modeste de la juridiction qui l'avait saisie* [18]. **Cependant, la Cour de justice ignore presque totalement** cette question et se prononce de manière extrêmement laconique ; elle n'examine pratiquement pas si un élément de l'identité constitutionnelle nationale de l'État était affecté, ni s'il y a eu atteinte à cet élément, ni si – dans l'affirmative – cette atteinte était ou non proportionnée ou était justifiée par d'autres motifs (*par exemple, par la protection de l'unité et de la primauté du droit de l'Union, telle que considérée notamment dans l'affaire Melloni* [19]).

17| Arrêt de la Cour de justice (Grande chambre) du 5 juin 2018, *Coman e.a.*, C-673/16, ECLI :EU:C:2018:385.

18| Voir, par exemple, arrêt de la Cour de justice du 14 octobre 2004, *Omega*, C-36/02, ECLI :EU:C:2004:614**.**

19| Arrêt de la Cour de justice (Grande chambre) du 26 février 2013, *Melloni,* C-399/11, ECLI :EU:C:2013:107, point 60.

5) La Cour de justice méconnaît aussi totalement que cet aspect de l'identité constitutionnelle nationale bulgare a fait – qui plus est très récemment [20] – **l'objet d'une décision explicite de la juridiction constitutionnelle de l'État concerné, dont la motivation est entièrement ignorée par la Cour de justice.** J'ose affirmer qu'une telle méconnaissance totale par la Cour de justice du fait qu'une cour constitutionnelle nationale a statué, est déconcertante, difficile à expliquer et contre-productive.

6) Ensuite, je trouve troublant le fait que la Cour de justice a non seulement refusé de suivre, mais de surcroît **complètement ignoré l'analyse détaillée des mêmes questions et les déductions qui en ont été tirées par Madame l'avocate générale dans ses conclusions dans cette affaire.** Cela est d'autant plus grave qu'il s'agit de l'une des personnalités les plus éminentes, notamment en matière de droits de l'homme, siégeant actuellement à la Cour de justice : M[me] Juliane Kokott [21].

7) Les considérations relatives à l'ordre public soulevées par l'Administrativen sad Sofia-grad ont également été ignorées. La Cour de justice a rappelé que « **la notion d'« ordre public »** en tant que justification d'une dérogation à une liberté fondamentale doit être entendue strictement, de telle sorte que sa portée ne saurait être déterminée unilatéralement par chacun des États membres sans contrôle des institutions de l'Union. Il en découle que l'ordre public ne peut être invoqué **qu'en cas de menace réelle et suffisamment grave, affectant un intérêt fondamental de la société** (point 55 de l'arrêt Stolichna obshtina, rayon « Pancharevo » [22]). Supposons qu'il en soit ainsi. Mais pourquoi donc, après avoir souligné ces conditions, le juge de l'Union ne les examine-t-il pas du tout ? Dans ses motifs, on ne trouve pas un seul mot sur le point de savoir si l'atteinte au régime national de la filiation, de la famille et du mariage, notions qui sont

20| Seulement quelques semaines plus tôt ! Il s'agit de l'arrêt du 2 octobre 2021 dans l'affaire constitutionnelle n° 6/2021 (au rapport de Kr. Vlahov).

21| Peut-être convient-il ici de rappeler que la Cour de justice s'était déjà prononcée de manière totalement contraire à l'avis de l'avocate générale Kokott dans une autre affaire bulgare emblématique : l'arrêt de la Cour de justice du 31 janvier 2013, *Belov*, C-394/11,ECLI :EU:C:2013:48, où elle avait considéré que la Commission de défense contre la discrimination de Bulgarie n'était pas une « juridiction » apte à renvoyer une demande de décision préjudicielle ; voir, plus en détail, Semov, A., *Novo ili dopalneno vizhdane na SES otnosno ponyatieto za « natsionalna yuridiktsia » po chl. 267 na DFES (izvodi ot edno ot nay-vazhnite balgarski preyuditsialni zapitvania – delo Belov, C-394/11)* [Ndt : « Position nouvelle ou complétée de la CJUE sur la notion de "juridiction nationale" au sens de l'article 267 TFUE (déductions tirées d'une des plus importantes demandes de décision préjudicielle bulgares – l'affaire Belov, C-394/11) »], *Nauchni trudove na Instituta za darzhavata i pravoto*, Académie des Sciences de Bulgarie, Sofia, tome 16/2017, pages 345 à 372.

22| La Cour de justice renvoie une fois de plus à l'arrêt *Coman,* point 44 et jurisprudence citée.

incontestablement pertinentes pour toute conception de l'ordre public – y compris, dans la jurisprudence de la Cour de justice elle-même, pour la perception de la morale par le public – constitue une « menace réelle et suffisamment grave, affectant un intérêt fondamental de la société ». Il ne fait probablement aucun doute qu'un intérêt fondamental de la société est concerné. On pourra discuter du caractère réel et surtout suffisamment grave de la menace en l'espèce, mais cela nécessite en tout état de cause une vérification. Voici, pour ne pas la nommer, la question rhétorique qui subsiste : le fait de nier des éléments essentiels de la conception sociale et législative du mariage et de la famille – qui ont pourtant une base explicite dans la Constitution nationale et sont interprétés sans ambiguïté par la juridiction constitutionnelle nationale – ne constitue-t-il pas un cas caractérisé d'atteinte suffisamment grave à un intérêt de la société ?

En définitive, l'arrêt de la Grande chambre de la Cour de justice de l'Union européenne apparaît dépourvu de toute motivation valable et soulève des questions absolument fondamentales sur la portée du droit de l'Union et l'importance du régime des compétences de l'Union et de leurs limites, ainsi que sur l'efficacité du mécanisme de protection de l'identité constitutionnelle nationale des États membres prévu par le droit de l'Union, que j'analyserai en détail ci-après.

b) Une distanciation totale vis-à-vis la protection de l'identité constitutionnelle nationale ?

L'arrêt de la Cour de justice dans l'affaire *Stolichna obshtina, rayon « Pancharevo »* suscite des questions fondamentales **quant aux critères** sur la base desquels la Cour de justice apprécie si, dans une affaire donnée, l'identité constitutionnelle nationale d'un État membre a été affectée mais aussi, plus globalement, **sur l'approche de la Cour de justice** : quand et sous quelles conditions estimera-t-elle qu'il est nécessaire d'analyser une atteinte à l'identité (a fortiori lorsque cette atteinte est clairement mentionnée dans la question préjudicielle et a fait l'objet d'une analyse dans les conclusions de l'avocate générale) ?

La Cour de justice a, dans plusieurs de ses arrêts, accordé une attention particulière à la question de l'identité nationale affectée ou violée ; mais elle n'en a rien fait dans cette affaire. De plus, dans plusieurs arrêts, elle a donné raison à des arguments excipant d'une atteinte à l'identité (voir ci-dessous) ; mais elle ne l'a pas fait en l'espèce et ce, sans que les raisons en soient clairement exposées. Dans un nombre non négligeable d'affaires, la Cour de justice a pris en considération les conclusions de l'avocat général ; mais en l'espèce, elle les a totalement ignorées, bien qu'elles soient remarquablement

argumentées. Dans certaines affaires, la Cour de justice a tenu compte des décisions rendues par la juridiction constitutionnelle nationale concernée ; mais ici, elle ne les mentionne même pas, sans que l'on puisse comprendre pourquoi…

À tout le moins du point de vue d'un juge constitutionnel, cela soulève la question de savoir si la Cour de justice encourage réellement le dialogue entre juges et, si oui, **pourquoi elle n'accorde aucune attention à la décision d'une juridiction constitutionnelle nationale** statuant sur une question directement liée à l'affaire dont la Cour de justice est saisie ? Bien entendu, la Cour de justice pourra être en désaccord avec l'une ou de l'autre position de telle ou telle juridiction constitutionnelle, mais pourquoi ignorer complètement son existence ? Cela vaut a fortiori **dans un domaine particulièrement sensible et important** à lui seul, mais aussi compte tenu de la question épineuse de l'adhésion de l'Union européenne à la Convention dite d'Istanbul, bloquée en raison de la position de cette même juridiction constitutionnelle.

8) **Considérations générales**

La question de l'identité constitutionnelle nationale est soulevée – de manière non seulement explicite, mais aussi particulièrement motivée – dans la demande préjudicielle de la juridiction de renvoi [23], laquelle relève expressis verbis que :

il apparaît acquis que le mariage traditionnel, entendu comme une union volontaire entre un homme et une femme, ainsi que le prévoit expressément l'article 46, paragraphe 1, de la Constitution bulgare (en tant que disposition impérative qui ne prévoit pas de dérogations), **fait partie intégrante de l'identité constitutionnelle bulgare ;**

- cette conception, inscrite dans la Constitution, trouve également une expression explicite dans le code de la famille, en particulier dans ses dispositions relatives à la filiation par la mère, etc., qui sont (l'Administrativen sad Sofia-grad soulignant expressément qu'il s'agit de sa lecture) des expressions de l'identité constitutionnelle nationale de la République de Bulgarie au sens de l'article 4, paragraphe 2, TUE ;

23| Pages 13-16 de l'ordonnance de l'Administrativen sad Sofia-grad.

- ces dispositions se reflètent également dans d'autres actes de droit interne pertinents, notamment en ce qui concerne la filiation et la désignation des parents de la personne à laquelle un acte de naissance est délivré ;
- il doit être déterminé (par la Cour de justice) si les considérations relatives à la protection de l'identité (et de l'ordre public) pourraient justifier le refus des autorités bulgares d'établir un acte de naissance pour l'enfant ; la juridiction de renvoi expose notamment qu'une éventuelle obligation pour ces autorités d'établir un acte de naissance mentionnant, comme étant les parents dudit enfant, deux personnes de sexe féminin **pourrait porter atteinte** à l'ordre public ainsi qu'à **l'identité nationale de la République de Bulgarie,** dans la mesure où la Constitution bulgare et le droit de la famille bulgare ne prévoient pas la parentalité de deux personnes de même sexe.
- l'article 9 de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte ») prévoit expressément que le droit de fonder une famille est garanti selon les lois nationales, ce qui est, en fait, l'expression fidèle du respect de l'identité nationale et constitutionnelle reconnue par l'article 4, paragraphe 2, TUE ;
- il existe « des différences d'échelles des valeurs de société entre États membres de l'Union » ;
- partant, il est douteux que l'article 24, paragraphe 2, de la Charte « impose à un État membre d'écarter l'application de dispositions fondamentales de son droit national » ;
- seul le législateur pourrait décider souverainement (note de l'auteur : dès lors que cette matière relève toujours de la compétence nationale exclusive) si la filiation de l'enfant peut être établie à l'égard non pas d'un(e) seul(e) mais de deux mères et/ou pères ;
- il convient d'apprécier si le fait d'obliger les autorités bulgares à délivrer un acte de naissance en y inscrivant deux « mères » comme parents [24] « ne porterait pas atteinte à l'identité nationale de l'État bulgare » ;

24| Toutefois, une telle obligation ne ressort pas en tant que telle de l'arrêt de la Cour de justice : cet arrêt laisse aux autorités bulgares (je me demande d'ailleurs lesquelles, si l'Administrativen sad Sofia-grad se borne à annuler le refus de la commune…) le soin d'apprécier ce qu'il est nécessaire de faire pour qu'un acte de naissance soit délivré. Cela n'implique pas nécessairement l'inscription de deux mères mais, à l'évidence, un refus par les autorités d'indiquer la mère biologique constituera un non-respect des dispositions réglementaires régissant la délivrance d'un tel acte…

- Il est donc « nécessaire de trouver un équilibre entre les différents intérêts légitimes en présence : d'une part, l'identité constitutionnelle et nationale de la République de Bulgarie et, d'autre part, les intérêts de l'enfant, notamment son droit à […] la libre circulation » ;
- il convient également d'examiner si un tel équilibre pourrait être atteint grâce au principe de proportionnalité (la juridiction de renvoi proposant même une approche raisonnable, voir page 16) ;
- enfin, l'Administrativen sad Sofia-grad souligne que la jurisprudence existante de la Cour de justice (en particulier l'arrêt Coman, que l'Administrativen sad Sofia-grad cite à plusieurs reprises et à l'égard duquel il considère – fort justement – que l'affaire est substantiellement différente !) n'apporte pas de réponse aux questions soulevées [25].

Tous ces éléments ont, dans les faits, été ignorés par la Cour de justice…

9) **L'appréciation de l'identité constitutionnelle nationale**

Au lieu de cela, la Cour de justice a simplement considéré (*au point 45 de son arrêt*) que l'article 4, paragraphe 3, de la directive 2004/38 **impose aux autorités bulgares de délivrer une carte d'identité** ou un passeport à [l'enfant] **indépendamment de l'établissement d'un nouvel acte de naissance** pour cet enfant.

Cet « indépendamment » signifie tout simplement que les autorités nationales compétentes devraient [selon la Cour de justice] **laisser inappliquées les règles de droit interne applicables** – sous-entendu, en tant qu'incompatibles avec le droit de l'Union – alors même que cette matière relève de la compétence nationale exclusive : « […] dans la mesure où le droit bulgare exige l'établissement d'un acte de naissance bulgare préalablement à la délivrance d'une carte d'identité ou d'un passeport bulgare, **cet État membre ne saurait invoquer son droit national** pour refuser d'établir […] une telle carte d'identité ou un tel passeport » (point 45).

25| Il convient du reste de noter l'excellente lecture que le juge de renvoi fait de la jurisprudence pertinente de la Cour de justice, tout comme d'ailleurs de la Cour européenne des droits de l'homme (voir pages 17 et 18 de l'ordonnance).

La Cour de justice a ensuite **affirmé, de la manière la plus laconique qui soit,** que cette obligation – découlant, selon elle, du droit de l'Union – imposée à la Bulgarie « **ne méconnaît pas l'identité nationale** ni ne menace l'ordre public de cet État membre » (point 56).

Partant, elle a imposé à la Bulgarie l'obligation « **de délivrer** à un enfant, ressortissant de cet État membre, qui est né dans un autre État membre et dont l'acte de naissance délivré par les autorités de cet autre État membre **désigne comme ses parents deux personnes de même sexe,** une carte d'identité ou un passeport et, d'autre part, **de reconnaître le lien de filiation** entre cet enfant et **chacune de ces deux personnes** […] ». La seconde de ces obligations peut être considérée comme remplie : personne en Bulgarie ne conteste la filiation de l'enfant lors de l'exercice par celui-ci (ou par ses « parents ») des droits découlant du droit à la libre circulation dans l'Union. La première, en revanche, **touche directement et de manière significative à l'identité constitutionnelle nationale bulgare** (même si elle ne la viole pas réellement). Toutefois, cela échappe totalement à l'attention de la Cour de justice.

Ceci est à mon avis difficile à expliquer : pourquoi la Cour de justice – qui plus est, statuant en grande chambre – estime-t-elle qu'il est suffisant de constater d'une manière décisive pour l'affaire que l'identité constitutionnelle nationale d'un État membre n'a pas été violée, en n'avançant pratiquement aucun motif ?

Et ce, après qu'elle a elle-même développé le concept déjà élaboré de protection de l'identité au titre de l'article 4, paragraphe 2, TUE (y compris en ce qui concerne des aspects dont il est discutable qu'ils constituent un élément de l'identité nationale, par exemple le droit à la dignité humaine [26])? Qui plus est, cela concerne des obligations qui sont manifestement contraires à celles qui existent – de manière très étendue et depuis longtemps – dans l'État concerné **en matière de morale publique et d'identité constitutionnelle nationale** (obligations qui sont connues dans l'Union et donc nécessairement aussi des juges de la Cour de justice…) et ce, alors même que la juridiction constitutionnelle nationale s'est déjà prononcée de manière suffisamment claire sur ce même élément de l'identité. Le fait que la Cour de justice a totalement ignoré tant la jurisprudence de la Cour constitutionnelle nationale

26| Voir, entre autres, arrêt de la Cour de justice du 14 octobre 2004, *Omega*, C-36/02, ECLI:EU:C:2004:614.

que l'impératif de motiver sa décision – et ce en dépit du fait que l'avocate générale désignée pour cette affaire avait analysé la même question – me semble contre-productif et, partant, inacceptable.

Il y a lieu de considérer que l'arrêt de la Cour de justice dans l'affaire Pancharevo est dépourvu de motivation dans sa partie la plus essentielle.

10) **L'approche qui semblait logique**

L'avocate générale avait proposé **une approche à mon avis correcte** (qui n'a pas été retenue par la Cour de justice) : il convenait d'examiner, en premier lieu, si le refus de délivrer l'acte de naissance demandé constitue une entrave aux droits subjectifs des citoyens de l'Union (point 43 des conclusions) puis, en second lieu, de rechercher « si une éventuelle entrave à la libre circulation peut être **justifiée,** notamment au regard de l'article 4, paragraphe 2, TUE qui garantit le respect de l'identité nationale des États membres » et, le cas échéant, si l'invocation de l'identité nationale appelle « **une mise en balance avec d'autres intérêts** », tels que les droits fondamentaux de la Charte (point 44 des conclusions).

La Cour de justice semble répondre par l'affirmative à la première question, apporte une réponse laconique à la deuxième question et ignore totalement la question (en soi fondamentale et dont la réponse contribuerait grandement au droit) de la mise en balance entre l'identité constitutionnelle nationale et les « autres intérêts », tels que les droits garantis par la Charte.

Je pense que la Cour de justice **aurait pu :**

- constater que la détermination de la filiation d'une personne **ne constitue pas un élément de l'identité constitutionnelle nationale bulgare ;**
- ou, du moins, que l'exigence d'indiquer la mère biologique d'une personne aux fins de la détermination de la filiation de l'enfant **n'est pas un tel élément ;**
- ou que les dispositions du droit interne invoquées par l'Administrativen sad Sofia-grad comme étant applicables à l'affaire dont il est saisi ne sont pas une expression de l'identité constitutionnelle nationale ;
- ou, inversement : considérer que, **bien qu'elle soit affectée, l'identité constitutionnelle nationale n'est pas violée** (et qu'il n'y a pas de contradiction avec les normes alliées applicables) – comme le suggère précisément l'avocate générale ;

- ou **qu'il y a violation, mais qu'elle est proportionnée** à l'objectif légitime supérieur poursuivi – par exemple, « l'intérêt supérieur de l'enfant » ;
- ou, en dernier ressort (et avec une motivation qui aurait certainement été intéressante), que la violation disproportionnée de l'identité **est justifiée par des considérations d'unité et de primauté** du droit de l'Union…

Mais laisser toutes ces questions sans réponse me paraît inexplicable et inacceptable.

Tout compte fait, la Cour de justice aurait pu proposer à la juridiction nationale **des méthodes appropriées pour interpréter conformément au droit de l'Union** les règles de droit interne applicables [27] afin d'éviter que leur application soit écartée (et qu'il soit ainsi porté atteinte à l'identité constitutionnelle nationale).

La Cour de justice aurait également pu se contenter d'indiquer simplement que la Bulgarie est tenue de délivrer un acte de naissance à l'enfant, pour autant que la demande de délivrance d'un tel acte devant les autorités bulgares satisfasse à l'exigence, prévue par le droit interne, de désigner la mère biologique de l'enfant.

En réalité, la riche motivation de la juridiction de renvoi (page 16 de l'ordonnance) offrait à la situation une issue suffisamment satisfaisante, à tel point même qu'on peut se demander pourquoi la demande préjudicielle était nécessaire si cette juridiction considère que l'approche discutée est envisageable…

Cependant, l'imposition par la Cour de justice d'une obligation de délivrer un acte d'état civil en ignorant complètement un certain nombre de dispositions essentielles (lesquelles sont non seulement impératives, mais aussi d'une « importance fondamentale dans la tradition constitutionnelle bulgare, ainsi que dans la doctrine bulgare en matière de droit de la famille et des successions, tant du point de vue purement juridique que du point de vue des valeurs » [28]) est non seulement créatrice de problèmes pratiques et juridiques très importants (argument qui sera

27| Voir, plus en détail, Semov, A., *Zadalzhenieto za saotvetvashto na Pravoto na ES talkuvane na vatreshnite pravni normi. Nay-shirokoobhvatnata posleditsa ot deystvieto na Pravoto na ES*, [Ndt : « L'obligation d'interpréter les normes juridiques internes conformément au droit de l'Union – la conséquence la plus étendue de l'application du droit de l'Union »], Éditions académiques UI « Sv. Kliment Ohridski », Sofia, 2022.

28| Il convient de noter que la motivation de la juge Kornezova est ici irréprochable.

peut-être être considéré comme peu important, au vu de la jurisprudence actuelle de la Cour de justice [29]), mais se trouve de surcroît en contradiction flagrante avec les valeurs de la morale publique et de l'identité constitutionnelle nationale qui prévalent dans le pays de manière très étendue et depuis longtemps, comme le montre l'attitude à l'égard de la convention dite « d'Istanbul ».

11) Des éléments clés des conclusions de l'avocate générale ont été ignorés par la Cour de justice

L'avocate générale Kokott a traité l'affaire non seulement de manière très analytique, mais aussi avec un engagement évident en faveur de la garantie, par la Cour de justice, de l'identité constitutionnelle nationale des États membres. Malheureusement, dans l'arrêt qui a suivi, la Grande Chambre de la Cour de justice **n'a suivi ni le point de vue, ni l'approche analytique de son avocate générale.**

11.1. Dès le début (point 2 des conclusions), M[me] Kokott souligne que **prévaut en Bulgarie la conception de la famille dite « traditionnelle »** qui constitue, selon les indications de la juridiction de renvoi, **une valeur protégée au titre de l'identité nationale** au sens de l'article 4, paragraphe 2, TUE. Effectivement, le véritable problème du fond de l'affaire ne réside pas dans le droit de l'enfant d'obtenir un document relatif à la nationalité bulgare, et encore moins dans la reconnaissance de cette nationalité, mais uniquement dans le refus de la ressortissante bulgare qui prétend en être la mère de l'indiquer dans la demande d'acte de naissance.

11.2. L'avocate générale souligne ensuite (point 3) que « **[c]ette question est particulièrement sensible** », cela précisément **« eu égard à la compétence exclusive que détiennent les États membres » dans la matière** concernée et également (ce que la Cour de justice a aussi ignoré) eu égard « **aux différences considérables** qui existent, à ce jour, au sein de l'Union en ce qui concerne le statut juridique et les droits reconnus aux couples de même sexe » [30].

29| Voir, par exemple, l'obligation imposée par la Cour de justice à l'Allemagne et à l'Autriche de trouver un moyen de régler entre elles la question de la nationalité d'une personne, afin que cette dernière puisse recouvrer sa nationalité dans l'un des deux pays avant d'être déchue de sa nationalité dans l'autre (!) – arrêt de la **Cour** de justice (Grande chambre) du 2 mars 2010, *Rottmann*, C-135/08, ECLI:EU:C:2010:104.

30| Cette question est en outre d'une importance pratique notable, ce dont fait preuve l'affaire C-2/21, *Rzecznik Praw Obywatelskich,* qui était alors pendante devant la Cour de justice et dont le cadre factuel et juridique est très semblable à celui de la présente affaire et qui soulève pour partie des questions presque identiques.

11.3. L'avocate générale propose également une analyse très détaillée de la **notion d'« identité nationale » au sens de l'article 4, paragraphe 2, TUE.**

Tout d'abord, il convient de souligner avec force que, selon l'avocate générale, « **le contenu précis de cette notion est susceptible de varier d'un État membre à l'autre** » (point 70 des conclusions) et « ne saurait être déterminé sans **tenir compte des conceptions que retiennent les États membres de leur identité nationale** » (toujours au point 70) ! Or, la Cour de justice ne fait dans ses motifs aucune mention de cette position, qui n'apparaît d'ailleurs pas non plus dans sa jurisprudence antérieure ; pourtant, je me permets de la considérer comme **décisive pour l'essence même du droit** des États membres de l'Union au respect de leur identité constitutionnelle nationale [31].

C'est pourquoi le respect de l'identité constitutionnelle nationale est expressément défini non seulement comme une « **obligation pour l'Union** » (point 71 des conclusions [32]), mais aussi comme une « **obligation de respecter la pluralité de conceptions,** et, partant, **les différences qui caractérisent chaque État membre** ». J'ai déjà souligné que la question de l'identité reste, dans sa totalité, sans analyse dans l'arrêt de la Cour de justice, si bien que je ne le rappellerai pas lorsque j'évoquerai chaque élément des considérations de l'avocate générale. En particulier, Madame l'avocate générale constate qu'« [à] l'heure actuelle, **il n'existe pas, au sein de l'Union, de consensus** en ce qui concerne les conditions préalables pour l'accès aux institutions fondamentales du droit de la famille » et même que « [s]'agissant, par exemple, du divorce, des divergences conceptuelles insurmontables ont été constatées lors de l'élaboration d'un règlement sur la loi applicable à cette institution, conduisant à l'échec de l'initiative législative [...] » (point 75 des conclusions). Elle n'hésite pas non plus à reconnaître que, « [e]n ce qui concerne le mariage, **seulement 13 des 27 États membres** de l'Union ont, à l'heure actuelle, ouvert cette institution aux couples

31| Voir, plus en détail, Semov, A., *Zashtita na natsionalnata konstitutsionna identichnost v Evropeyskia Sayuz,* Éditions académiques AI Prof. Marin Drinov, Sofia, 2021, pages 63 et s.

32| L'avocate générale se réfère à nouveau aux arrêts de la Cour de justice du 22 décembre 2010, *Sayn Wittgenstein,* C-208/09, ECLI:EU:C:2010:806, points 91 et 92, et du 2 juin 2016, *Bogendorff von Wolffersdorff,* C-438/14, ECLI:EU:C:2016:401, point 73.

de même sexe » (point 75)[33] et que, en outre, **seule une partie de ces 13 États** prévoit la parentalité « automatique » de l'épouse de la mère biologique de l'enfant[34].

Il est par conséquent extrêmement important de comprendre que « la notion d'identité nationale **ne saurait faire l'objet d'une interprétation abstraite** au niveau de l'Union » (point 72 des conclusions) ! Or, la Cour de justice ne fait dans ses motifs aucune mention d'une telle interprétation, qui n'apparaît d'ailleurs pas non plus dans sa jurisprudence antérieure ; pourtant, je me permets de la considérer comme **décisive pour l'essence même du droit des États membres de l'Union au respect de leur identité constitutionnelle nationale**[35].

11.4. Et c'est pour cela que « constituent le point de départ de l'interprétation de l'article 4, paragraphe 2, TUE **les indications de la juridiction de renvoi** et de l'État membre concerné[36], lequel **dispose à cet égard d'une large marge d'appréciation**[37] (point 73 des conclusions). Bien entendu, cela va de pair avec « l'obligation de coopération loyale inscrite au paragraphe 3 de cette même

33| Il convient peut-être de souligner que la High Court of Justice, Queen's Bench Division, Administrative Court [Haute Cour de justice, division du Queen's Bench (chambre administrative), Royaume-Uni] a, dans son arrêt du 22 juin 2018 dans l'affaire CO/2704/2017 [Elan-Cane, R (on the application of) v Secretary of State for the Home Department & Anor [2018] EWHC 1530 (Admin) (22 June 2018) (bailii.org)] rejeté l'introduction de passeports neutres quant au genre et a estimé que l'indication du genre par la lettre « X » compromettrait un système juridique fondé sur une distinction claire entre les hommes et les femmes… Cet arrêt précisait qu'il n'existe aucune législation reconnaissant les personnes non binaires, mais qu'il existe de nombreuses lois qui classent les personnes comme étant des hommes ou des femmes.

34| L'avocate générale relève dans une note que l'Espagne en est l'une, mais précise : « Dans la plupart de ces États, cette possibilité n'est cependant admise qu'en cas de procréation médicalement assistée, à laquelle l'épouse de la mère biologique [note de l'auteur : voyez donc !] a consenti ».
En raison de ces divergences, le règlement 2016/1191 simplifiant les conditions de présentation de certains documents publics attestant, entre autres, la naissance, le mariage, le divorce et la filiation réitère à plusieurs reprises qu'il ne modifie ni le droit matériel dans ce domaine ni les obligations de reconnaissance des effets juridiques attachés à un tel document. Or, la Cour de justice ne considère pas ce règlement comme pertinent pour l'affaire, ce qui est également surprenant…

35| Voir, plus en détail, Semov, A., *Zashtita na natsionalnata […]*, op. cit., page 47.

36| Cela ressort également de l'arrêt de la Cour de justice du 17 juillet 2014, *Torresi*, C-58/13 et C-59/13, ECLI :EU:C:2014:2088, point 58.

37| Or, la Cour de justice a elle-même indiqué qu'elle partage cette lecture : voir arrêts du 4 décembre 1974, *van Duyn*, 41/74, ECLI:EU:C:1974:133, point 18 ; du 14 octobre 2004, *Omega*, C-36/02, ECLI :EU:C:2004:614, point 31 ; du 22 décembre 2010, *Sayn-Wittgenstein,* C-208/09, ECLI:EU:C:2010:806, point 87 ; et du 2 juin 2016, *Bogendorff von Wolffersdorff,* C-438/14, ECLI:EU:C:2016:401, point 68.

disposition ». En revanche, l'affirmation selon laquelle « ne peut être protégée [...] qu'une conception de l'identité nationale qui est conforme aux valeurs fondamentales de l'Union consacrées notamment à l'article 2 TUE » est très controversée [38]. Hormis le fait qu'il est difficile d'imaginer un élément de l'identité constitutionnelle nationale d'un État membre qui ne serait pas conforme aux valeurs de l'Union consacrées à l'article 2 du TUE, il me semble que si une telle hypothèse devait se présenter (au vu de l'interprétation de plus en plus large que la Cour de justice fait tant des compétences que des valeurs de l'Union), cela aurait surtout des conséquences politiques et moins des conséquences strictement juridiques.

11.5. Est dès lors très pertinent le point de vue de l'avocate générale selon lequel « [...] la Cour ne peut exercer **qu'un contrôle restreint** des mesures adoptées par un État membre aux fins de la sauvegarde de son identité nationale » (point 90). **Ce point est plus qu'essentiel, c'est la question centrale de l'affaire !** « S'agissant d'**une telle expression fondamentale de l'identité nationale, une restriction de l'intensité du contrôle s'impose** [...] afin de préserver l'existence de domaines de compétences matérielles réservés aux États membres dans le champ d'application du droit de l'Union » (point 96 des conclusions) [39].

12) Le droit de la famille et l'identité nationale

12.1. L'avocate générale observe à juste titre que « **le droit de la famille est une matière juridique particulièrement sensible** qui est caractérisée par une **pluralité de conceptions et de valeurs** à l'échelle des États membres et des sociétés qui les composent » (point 77 des conclusions). Partant, selon elle, « qu'il soit fondé sur des valeurs traditionnelles ou plus "modernes" [Note de l'auteur : le mot est ici mis entre guillemets par l'avocate générale, manifestement pour souligner que la notion de modernité est ici tout-à-fait relative] », le droit régissant cette matière « est l'expression de l'image de soi d'un État tant sur le plan politique que sur le plan social ». Il peut « être basé sur des idées religieuses ou marquer le renoncement de l'État concerné à ces idées ».

38| Cette position est étayée par une référence aux conclusions de l'avocat général Cruz Villalón dans l'affaire *Gauweiler e.a.*, C-62/14, ECLI:EU:C:2015:7, point 61, et fortement contestée par le Bundesverfassungsgericht (Cour constitutionnelle fédérale, Allemagne) qui avait saisi la Cour de justice dans cette affaire.

39| M[me] Kokott se réfère aux brillantes et extrêmement importantes conclusions de l'avocat général Poiares Maduro dans l'affaire *Rottmann*, C-135/08,ECLI: EU:C:2009:588, points 24 et 25.

12.2. Et Madame l'avocate générale résume ensuite – de manière décisive ! – que ce droit matériel « est en tout cas **une expression de l'identité nationale** inhérente aux structures fondamentales politiques et constitutionnelles » ! Et également que « les règles définissant les liens familiaux revêtent une importance primordiale pour le fonctionnement de la collectivité étatique en général » (point 78 des conclusions). Vient ensuite la **remarque tout aussi importante** que : « [l]a définition, au sens juridique, de ce qu'est une famille ou l'un de ses membres **touche [...] aux structures fondamentales d'une société.** Cette définition est donc **susceptible de relever de l'identité nationale d'un État membre** au sens de l'article 4, paragraphe 2, TUE » (point 79 des conclusions).

12.3. Par la suite, Madame l'avocate générale parvient au constat sans équivoque – et d'une importance cruciale pour l'affaire ! – que **« la Cour a déjà implicitement reconnu que les règles régissant le mariage font partie de l'identité nationale au sens de l'article 4, paragraphe 2, TUE »** (point 76 des conclusions), en citant les points 42 et 43 de l'arrêt Coman, auquel la Cour de justice s'est elle-même référée à plusieurs reprises dans ses motifs, quoique non sur cette question.

12.4. La réglementation juridique de la famille et du mariage fait sans aucun doute partie de l'identité constitutionnelle nationale d'un pays comme la Bulgarie, qui est marqué par des siècles de crise démographique, de sorte qu'il est fortement attaché à l'affirmation du rôle reproductif du genre [40]. Qui oserait nier que l'interdiction constitutionnelle de l'avortement en Irlande, qui a connu une grave crise démographique pendant une longue période, reflète son identité ? La bonne volonté de la Cour de justice, qui a reconnu des éléments d'identité de certains États en ce qui concerne des principes universels tels que la dignité humaine [41] et l'égalité [42], est-elle désormais oubliée ? Pourquoi la promotion de la diversité linguistique [43] ou d'un régime linguistique national propre [44] serait-elle un élément de l'identité

40| Voir les motifs de l'arrêt de la Cour constitutionnelle dans l'affaire n° 6/2021 (précité).

41| Voir, en ce qui concerne l'Allemagne, arrêt de la Cour de justice du 14 octobre 2004, *Omega*, C-36/02, ECLI:EU:C:2004:614.

42| Voir, en ce qui concerne l'Autriche, arrêt de la Cour de justice du 22 décembre 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806.

43| Arrêt de la Cour de justice du 5 mars 2009, *UTECA*, C-222/07, ECLI:EU:C:2009:124 ; cette affaire (qui a fait l'objet de conclusions de M^me^ Kokott) concernait l'Espagne.

44| Arrêt de la Cour de justice du 12 mai 2011, *Runevič-Vardyn et Wardyn*, C-391/09, ECLI:EU:C:2011:291 ; cette affaire concernait la Lituanie.

constitutionnelle d'un État plus défendable que le régime ou le rôle de la famille et du mariage ?

12.5. À cet égard, l'avocate générale rappelle expressément l'arrêt « Lissabon » (Lissabon-Urteil), rendu en juin 2009 par le Bundesverfassungsgericht (Cour constitutionnelle fédérale allemande)[45] et selon lequel le droit de la famille fait partie **des domaines particulièrement sensibles pour la capacité d'autodétermination démocratique d'un État constitutionnel,** ce dont il découle que l'action de l'Union doit se limiter au strict minimum nécessaire à la coordination des situations transfrontalières.

12.6. Madame l'avocate générale relève sans ambiguïté que **la définition des liens familiaux peut faire partie de l'identité nationale des États membres** (point 80 des conclusions). Cela soulève deux questions : pourquoi cette constatation est-elle cependant hypothétique (« peut être ») au lieu d'être une affirmation (« est »), compte tenu des arguments catégoriques sur lesquels elle se fonde ? Et pourquoi cette constatation est-elle abstraite (pour tous les États membres) et non spécifique à la Bulgarie, pour laquelle il existe sans aucun doute de très importants motifs « propres » supplémentaires ?

12.7. M[me] Kokott souligne ensuite avec force que, dans sa jurisprudence existante, la Cour de justice a reconnu à plusieurs reprises **comme étant protégés des éléments qui ne constituent pas « l'expression fondamentale » de l'identité constitutionnelle nationale** (point 93 des conclusions)[46]. Elle analyse même de manière approfondie (au point 94) les décisions antérieures de la Cour de justice dans lesquelles sont

45| Bundesverfassungsgericht, 30 juin 2009, 2 BvE 2/08, arrêt *« Lissabon » (Lissabon-Urteil)*, points 251 et 252.

46| Elle indique clairement que « [d]ans les affaires ayant soulevé la question de la protection de l'identité nationale à ce jour, n'était pas en cause l'expression fondamentale de la conception que l'État membre concerné entendait protéger au titre de son identité nationale. Ces affaires ont eu pour objet, pour la plupart, des restrictions à la libre circulation des citoyens de l'Union du fait du refus de reconnaître le nom qu'ils avaient adopté dans un autre État membre. La Cour a, certes, constaté que l'abolition de la noblesse, la protection de la langue officielle nationale ou la forme républicaine de l'État, avancées, respectivement, à titre de justification pour ce refus, étaient susceptibles de faire partie de l'identité nationale au sens de l'article 4, paragraphe 2, TUE ». L'avocate générale cite ici précisément des arrêts emblématiques, dans lesquels la Cour de justice a analysé le motif invoqué par l'État membre concerné comme étant un objectif légitime susceptible de justifier la restriction, en admettant manifestement qu'elle doit se prononcer de manière motivée sur chaque élément invoqué de l'identité – chose que la Cour de justice n'a pas fait dans l'affaire qui nous occupe…
Il convient toutefois de souligner que l'obligation de transcrire ou de reconnaître un nom ne touche généralement pas à l'essence de ces objectifs.

reconnus comme éléments protégés des éléments qui ne peuvent être qualifiés d'« expression essentielle ».

Enfin, l'avocate générale souligne clairement que, dans l'affaire Coman, qui a été citée à plusieurs reprises par la Cour de justice, il a été jugé sans équivoque que « l'obligation de reconnaître des mariages entre personnes de même sexe, conclus dans un autre État membre conformément au droit de celui-ci, aux seules fins de l'octroi d'un droit de séjour dérivé à un ressortissant d'un État tiers, ne porte pas atteinte à l'institution du mariage, qui relève de la seule compétence des États membres [autrement dit, la Cour de justice a apprécié le degré d'atteinte à l'identité constitutionnelle nationale ou l'existence d'une « atteinte » – voir ci-après]. La raison en est que la reconnaissance d'un tel mariage à la seule fin d'octroyer un droit de séjour n'implique pas, pour ledit État membre, de prévoir l'institution du mariage entre personnes de même sexe dans son droit national » (point 94 des conclusions).

13) **La différence entre « affecté » et « violé »**

On ne saurait ignorer que Madame l'avocate générale a également analysé les **« conséquences juridiques d'une invocation de l'identité nationale »** en examinant séparément « la nature et la fonction de la clause de sauvegarde de l'identité nationale » et les « effets juridiques de son invocation » (points 80 et suivants des conclusions). Après avoir considéré que **l'identité constitutionnelle nationale était affectée** (manifestement aussi en Bulgarie), elle fait le pas logique et essentiel suivant, consistant à déterminer **s'il y a également « violation » de l'identité –** notion plus étroite que celle d'« affecter » (comprise dans le sens d'un lien)[47].

Madame l'avocate générale souligne inévitablement – et selon moi à juste titre – que **seuls les éléments essentiels** doivent être protégés au titre de l'article 4, paragraphe 2, TUE, et non « toute expression de l'identité nationale », « afin d'éviter que l'application de l'article 4, paragraphe 2, TUE se heurte au principe de primauté du droit de l'Union » (point 92 des conclusions).

Tous ces arguments, voire même les pistes de réflexion, sont absents de l'arrêt de la Cour de justice. La question se pose inévitablement : mais pourquoi ?

47| J'analyse en détail cette question, qui est la plus importante sur le plan pratique, dans Semov, A., *Zashtita na natsionalnata [...],* op. cit., pages 63 et suivantes.

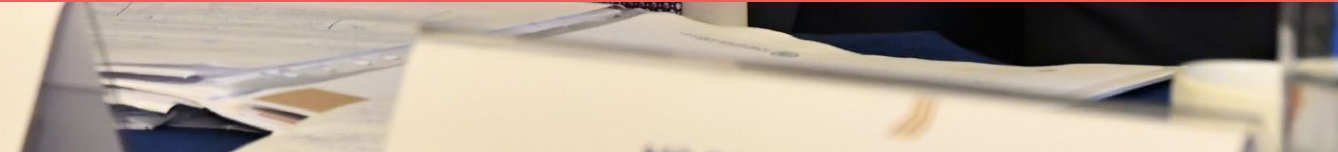
En conclusion, je suis d'avis que, indépendamment de l'appréciation du dispositif de l'arrêt examiné et de ses effets sur le système juridique bulgare – en particulier, sur l'affaire au principal devant la juridiction de renvoi bulgare – la motivation de la Cour de justice et son approche dans cette affaire sont, pour le dire gentiment, confuses.

Tout comme l'est aussi le fait que la Cour de justice ignore – je le souligne à nouveau – l'avis de la juridiction constitutionnelle bulgare, laquelle a pourtant démontré de la manière la plus catégorique (comme je l'ai indiqué au point I) son attachement au droit de l'Union.

Pour ces raisons, il faut à mon avis envisager sérieusement la nécessité de créer **un mécanisme structuré de dialogue permanent** entre les juridictions nationales (à tout le moins les juridictions constitutionnelles) et la juridiction constitutionnelle de l'Union européenne.

Des forums tels que celui-ci, aussi précieux soient-ils, sont à eux seuls manifestement insuffisants.

Mr Koen Lenaerts
President of the Court of Justice
of the European Union



Concluding remarks

Koen Lenaerts, President of the Court of Justice of the European Union

President Panova,

Dear Colleagues,

Ladies and Gentlemen,

After two days of fruitful discussions, I would like, first of all, to congratulate President Panova and her team for being such wonderful hosts. On behalf of all of us, thank you so much for your hospitality.

I would also like to thank the panellists and colleagues who have actively participated in the discussions, contributing to the success of this conference. I have very much enjoyed our mutual exchange of ideas. Thank you also to the interpreters for all their hard work.

As has been highlighted by President Panova, and by some of you during this conference, we live in uncertain times. Fundamental values which are shared and cherished by the EU and the Member States, such as liberty, democracy, the rule of law and fundamental rights, can no longer be taken for granted. As can be seen throughout the world, authoritarian tendencies are on the rise.

EU constitutionalism, which is grounded in those common values, must be protected. It is part of our common heritage, as Judge Feti pointed out. Or, as President Tănăsescu put it, those values – which revolve around the basic concept of human dignity – define our common identity as Europeans. We must protect and promote those values, because we owe it not only to the generations of Europeans who, for decades, struggled for peace and prosperity, but also to future generations who must continue to exercise the same freedoms and liberties that we currently enjoy.

European identity and national identity must be based on those common and fundamental values. An essential part of that identity is the role that judges and, in particular, constitutional judges are called upon to play in democratic societies. Constitutional judges are, as Judge Ziemele pointed out, 'the last line of defence', not only as champions of fundamental rights but also as custodians of the systems of checks and balances

set out in national constitutions. The Court of Justice – and the General Court, as well as the European Court of Human Rights – also form part of that line of defence that strives to keep democratic backsliding at bay.

As discussed in the second panel of this conference, it is in times of emergency when our common resolve towards upholding those values is truly tested. The examples mentioned by the panellists and the discussions that followed clearly demonstrated that the right balance between individual liberty and the general interest must be found in keeping with the principle of proportionality. In so doing, judges must refrain from crossing the dividing line between law and politics, whilst exercising a degree of judicial scrutiny that goes beyond merely rubberstamping decisions taken by the executive. I am happy to note that in difficult times, and when confronted with mounting pressure brought about by highly sensitive cases, EU constitutionalism has emerged successfully, demonstrating the strength of our common identity as Europeans. As Judge Mizaras eloquently explained,[1] ultimately, no matter the emergency, judges must be guided by the need to protect human dignity. Detaining and putting illegal third-country nationals into custody without due process and on the basis of a blanket restriction is simply repugnant to our common values.

We must therefore continue to work together in promoting and protecting those values and structures that keep our democracies healthy. In order to do so, we must, as Justice Díez Bueso observed, 'develop a common constitutional language' or, as Judge Accetto added, find a 'systemic consistency'. The question that then arises, and which is ultimately the *raison d'être* of this conference series, is therefore the following:

How do we build that common language that strengthens EU constitutionalism, while reducing normative conflicts to a minimum?

In my view, four essential features must form part of that common language, namely awareness, trust, dialogue and pluralism.

1| See Mizaras, V., "Human Rights and National Security – The Search for Common Values: The Lithuanian Constitutional Case Regarding Asylum Seekers in the Event of a Mass Influx of Aliens", in this volume.

First, I would like to draw your attention to the fact that gone are the days where EU law was confined to the internal market. Over the past 40 years, with every successive Treaty reform, the competences of the EU have been expanded. As 'Masters of the Treaties', the Member States have jointly and freely decided to expand the powers of the EU to policy areas that were traditionally reserved for the Member States, such as criminal law, immigration law or border control.[2] Thus, the EU now aims to establish and maintain an area of freedom, security and justice ('AFSJ') without internal borders where EU citizens may move freely and securely. Those Treaty changes have given rise to more 'contact points' between EU law and national constitutional law, notably in the realm of fundamental rights protection. That increase in interconnection between EU law and national constitutional law is not the result of judicial overreach but that of Treaty reform, followed by EU legislative activity.

To name just a few examples, the execution of a European Arrest Warrant, the detention of a third country national with a view to his or her return, or the abduction of a child in a cross-border context are cases that involve, respectively, criminal law, migration law and family law. At the same time, when it comes to fundamental rights, those cases are also to be examined through the prism of constitutional law and that of EU law. This shows that the 'network density' between EU law and constitutional law has increased dramatically in recent decades. This point was illustrated by President Lavrysen when he pointed out that 25% of cases brought before the Belgian Constitutional Court concern questions of EU law.

National constitutional courts must therefore become aware of the fact that, when they exercise their jurisdiction in policy areas that have been 'Europeanised', they will come across questions of EU law. However, awareness is a two-way street. I can guarantee you that the Court of Justice is fully aware of the fact that cases brought before it, in particular in the AFSJ, may also raise constitutional questions for the Member States. That is why, as Judge Lycourgos pointed out, the principle of conferral is not limited to judicial review cases, but also influences that way in which the Court of Justice interprets

2| See Viganò, F., "Protection of Fundamental Rights Between Constitutional Courts and the Court of Justice: The Italian Case", *Review of European Litigation*, 2024, pp. 94 and 95 (noting that '[e]ven in a field like criminal law, which has long been considered a bastion for national sovereignty, national provisions nowadays implement, to a large extent, obligations of criminalisation flowing from EU law; and criminal procedural rules increasingly abide by standards of protection of fundamental rights directly set by other EU instruments').

EU law.[3] Conferral and the principle of separation of powers are grounding principles of interpretation for the Court of Justice.[4]

This shows that EU constitutionalism has already entered a new paradigm in which constitutional law and EU law are becoming more and more interconnected. As President Abrantes observed, the fact that the EU is a constitutional project can no longer be contested. This brings me to the next feature.

Second, in this new paradigm, dialogue becomes essential in order for both national constitutional courts and the Court of Justice to establish a common language that reinforces EU constitutionalism as a whole.

Formally, that dialogue must take place by means of the preliminary reference mechanism. As Vice-President von Danwitz observed, national constitutional courts operate as courts of last instance and, therefore, they have the obligation to make a reference to the Court of Justice, unless the questions referred are covered by the exceptions set out in the judgment in *CILFIT*.[5] *Informally*, as Judge Georgiou mentioned, conferences such as this one are important for exchanging ideas and comparing experiences.

3| See Lycourgos, C., "The Allocation of Competences between the Member States and the European Union – relevant Case Law of the Court of Justice", in this volume.

4| See, for example, judgment of 1 August 2025, *Alace and Canpelli,* C-758/24 and C-759/24, ECLI:EU:C:2025:591. In that case, which concerned the interpretation of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60), one of the questions referred was whether a Member State could designate as 'a safe country of origin' a third country which does not satisfy, for certain categories of persons, the material conditions for such a designation, set out in Annex I to that directive. After looking at the literal, contextual and teleological interpretation of the relevant provisions of Directive 2013/32, the Court replied in the negative. It found that those provisions express 'the choice of the EU legislature to make the designation of a safe country of origin subject to the condition that the third country is generally safe for its entire population and not only for a part of it'. Ibid., paragraph 96. It was not for the Court of Justice to modify that choice, but for the EU legislative process to do so. This was actually what the EU legislature had done when adopting Regulation 2024/1348, which repeals Directive 2013/32 but was not applicable *ratione temporis* to the case at hand. This new regulation introduces the option for Member States to exclude clearly identifiable categories of persons for the purpose of designating a third country as 'a safe country of origin'. Thus, this judgment demonstrates that the Court strives to interpret EU law to the best of its ability and to refrain from encroaching upon the prerogatives of the EU legislature. Ibid., paragraphs 106 to 108.

5| See von Danwitz, T., "Different National Constitutional Law Constellations Relevant for EU law", in this volume.

Moreover, as Advocate General Szpunar and Judge Kornezov mentioned, where a national constitutional court is of the view that a provision of EU law – as interpreted by the Court of Justice – is at odds with the national identity of that Member State, that court must engage in a dialogue with the Court of Justice.[6] This is because such normative conflict is not bilateral in nature, but has a multilateral dimension, since that conflict is also calling into question the way in which that same provision of EU law is applied in the other 26 Member States. National constitutional courts must therefore bear in mind that unilateral non-compliance with EU law may have a 'ripple effect' in the other national legal orders, giving rise to the fragmentation of EU law as a common legal order.

As pointed out by Vice-President König, in order for EU constitutionalism to stand strong, it must be built on common ground. A unilateral breakaway is therefore contrary to achieving that common ground. As I mentioned in my introductory speech, communication is key. In that regard, the Court of Justice strives to find common ground by developing its case-law in keeping with Article 4(2) TEU.

In the judgment in *Pancharevo*,[7] for example, the Court aimed to find that common ground. That case concerned a lesbian couple, of British and Bulgarian nationality, who had a child of the latter nationality while living in Spain.[8] The couple sought to obtain a Bulgarian identity card or passport, by relying on a birth certificate issued by the Spanish authorities. Under Bulgarian law, only the name of the biological mother could be registered on the birth certificate of the child concerned. Under Spanish law, however, this was not the case, since for lesbian couples both mothers were registered without distinction. The question that arose was whether, by virtue of the Spanish birth certificate, Bulgarian authorities were obliged to issue travel documents to the child (an identity card or a passport), who had two mothers – one British, one Bulgarian – without knowing which mother was the biological one. The Court of Justice answered in the affirmative, in order to secure the child's right to free movement.

6| Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99, paragraphs 69 to 71.

7| Judgment of 14 December 2021, *Stolichna obshtina,* rayon *'Pancharevo'*, C-490/20, ECLI:EU:C:2021:1008.

8| It is worth noting that in this case, the referring court had found that the child had Bulgarian nationality by virtue of the Bulgarian Constitution. The Court of Justice therefore built its reasoning on that finding. Ibid., paragraph 40.

It observed, however, in a key passage of the judgment, that 'such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents'. [9] In other words, Bulgaria's national identity was left untouched, since EU law did not require that Member State to review its family law as a whole, but only to facilitate free movement. The same could be said regarding the national identity of Spain. Otherwise, one could argue that the non-recognition of birth certificates issued by that Member State for the purposes of free movement could significantly undermine its sovereign choices in the realm of family law. Therefore, in the judgment in *Pancharevo*, the Court of Justice upheld the right to free movement for same-sex couples while respecting the national identities of both the host and the home Member States.

Third, mutual trust must govern the relationship between national constitutional courts and the Court of Justice. That trust can be seen in relation to the duty of consistent interpretation, which was examined in the third panel. In its judgment in *Consorzio*, [10] the Court of Justice nuanced its previous judgment in *CILFIT* by limiting the obligation to refer to cases where there is a reasonable doubt as to the interpretation of the provision of EU law in question. This means, in essence, that the obligation to make a reference does *not* apply where there is a reasonable doubt only as regards the *application* of that same provision to a given case. In the judgment in *Consorzio*, the Court sought to adapt the *CILFIT* criteria to a more mature legal order, where national courts of last instance are more familiar with EU law and the preliminary reference mechanism than they were 40 years ago when the judgment in *CILFIT* was delivered. That maturity means, in general, that mutual trust between national courts of last instance, including constitutional courts, and the Court of Justice may move forward by allowing room for more flexibility.

9| Ibid., paragraph 57.

10| Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799, paragraph 47 ('it is only where (...) a national court or tribunal of last instance concludes that there is no circumstance capable of giving rise to any reasonable doubt as to the correct *interpretation* of EU law that that national court or tribunal may refrain from referring to the Court a question concerning the interpretation of EU law and take upon itself the responsibility for resolving it') (emphasis added).

Fourth and last, as mentioned by President Panova, pluralism is a key element of EU constitutionalism.[11] That pluralism must be ordered, which means, in concrete terms, that there must be unity in protecting and promoting common values. Yet, in protecting and promoting those values, EU law does not impose a particular constitutional model.[12] Member States are, for example, free to organise their justice systems as they see fit. They may choose whether or not to legalise same-sex marriage, or to provide for a policy of religious neutrality in the workplace; however, in so doing, they must not cross red lines that stem from those common values. For example, Member States may not undermine the independence of the judiciary by making judges succumb to pressure from the political branches.

Pluralism therefore means that, in the absence of EU harmonisation and without crossing those red lines, the Member States are free to make constitutional choices in accordance with their own history and tradition. This idea of pluralism is reflected in the motto of the EU: *United in diversity*. The EU is united by common values whilst allowing national diversity that protects and promotes them.

President Panova,

Dear Colleagues,

Ladies and Gentlemen,

EU constitutionalism, grounded in common European values, is constantly coming under threat both within and outside the EU. As custodians of those values, we, as judges, must work together by stressing the fact that what unites us is far stronger than our occasional differences. If Europeans are to overcome the challenges ahead, they must stay together. Otherwise, as President Abraham Lincoln once said, 'a house divided against itself cannot stand'.[13]

Thank you very much.

11| See Panova, P., "Introductory Speech", in this volume.

12| See, to that effect, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, ECLI:EU:C:2022:99, paragraph 43 and the case-law cited.

13| Lincoln, A., "A House Divided", speech delivered on 16 June 1858 in Springfield, USA.

Ms Pavlina Panova
President of the Constitutional Court
of the Republic of Bulgaria

Concluding remarks

Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria

Esteemed President Lenaerts,

Esteemed colleagues,

Dear ladies and gentlemen,

I would like to thank everyone involved in organising this conference. The credit for its success goes entirely to the teams from the Court of Justice of the European Union and the Constitutional Court of the Republic of Bulgaria. I would like to give special thanks to my colleagues from the Constitutional Court. The organisation of this meeting has also given substance to its title, 'EUnited in Diversity'. Europeans, citizens of different States, came together with a common goal – to hold a meeting where we could freely discuss matters of common interest.

I would also like to thank all participants. The discussions in the panels yesterday and today allowed us to establish concrete ways forward to maintain unity in the application of EU law. The perspectives on the possible means of safeguarding the diversity that unites us have become very clear.

We share the view that the Court of Justice of the European Union ensures unity in the interpretation and application of EU law. That nevertheless takes place through dialogue with the national courts, thereby also safeguarding the identity of Member States as guardians of the Treaties (the supreme source of constituent power in the European Union).

In that regard, it is important to note that protecting national identity is a prerequisite for a European integration that respects diversity. The preliminary reference procedure is an important tool that ensures the harmonious melding of the common values of the European Union, while at the same time safeguarding national particularities. In the delicate task of seeking balance, the national constitutional courts and the Court of Justice of the European Union are not in competition; we act together. The Court of Justice of the European Union supports the national courts in their role as guarantors of the rule of law in the different national legal systems, and has the possibility of providing

those courts with guidance on the interpretation and application of the complex and ever-expanding body of EU law.

We gained clear awareness, from the statements and discussions, that we are united around the idea that national identity is not a means of disregarding EU law. In the event of doubt as to whether national constitutional identity has been encroached upon, the assessment ultimately falls to the Court of Justice of the European Union. That circumstance necessitates a dialogue between the national constitutional courts and the Court of Justice of the European Union with a view to attaining the requisite balance between, on the one hand, the safeguarding of the supremacy and effective application of EU law in all Member States and, on the other, respect for the national constitutional identity. In a number of its judgments, the Court of Justice of the European Union has shown that it takes the need for such a balance seriously. [1]

Within the framework of Article 267 of the Treaty on the Functioning of the European Union, judicial dialogue must be grounded in mutual trust. After all, as President Lenaerts stated in his speech yesterday, 'mutual trust must not be confused with blind trust'. It is necessary for the constitutional courts to recognise the jurisdiction of the Court of Justice of the European Union. That would allow the Court of Justice of the European Union to take much clearer account of their concerns, more specifically as regards the potential infringement on the part of the European Union's institutions of the Member States' competences (*ultra vires* review), and respect for the Member States' constitutional identity. In that way, the preliminary reference procedure would fully serve its function of striking a balance in the relations both between the different legal systems within the common legal order and between the courts.

The interpretation of EU law does not come within the exclusive jurisdiction of the Court of Justice of the European Union. Although the Court alone may give a definitive interpretation of EU law that is valid for all, the day-to-day clarification of the meaning and application of that law comes within the powers and obligations of the national courts. They are empowered to apply EU law in a way that the Court of Justice

1| Judgments of 14 October 2004, *Omega,* C-36/02, ECLI:EU:C:2004:614; of 22 December 2010, *Sayn-Wittgenstein,* C-208/09, ECLI:EU:C:2010:806; of 7 September 2022, *Cilevičs and Others,* C-391/20, ECLI:EU:C:2022:638; and of 15 July 2021, *WABE and MH Müller Handel*, C-804/18 and C-341/19, ECLI:EU:C:2021:594.

of the European Union, owing *inter alia* to the principle of conferral, cannot. However, as has become clear from some of the statements, the issue that arises in practice is not so much the acceptance of the principle of conferral itself as a fundamental criterion for delineating the powers, which is indisputable, as the determination of the precise scope of the powers conferred. We all agree that those issues cannot be resolved through conflict, but rather require a dialogue between the courts that is based on constitutional sincere cooperation and mutual respect. The independent but complementary jurisdiction of national constitutional courts and of the Court of Justice of the European Union, respectively, in establishing a common legal order are also clearly outlined. While the review for compliance of a national legal act with the Constitution comes within the jurisdiction of the constitutional courts, it is without prejudice to the review concerning the applicability of a specific national norm, which comes within the jurisdiction also of the Court of Justice of the European Union. The two powers employ different parameters for the respective review, account being taken of the fact that, within the framework of constitutional proceedings, the domestic norm is reviewed for compliance with the relevant constitution, whereas references for a preliminary ruling have the interpretation and validity of EU law as their subject matter.

We cannot underestimate the challenges we encounter in practice, to which attention was paid. The preliminary reference procedure is susceptible to being used as a means either of seeking an alternative application of the principles laid down in both national constitutions and EU law or of objecting to the enforcement of the binding decisions of a national constitutional court. The ever broader scope of EU law also poses a challenge in practice. Dialogue is particularly important in overcoming those challenges. As President Lenaerts noted in his introductory speech, ‘when confronted with complex and unexplored questions of EU law, Constitutional Courts should themselves engage in a dialogue with the Court of Justice. Otherwise, they run the risk of other courts doing it instead of them.'

Those challenges can be overcome as long as the Court of Justice of the European Union and the national constitutional courts act in a spirit of sincere cooperation and mutual respect.

The law is a system of social regulation. Unfortunately, in recent years, Europe has faced a series of crises to which both the political institutions and the courts have had to respond. Whether in times of crisis or in periods of relative calm, the role of the courts is always to defend our common values and, in particular, the rule of law. That can be achieved by ensuring that political decisions taken by both EU and national

authorities are in line with the constitutions, the EU Treaties and the Charter. An important factor for the full attainment of those objectives is to reject the possibility that legislative acts may be interpreted differently in view of conjunctural factors, even where considerations other than purely legal ones are of great importance.

In a European Union based on the rule of law, exceptional measures must be – and experience shows that they are – subject to independent and impartial judicial review. An important tool available to all courts is the principle of proportionality, deriving from the common constitutional traditions of the Member States.[2] The speeches during these two days made it clear that often, and not just in those exceptional situations, national constitutional courts exercise their discretion in dialogue with the Court of Justice of the European Union not only by making references for a preliminary ruling, but also by way of interpretations that are in line with EU law.

Occasionally, it may be necessary for the political institutions to adopt 'special legislation', in order to regulate 'special cases', but that does not mean that the courts are required to adopt a 'special interpretation' or, as First Advocate General Szpunar noted, 'a different standard of review'. It became clear, to a large degree, from the interventions made during the conference, that, both in exceptional situations and during periods of relative calm, the courts exhibit flexibility and apply all methods of interpretation, without giving priority to any one of them.

Without setting myself the impossible task of summarising all the presentations made over the last two days, two expressions seemed to be dominant – the rule of law and fundamental rights. These are not just empty words. They amount to ideas and norms, the foundation of the common legal order that we, as judges, are obliged to safeguard.

The very essence of Europe requires the active participation of the entire diversity of viewpoints, traditions and historical experiences that together form the heart of European identity. Maintaining a dialogue on European values is in the interest not only of a specific national legal system. For the European Union, that is to say, for all of us,

2| Lenaerts, K., "Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action", *ECB Legal Conference*, 2021.

it is particularly important to support the participation of all, so that the European Union remains true to its own ideals, among which the rule of law and fundamental rights hold a significant place.

In Bulgaria, we appreciate that fact very well. The year 2026 will mark the 35th anniversary of the adoption of the Bulgarian Constitution currently in force, and of the establishment, for the first time in Bulgarian history, of a Constitutional Court empowered to uphold the ideals and values we all share. During those 35 years, the Bulgarian legal system has undergone a series of significant changes. One of the most significant changes has been its adaptation to the challenges posed by European integration. Breaking with its totalitarian past, Bulgaria became part of the common European legal order. EU law, which until 2007 we regarded as foreign law, has become our own, Bulgarian, law.

The creation of common European values needs each national constitutional experience. Among the intellectual movements that have impelled almost all European countries, there is one that we can definitively call European: the Enlightenment. In it, we can seek the historical roots on which, despite our differences, we all stand today and which we must continue to safeguard in the future. The spirit of the Enlightenment is described in a remarkable way by Kant. Several lines from his essay 'What is Enlightenment?' illustrate this. Allow me to recall them:

> 'Enlightenment is man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's understanding without guidance from another. This immaturity is self-imposed when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without guidance from another. *Sapere Aude!* "Have courage to use your own understanding!" – that is the motto of enlightenment.'

Kant defines the Enlightenment not merely as a state corresponding to a specific historical moment, but as the state of mind of a free and rational person.

Esteemed President Lenaerts,

Esteemed colleagues,

Dear ladies and gentlemen,

I believe that conferences such as ours contribute, in a spirit of freedom and critical thinking, to the discussion and reflection on our common present and future, based on the Enlightenment ideal that we, as Europeans, must preserve. I am confident that the next conference, 'EUnited in Diversity IV', will also contribute to this goal.

Mr Koen Lenaerts, President of the Court of Justice of the European Union,
and Ms Pavlina Panova, President of the Constitutional Court of the Republic of Bulgaria

COURT OF JUSTICE
OF THE EUROPEAN UNION

Court of Justice of the European Union
L-2925 Luxembourg

Drafting finished: February 2026

Photography credit: Cover © shutterstock.com

Layout: Court of Justice of the European Union – Directorate-General for Information – Communications Directorate – Publications and Electronic Media Unit, 2026

Luxembourg: Publications Office of the European Union, 2026

PDF	ISBN 978-92-829-5218-4	doi: 10.2862/7971962	QD-01-26-003-2A-N
Print	ISBN 978-92-829-5219-1	doi: 10.2862/3052149	QD-01-26-003-2A-C

COURT OF JUSTICE
OF THE EUROPEAN UNION

Directorate-General for Information
Communications Directorate
Publications and Electronic Media Unit

May 2026

Print	ISBN 978-92-829-5219-1	doi: 10.2862/3052149	QD-01-26-003-2A-C
PDF	ISBN 978-92-829-5218-4	doi: 10.2862/7971962	QD-01-26-003-2A-N

The third edition of 'EUnited in Diversity' took place in Sofia, Bulgaria, on 3 – 5 September 2025 under the auspices of the Constitutional Court of Bulgaria. This time the purpose of the dialogue between the Court of Justice of the European Union (the 'CJEU') and the constitutional – or equivalent – courts of the Member States was to explore the notion of 'constitutional justice' within the EU. The discussions proceeded from an understanding of the EU as a common legal order composed of both the EU itself and its Member States. Constitutional justice within the EU is a complex and multi-layered notion which covers both structural and substantive aspects of EU constitutionalism, such as the principles of allocation of competences and separation of powers, the values of respect for fundamental rights, democracy and the rule of law, as well as a shared responsibility of the CJEU and the constitutional – or equivalent – courts of the Member States for protecting and implementing those values, which constitute the very identity of the EU as such a common legal order.

The conference featured four panels focusing respectively on the allocation of competences between the EU and the Member States governed by the principle of conferral, the protection of the identity of the EU in times of crisis, the cross section between national constitutional law and EU law in the Member States, and the interpretation and application of EU law in view of ensuring the coherence and consistency of the common legal order.

'EUnited in Diversity' is a biannual dialogue between the CJEU and the constitutional – or equivalent – courts of the Member States, which has become a useful, valuable and important tool in building a common language and common judicial methods among constitutional judges across the EU in the interests of safeguarding and promoting EU constitutionalism.