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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 14/08

Oreste Pollicino

**New Emerging Judicial Dynamics of the Relationship Between  
National and the European Courts after the Enlargement of Europe**

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## **European Legal Integration: The New Italian Scholarship (ELINIS)**

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

*J.H.H. Weiler*

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# **New Emerging Judicial Dynamics of the Relationship Between National and the European Courts after the Enlargement of Europe**

By Oreste Pollicino \*

## **Abstract**

The paper explores the impact of the great enlargement of Europe (European Union and Council of Europe) to the east on the judicial interaction between the EU, the ECHR and the Member States legal orders. In order to appraise the dynamic and prospective nature of the enlargement, in particular, the paper tries to contextually shed light on both the National and European “sides of the coin”. In particular, with regard to the “national side”, the paper investigates how the Central and East European Constitutional Courts have reacted to the enlargement of European Union; and in relation to the “European side”, the paper attempts to identify which changes have occurred due to the enlargement of the European Union, especially in the judicial approach of the European Court of Justice, as compared with the newly emerging approach of the European Court of Human Rights after the eastward enlargement of the Council of Europe.

The concluding remarks have a twofold aim. First of all they focus on the idea of judicial dialogue by underlining which models of conflict settlement between legal systems have emerged from the analysis. Secondly, they address the question of whether the latest enlargement has been able to promote an effective policy of human rights within the EU.

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*The enlargement decision was the single most important constitutional decision taken in the last decade, and arguably longer. For good or for bad, the change in the number of Member States, in the size of Europe's population, in its geography and topography, and in its cultural mix are all in a scale of magnitude which will make the new Europe a very, very different polity, independently of any constitutional structure adopted.*

-- J.H.H. Weiler<sup>1</sup>

## **Introduction**

### Research question, methodological proposals for the investigation and structure of the paper

What has been the impact of the great enlargement of the European Union to the east on the judicial interaction between the EU and the Member States legal orders? What changes (if any) has this brought in the judicial approach of the European Court of Justice, in comparison with the newly emerging approach of the European Court of Human Rights after the enlargement of the Council of Europe to the east? What are the new constitutional challenges that the enlargement has created for the Member States and the European judiciatures?

In attempting to answer these research questions it is not possible to refer exclusively to the relevant literature, which has mainly<sup>2</sup> examined the impact of the 2004 and 2007 enlargements

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<sup>1</sup>*A Constitution for Europe? Some hard choices*, in G. A. Berman, K. Pistor (Eds.), *Law and Governance in an enlarged Union*, Oxford, 2004, 38 ff., 40.

<sup>2</sup> There have been, obviously, praiseworthy exceptions. Among them see J.H.H. Weiler, *supra* note 1, 38 ff.; A. Albi *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of 'Co-operative' Constitutionalism*, in *European Constitutional Law Review*, 2007, 25 ff.; B. De Witte, *The Impact of Enlargement on the Constitution of the European Union*, in M. Cremona (Ed.), *The Enlargement of the European Union*, Oxford, 2003, 209 ff.; A. Sajó, *Accession's Impact on Constitutionalism in the New Member States*, in G. A. Berman, K.

from two particular points of view. Focusing exclusively on the domestic constitutional situation, some scholars have investigated the “European” constitutional amendments within the Constitutions of new Member States in central and eastern Europe.<sup>3</sup> A second group, who instead focus exclusively on the European dimension, have studied the institutional adjustments the European Union carried out (or should have carried out) in order to be ready for the accession of the ten central and eastern European (hereinafter CEE) States, along with the short-term impact of the enlargement on the European Union’s constitutionalisation process.<sup>4</sup>

The exclusivity of these points of view, taken as the focus of investigation, entails a weak point in relation to our research questions. These in fact seemingly can be answered only within an investigation that valorises the actuality and the dynamic nature of the enlargement issue. On the contrary, both of the approaches in the recent literature entail the problem of analysing the enlargement in a retrospective light: an important but closed, chapter of the history of European integration. Their main disadvantage seems to be that, under those points of view, the enlargement is considered more as a final achievement, rather than as a constitutional process in line with the dynamic nature of the EC supranational system.<sup>5</sup> In other words the enlargement, in

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Pistor (Eds.), supra note 1, 415 ff.; J. Komarek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, Jean Monnet Working Paper No. 10/05, available at <http://www.jeanmonnetprogram.org/papers/05/051001.html>; W. Sadurski, *Solange, Chapter 3: Constitutional Courts in Central Europe Democracy European Union*, in *European Law Journal*, 2008, 1 ff.; D. Piquany, *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration*, in *European Journal of Legal Studies*, 2008.

<sup>3</sup> See, *ex plurimis*, W. Sadurki, J. Ziller, A. Zurek (Eds.), *Après Elargment, Legal and Political Responses in Central and Eastern Europe*, Italy, RSCAS, EUI, 2005; A. Albi, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, Cambridge, 2005.

<sup>4</sup> A. Kellerman, J. De Zwan J. Czuczai (Eds.), *EU Enlargment, The constitutional impact at EU and National Level*, 2001; M. Cremona (Ed.), *The Enlargement of the European Union* (Collected Courses of the Academy of European Law), 2003; B. De Witte, *Anticipating the Institutional Consequences of Expanded membership of the European Union*, in *International Political Science Review*, 2002, 235 ff.; A. Kellermann, J. Cuczai, S. Blockmans, A. Albi, W. Th. Douma (Eds.), *The Impact of EU Accession on the Legal Order of the New EU Member States and (Pre-) Candidate Countries, Hope and Fears*, The Hague, 2006.

<sup>5</sup> J.H.H. Weiler, *The Community System: the dual character of Supranationalism*, in *Yearbook of European Law*, 1992, 267 ff., 269.

both cases (focusing exclusively either on the national constitutional side or the European side) tends to become a static and isolated component, rather than the “constitutional work in progress” that, in my view, it should be seen as.

The question is the following: how to move the research trends from a retrospective dimension towards a prospective and dynamic one in order to answer the research questions that have to do with the judicial interaction between the national constitutional dimension and the European dimension before and after the enlargement of Europe?

In my view the key element is to try to answer these questions in the framework of the investigation trend that focuses on the relationships between interacting legal orders,<sup>6</sup> with particular attention paid to the judicial interaction between the European Courts and the CEE Member States’ Constitutional Courts.<sup>7</sup> This means looking *contextually* at both sides of the judicial coin (European and national constitutional) in order to evaluate the reciprocal influences between the two sides.

This perspective will be investigated subject to two assumptions. The first is the firm belief that, today more than ever, the courts (especially, in relation to the national legal orders, the constitutional courts) are the institutions which, in their respective legal orders, occupy a privileged position to forge closer ties between different but interacting legal regimes. For this reason, in this paper, the courts (both the European and the constitutional ones) will often be identified as the “judicial interconnecting entities” between interacting legal regimes. The second assumption stems from the awareness that the said interconnection is, in most of the cases, based on a pre-existing risk of constitutional conflict between legal orders situated at different but not hierarchically-based, levels. One of the areas in which the risk of conflict remains very high is

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<sup>6</sup> S. Cassese, *La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all’ordine giuridico globale*, in *Rivista trimestrale di diritto pubblico*, 2007, 609 ff.; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2007; Idem, *Regulating Jurisdictional Relations between National and International Courts*, Oxford, 2007; M. L. Volcansek, J. F. Stack (Eds.), *Courts Crossing Borders : Blurring the Lines of Sovereignty*, Durham, N.C., 2005

<sup>7</sup> C. Baudembacher, H. Bull (Eds.), *European Integration through Interaction of Legal Regimes*, Oslo, 2007; O. Pollicino, *Against the idea of “Americanization” of European judicature in the context of the next era of judicial globalization*”, in *Panóptica*, 2007, 407 ff.



the delicate issue of the adequacy of the standard of protection of fundamental rights. This difficulty remains despite the ever greater coordination between the levels. It raises the most sensitive questions, from a constitutional perspective, and is, therefore, most likely to be the locus for constitutional conflicts between the national constitutional dimension and European dimension. This issue is presented in the first part of the paper.

That being said, as far as concerns the structure of the paper, the investigation of the ways in which the interconnecting judicial entities are dealing with the new risks of judicial misunderstanding and constitutional conflicts post-enlargement will focus on two main fronts. First, I will examine the reactions of some CEE Constitutional Courts to the new challenges brought by the enlargement, distinguishing between an initial reaction immediately after the enlargement and a second judicial trend that is still ongoing. The saga of the European Arrest Warrant will be taken as a case study.

The second front (the other side of the coin) will focus on the European judicial side, asking how the European Courts in Luxembourg and in Strasbourg have reacted, respectively, to the enlargement of the European Union and the Council of Europe. In this regard, the paper will also outline what still needs to be done in order to foster communication between the two abovementioned legal dimensions (European versus national), especially on the European judicial side.<sup>8</sup>

The concluding remarks have a twofold aim. First of all they will underline, by focusing on the idea of judicial dialogue, which models of conflict settlement between legal systems have emerged from the analysis. Secondly, they will address the question of whether the latest enlargement has been able to promote an effective policy of human rights within the EU.

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<sup>8</sup> See H. Rasmussen, *Present and future judicial problems after Enlargements and the post-2004 ideological revolt*, in *Common Market Law Review*, 2007, 1661 ff.

## **Part one: the CEE interconnecting judicial entities**

### **(a) The first reaction**

Based on what we have considered above, the analysis begins with the reactions of certain CEE Constitutional Courts to the risk of constitutional conflicts between the European level and their domestic legal orders. It will then proceed to consider how the CEE Constitutional Courts are actually settling EC legal disputes<sup>9</sup>, focusing on the European Arrest Warrant saga as a case study, and question whether certain general trends might be identified and injected into the current “season” of European cooperative constitutionalism.

There are few doubts that the potential grounds for the raising of such constitutional conflicts were inherent in the CEE legal orders at the time of their accession, and the reasons for this are too obvious to be further discussed here. It is sufficient to recall the early (and later) predictions warning of: (1) the risk that the taste of freedom – recently rediscovered after years of humiliation and substantial or formal subjection to the Soviet Union – would make the CEE candidate countries strongly averse to a (new) transfer of sovereignty to the European Union, albeit in a complete different political and historical context;<sup>10</sup> (2) the related argument underlying the CEE legal orders’ “sovereignist” nature with regard to western constitutional models;<sup>11</sup> (3) the emphasis on the supremacy of the CEE Constitutions over all other sources of

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<sup>9</sup> This is the main criticism that Alec Stone Sweet moved to the reports parts of the volume, *The European Court and national Courts-- doctrine and jurisprudence*, when he stated as, “however excellent on their own terms, the national reports (and studies like them) collectively suffer from a fatal flaw: the privileged focus on formal doctrine. Far more important what is ignored: how the Courts are actually resolving legal dispute”. A. Stone Sweet, *Constitutional Dialogue in the European Community*, in J.H.H. Weiler, A. M. Slaughter, A. Stone Sweet (Eds.), *The European Court and national Courts-- doctrine and jurisprudence: Legal change in its social context*, Oxford, 2004, 304 ff, 325.

<sup>10</sup> W. Sadursky, *Constitutionalization of the EU and the Sovereignty concerns of the new accession States: the role of the charter of Rights*, EUI Working Paper Law, No. 2003/11

<sup>11</sup> A. Albi, *Postmodern versus Retrospective Sovereignty: two different discourses in the EU and the Candidate Countries* in N. Walker (Ed.), *Sovereignty in transition*, Oxford, 2003; and more generally A. Albi, *EU enlargement*, supra note 3.

law (including International Treaties)<sup>12</sup>; and (4) the Constitutional Courts' role within CEE legal orders, as protagonists of the transition period and guardians of regained sovereignty, who are empowered to interpret and annul international Treaties that might run foul of national Constitutions.<sup>13</sup>

Considering how the CEE Constitutional Courts, as the interconnecting domestic judicial entities have reacted up to the abovementioned risks of collisions between the domestic legal orders and the supranational one, two distinct periods can be identified; the first immediately following the enlargement of 2004, and the second still ongoing. In order to be, as far as possible, more prospective than retrospective, we will devote greater attention to the second, current period.

In relation to the first (immediately post-accession) period, the less-than-Europe-friendly approach (more in tone than in final outcome) of certain CEE Constitutional Courts' decisions seems to have less to do, with the abovementioned warnings and more to do with psychological and emotional reactions<sup>14</sup> to "the EU treatment" of the CEE candidate countries in the pre-accession period. It would, in fact, be difficult and not less confusing to try to understand in light of those warnings alone why the Polish Constitutional Tribunal,<sup>15</sup> only a few days after its

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<sup>12</sup> See Article 8 of the Polish Constitution; Article 153 of the Slovenian Constitution; Article 7 of the Lithuanian Constitution; Article 2 (2) of the Slovak Constitution; Article 77 (1) of the Hungarian Constitution; Articles 123 (1) 15 and 152 of the Estonian Constitution. See A. Albi, *Europe Articles* supra note 3, 421.

<sup>13</sup> As it has been noted by Wojciech Sadurski all the Constitutional Courts of CEE Member States have the power of preliminary review of the constitutionality of the Treaties and, in addition, the Constitutional Courts of Hungary, Poland and Estonia have the power of ex post review of Treaties. See W. Sadurski, *Accession's Democracy Dividend: the impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, in *European Law Journal*, 2004, 371 ff., 392.

<sup>14</sup> Another reason of possible conflicts has been astutely identified by Wojciech Sadurski who has noted that "the resistance of CEE Courts towards the supremacy of European law can be well explained by their attempts to reinforce their domestic inter-institutional position, especially in the face of challenges and threats, real and imagined by the other governmental branches". See W. Sadurski, *Solange, chapter 3: Constitutional Courts in Central Europe, democracy, European Union*, EUI working paper law, n. 2006/40 in [www.iue.it](http://www.iue.it).

<sup>15</sup> Polish Constitutional Tribunal, K 18/04, *Judgment on Poland's Membership in the European Union*, 11 May 2005.

Europe-friendly judgment regarding the European Arrest Warrant<sup>16</sup> (which will be examined below), rejected, on the one hand, as constitutionally groundless, all petitioners' complaints against the EC Accession Treaty and, on the other, felt the need to highlight that the "accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland". The judgment continued that, in the case of conflict between national laws and European law, "the nation as the sovereign would need to decide on amending the Constitution or causing modification within Community provision or, *ultimately*, on Poland's *withdrawal* from the European Union".

The latter approach seems more like a reaction of those who could eventually, once having joined the club, act on their judicial grudges caused by having been discriminated against (by the same club, during the pre-accession negotiations), by the application of a double standard in the area of human rights.

The truth appears to be that the demand for consistency and reciprocity between internal and external human rights policies, raised almost ten years ago by Philip Alston and Joseph Weiler,<sup>17</sup> was never neglected on an EU level as much as it was in the CEE candidate countries during the monitoring period, especially in light of the criteria laid down in Copenhagen in 1993.<sup>18</sup> Such policy was based, it has been argued,<sup>19</sup> on core discrimination. In order to join the EU, the CEE candidate Member States were required not only to adhere to a degree of scrutiny which, at that time, was not applicable to others (in the absence of a binding Charter of Fundamental Rights) within the EU, "but also to a system of enforcement which simply did not exist internally" in the EU. In other words, the candidate countries were required to meet standards that several of the

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<sup>16</sup> Polish Constitutional Tribunal, *European Arrest Warrant*, 27 Apr. 2005, No 1/05.

<sup>17</sup> Philip Alston and Joseph Weiler have in "not suspicious times" argued that "a credible human rights must assiduously avoid unilateralism and double standard, and that can only be done by ensuring reciprocity and consistency". See P. Alston and J.H.H. Weiler, *An European Union Human rights policy*, in P. Alston (Ed.), *The European Union and Human rights*, Oxford, 1999, 8-9.

<sup>18</sup> Which, *inter alia*, required the candidate countries to demonstrate the stability of the institutions guaranteeing democracy, rule of law, human rights, and the protection of minorities.

<sup>19</sup> A. Williams, *Enlargement of the Union and Human rights conditionality: a policy of distinction?* in *European Law Review*, 2001, 601 ff., 616.

Member States did not even meet at that time, regarding, for instance, the field of minority protection<sup>20</sup>, a key element of the Copenhagen criteria but which was not at all an integral part of the European *acquis*.<sup>21</sup> It is indisputably true that none of the first fifteen Member States, at the time of their admission, were subject to the same preconditions and “that no earlier enlargement had been conditioned by rules regarding democracy and human rights”.<sup>22</sup> In this regard, another element should be taken into account: the conditions to be fulfilled were entirely set by the EU without room for any negotiation or differentiation as to each candidate’s peculiar position. In the end, the whole European pre-accession strategy was nothing more than a *de facto* “take-it-or-leave-it package”.<sup>23</sup>

Why, then, should we be surprised by the less than Europe-friendly tone of some of the first post-accession decisions of CEE Constitutional Courts regarding matters of EU law?

Another post-accession, on the spot, reaction of certain CEE Constitutional Courts to pre-accession treatment was to substantially ignore the interconnecting link between domestic law and European law. An eloquent example is the decision of the Hungarian Constitutional Court of 2004.<sup>24</sup> The Hungarian judges voided a national statute, which was clearly passed in order to

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<sup>20</sup> See C. Hillion, *On enlargement of the European union: the discrepancy between membership obligations and the accession conditions as regards the protection of minorities*, in *Fordham International Law Journal*, 2004, 715 ff.

<sup>21</sup> See A. Wiener, G. Schweltnus, *Contested norms in the process of EU enlargement: non discrimination and minority rights*, *Constitutionalism Web-Papers*, ConWEB No. 2/2004. W. Sadursky, *Constitutionalization of the EU and the Sovereignty concerns of the new accession States: the role of the charter of Rights*, in EUI Working Paper Law 11/03, [www.iue.it/PUB/Law03-10.pdf](http://www.iue.it/PUB/Law03-10.pdf), 6; B. De Witte, *The Impact of Enlargement*, supra note 2. 240; G. De Burca, *On Enlargement of the European Union: beyond the Charter: how the enlargement has enlarged the human rights policy of the European Union*, in *Fordham international law journal*, 2004, 679 ff., 683.

<sup>22</sup> W. Sadursky, *Constitutionalization of the EU and the Sovereignty concerns of the new accession States: the role of the charter of Rights*; supra note 21, 6.

<sup>23</sup> András Sajó has observed, to make clear that the enlargement was mainly an unilateral process as “the accession process was, objectively and subjectively, a process of submission – one that may well have been in the best interest of the new Member States, but a submission nonetheless”. See A. Sajó, *Constitution without the constitutional moment: A view from the new Member States*, in *International Journal of Constitutional law*, 2005, 243 ff., 252.

<sup>24</sup> Hungarian Constitutional Court, Decision 17/2004 (V. 25.) AB. For a detailed analysis see A. Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*,

implement certain European Commission regulations, for being in breach of the constitutional principle of legal certainty, stating at the same time that: “in view of the above, the question about the provisions challenged in the petition concerns the constitutionality of the Hungarian legislation applied for the implementation of the EU regulations rather than the validity or the interpretation of these rules”.

The same indifferent approach to European integration appears to characterise the decision of the Slovak Constitutional Court rendered at the end of 2005,<sup>25</sup> where the judges declared unconstitutional a positive action provision adopted by the national legislature following an option (and not an obligation) provided for under the EC Race Directive<sup>26</sup> granted to Member States.<sup>27</sup> Furthermore, this ruling ignored the ECJ’s developed case law on positive actions.<sup>28</sup> As has been correctly stressed, “It is peculiar that after almost 10 years of approximation, the Slovak Constitutional Court has not found an opportunity to redress the relationship between Slovak and EC law...What the positive action case definitely shows is that the Slovak Constitutional Court is [*at the beginning of the post-accession period*] unwilling to apply EC law or the approximated Slovak norm when is not required to do so”.<sup>29</sup>

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in *Zeitschrift für Staats- und Europawissenschaften*, 2004, 351 ff. and R. Uitz, *EU Law and the Hungarian Constitutional Court: Lessons of the First Post-accession Encounter*, in W. Sadurski, J. Ziller and K. Žurek (Eds.), *Après Enlargement: Taking Stock of the Immediate Legal and Political Responses to the Accession of Central and Eastern European States to the EU* (EUI, 2006), 41-64.

<sup>25</sup> Decision of the Constitutional Court of the Slovak Republic, Pl US 8/04-202, October 18, 2005

<sup>26</sup> The EC Race discrimination Directive 2000/43 was adopted on 29th June 2000.

<sup>27</sup> Article 5 of the Race Directive, which the disputed Slovak provision transposed, states that: “with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member States from maintaining or adopting specific measures to prevent or compensate for disadvantaged linked to racial or ethnic origin”.

<sup>28</sup> For a broader analysis of this case law it is possible to see O. Pollicino, *Trattamento preferenziale e discriminazione sulla base del sesso nel diritto comunitario. Un profilo giurisprudenziale alla ricerca del nucleo duro del “new legal order”*, Milan, 2005.

<sup>29</sup> B. Havelokova, *Burden of proof and positive action in the decisions of the Czech and Slovak Constitutional Courts- milestones or mill-stones for the implementation of EC equality law?*, in *European Law Review*, 2007, 688 ff. (italics added).

The “judicial hypocrisy”<sup>30</sup> shown by the Hungarian and Slovak Constitutional Courts must be read, together with the “judicial grudge” of the decision of the Polish Constitutional Tribunal mentioned above, in light of the shift from the “imposed obedience” of the pre-accession period to a “voluntary obedience” which characterises the post-accession period. In other words, if, in order to become members, the candidate countries did not have any alternative but to obey the (extremely demanding) requirements of the European Union, then, after their formal entrance, what was previously mandatory suddenly became voluntary, and respect of the *acquis* and the application of EC law became a question of “constitutional tolerance”.<sup>31</sup> One might say that the pre-accession policy was not exactly the best strategy to foster such tolerance.<sup>32</sup>

**(b) After the first post-accession period: lessons from the European Arrest Warrant saga regarding conflict settlement between interacting legal orders**

1. Introduction

Despite the negative effects of the EU pre-accession strategy and the consequent “less than enthusiastic” *debut* of the CEE Constitutional Courts in the European judicial arena, and against all the negative predictions about their lack of the necessary amount of “constitutional

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<sup>30</sup> The expression is borrowed from A. Sajo, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, in *Zeitschrift fur Staats- und Europawissenschaften*, 2004, 351 ff.

<sup>31</sup> J.H.H Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, in *Harvard Jean Monnet Paper*, 10/2000, in <http://jeanmonnetprogram.org/papers/00/001001.html>

<sup>32</sup> On the contrary, as has been noted, the Council of Europe provided each new democracy with specific, tailor made, accession requirements. See G. Greer, *The European Convention on human rights*, 2006, Cambridge, 108. This is a possible explanation, not obviously the only one, for the greater success that the Strasbourg Court has obtained in the CEE institutions (and mainly in CEE constitutional case law) since the beginning of the CEE countries’ accession to the Council of Europe, and, in certain cases, even earlier. Another reason is, as Sadursky has pointed out, that in light of the humiliation that individual rights protection received in Communist times, “if there is a domain in which concerns over national identity and accomplishing notions of sovereignty are obviously weak in Central and Eastern Europe it is in the field of the protection of individual rights”. See. W. Sadurski, *The Role of the EU charter of fundamental rights in the process of the enlargement*, in G. A. Bermann, K. Pistor, (Eds.), *supra* note 1, 80.

tolerance”,<sup>33</sup> once the first post-accession period was over, the approach of the CEE interconnecting judicial entities seems to represent a leading model for a new season of judicial communication among interacting legal orders.

It has been argued<sup>34</sup> that those courts, being part of the third generation of Constitutional Courts, are distinguished by the fact that they were born into the global constitutional movement, which has determined their rapid reception of international standards and legal solutions and strong mutual cooperation. In particular the post-communist Constitutional Courts developed in a favourable international environment where, as opposed to the times when the “ancient” European Constitutional Courts were established, there already was (and is) a common European language of constitutionality and fundamental rights.<sup>35</sup>

The next section highlights, through a case-law based analysis, that not only did the CEE Constitutional Courts appear to have “learned to speak” that language very quickly, but also that they are starting to express new ideas using that same language of constitutional pluralism. In this context, the saga of the European Arrest Warrant (hereafter EAW) seems to be the most suitable example, not only because it implied a confrontation between “western” and “eastern” Constitutional Courts, but also because it appears a paradigmatic case to study the reactions of the domestic interconnecting judicial entities to the conflicts arising between the European and national legal systems.

## 2. European Arrest Warrant as a case study

As provided for by Article 1 of the Framework Decision 2002/584/JHA establishing the European Arrest Warrant, the EAW is a judicial decision issued by a Member State based on the arrest or surrender by another Member State of a requested person, for the purposes of

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<sup>33</sup> M. Aziz, *Constitutional Tolerance and Enlargement: the Politics of Dissent?*, in W. Sadurski, A. W. Czarnota, M. Krygier (Eds.), *Spreading Democracy and the Rule of Law?, The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders of Central and Eastern Europe, 2006*, 237.

<sup>34</sup> L. Solyom, *Constitutional justice, some comparative remarks*, Conference on “*Constitutional Justice and the Rule of Law*” on the occasion of the 10<sup>th</sup> anniversary of the Constitutional Court of Lithuania (Vilnius, 4-5 September 2003) in [http://www.venice.coe.int/docs/2003/CDL-JU\(2003\)030-e.asp](http://www.venice.coe.int/docs/2003/CDL-JU(2003)030-e.asp)

<sup>35</sup> L. Solyom, *The Role of Constitutional Courts in the transition to democracy*, in *International sociology*, 2003, 133 ff.



conducting a criminal prosecution or the carrying out of a custodial sentence or detention order. It is, therefore, a cooperation mechanism of a strictly judicial nature, which permits practical administrative assistance between Member States<sup>36</sup> executive bodies, thus leading to the free circulation of criminal decisions, grounded on a system of *mutual trust* among the Member States' legal systems.<sup>37</sup>

The legal manifestation of such mutual trust is the principle of mutual recognition of judicial decisions – as provided for by Article 1 n. 2 of the Framework Decision – with the obligation binding on all Member States to carry out an EAW issued by another EU Member States. According to the fifth *considerando* of the Framework Decision: ‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities’. In this regard, in spite of all the differences<sup>38</sup> that may be emphasised<sup>39</sup>, and highlighted in certain

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<sup>36</sup> See Articles 9 and Article 7 of Framework Decision 2002/584.

<sup>37</sup> See for comparison Articles 5, 6, 10 and Article 1, n. 2 of Framework Decision 2002/584.

<sup>38</sup> M. Plachta, *European Arrest Warrant European Arrest Warrant: revolution in extradition*, in *Journal of Crime, Criminal Law and Criminal Justice*, 2003, 193; O. Lagodny, *Extradition without a granting procedure: the concept of surrender*, in T. Blekxtoon, W. Van Ballegooij (Eds.), *Handbook of the European arrest warrant*, 2005, at 41; I. Jegouzo, *Le mandat d'arret europeen ou la premiere concretisation de l'espace judiciaire europeen*, in *Gazette du Palais*, 2004, at 2311.

<sup>39</sup> It is evident, as Advocate General Ruiz-Jarabo Colomer pointed out in his conclusions to case C-303/05 case (see conclusions to C-303/05 *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, following the preliminary reference of the Belgian *Cour d'Arbitrage*, with regard to the alleged Community illegitimacy of framework decision 2002/584/JHA on the European Arrest Warrant. The relevant decision of the European Court of Justice dated 3-5-2007, is now available at: [www.curia.eu.int](http://www.curia.eu.int)) that there exist substantial differences between extradition and the EAW. The extradition procedure implicates the relationship between two sovereign States: the first one requesting cooperation from the other, which in turn decides to grant it or not on the grounds of non-eminently judicial reasons, which rather lie, in fact, in the international relations framework, where the principle of political opportunity plays a predominant role.<sup>39</sup> As for the EAW instead, it falls into an institutional scenario where judicial assistance is requested and granted within an integrated transnational judicial system. In so doing, the States, by partially giving up their sovereignty, transfer their competences to foreign authorities which have been endowed with regulatory powers.

national statutes for the adoption of the Framework Decision,<sup>40</sup> it is clear that both measures (surrender by EAW and extradition) have as their goal the surrender of a requested person to the relevant authority of a Member State, for the purposes of prosecution or the carrying out of a criminal sentence.

A number of Member States have wanted to avoid the application of such a measure to one of their own citizens. In fact, before the Framework Decision's adoption, 13 of the (then) 25 Member States provided for constitutional dispositions forbidding<sup>41</sup>, or somehow limiting<sup>42</sup>, the extradition of nationals. No wonder, then, that the innovations of the EAW provisions caused, at the time of their adoption<sup>43</sup> unavoidable "constitutional disturbance" in the majority of Member States. Some countries, such as Portugal,<sup>44</sup> Slovakia,<sup>45</sup> Latvia<sup>46</sup> and Slovenia<sup>47</sup>, revised their

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<sup>40</sup> As the Advocate General pointed out in the mentioned conclusions, the preamble to the Spanish law dated 14-3-2003, on the EAW and surrender procedures (BOE n. 65 of 17-3-2003, 10244), highlights how: "the EAW changes the classical extradition procedures so radically that one can safely say that extradition as it once was no longer exists in the framework of the relationships between Member States in matters of justice and cooperation".

<sup>41</sup> In the pre-amendment version of the constitutional texts, the inadmissibility of nationals' extradition was ratified by the German (art. 16, para 2), Austrian (art. 12, para. 1), Latvian (art. 98), Slovak (art. 23, para. 4), Polish (art. 55), Slovenian (art. 47), Finish (art. 9.3), Cypriot (art. 11.2) and, to a lesser extent, by the Czech (art. 14 of the Fundamental liberties and rights' Charter) and Portuguese Constitutions.

<sup>42</sup> Other constitutional texts provide, as sole exception to the extradition ban, that a different measure be imposed by an international treaty (art. 36.2 Estonian Const.; art. 26,1 Italian Const.; art. 13 Lithuanian Const.).

<sup>43</sup> Italy was the last European country to transpose the Framework decision through its adoption, on 22-4-2005 of the law n. 69/2005 See F. Impalà, *The European Arrest Warrant in the Italian legal system between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, in *Utrecht Law Review*, 2005, 56 ff.. It is worth noting how some very authoritative doctrine had already highlighted, before the adoption of the Framework Decision's final version, its incompatibility with the constitutional principle, among others, of the peremptory nature of crime. See V. Caianello, G. Vassalli, *Parere sulla proposta di decisione quadro sul mandato di arresto europeo*, in *Cassazione penale*, 2002, 462 ff..

<sup>44</sup> Under Article 33 para. 3, of the Portuguese Constitution, which followed the review: "the extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant state's legal system enshrines guarantees of a just and fair trial".

respective Constitutions before the respective Constitutional Courts had a chance to rule on the alleged unconstitutionality of the implementing statute, as actually in the end occurred in Poland, the Czech Republic and Cyprus.

Germany, instead, faced quite an unusual scenario: the constitutional<sup>48</sup> amendment, in fact, was carried out shortly before the adoption of European Framework Decision 2002/584 in order to allow, under certain circumstances, the extradition of a citizen, which was previously utterly banned.<sup>49</sup> However, this did not avoid the intervention of the Federal Constitutional Court at Karlsruhe over the national regulation for the adoption of the Framework Decision.

In order to verify how (differently) some western and eastern Constitutional Courts have reacted to the same issue related to the risk of the rise of constitutional conflict provoked by the domestic

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<sup>45</sup> Before the revision of 2001, Article 23 para. 4, provided the right for the Slovak citizens: “not to leave their homeland, be expelled or extradited to another state”. The said revision brought to the elimination of the reference to the right not to be extradited.

<sup>46</sup> In Latvia, as Balbo was among the first ones to point out, two acts promulgated respectively on June 16<sup>th</sup> 2004 – and in force as of June 30<sup>th</sup> 2004 – and June 17<sup>th</sup> 2004 – in force as of October 21<sup>st</sup> 2004 – introduced the necessary amendments to implement the constitutional modifications to Article 98 and the other relevant parts of the code of criminal law, in order to execute the EAW of Lithuanian citizens. See P. Balbo, *I sistemi giurisdizionali nazionali di fronte all'interpretazione del mandato di arresto europeo*, at: [www.giurcost.org/studi](http://www.giurcost.org/studi).

<sup>47</sup> In the original version, Article 47 of the Slovenian Constitution, provided the extradition ban of its citizens. Following its review, occurred with the *constitutional Act 24- 899/2003*, the notion of surrender was added, as autonomous constitutional concept, compared to extradition. Today, Article 47 of the Slovenian Constitution states verbatim that: “no Slovenian citizen may be extradited or surrendered (in execution of a EAW), unless the said extradition or surrender order stems from an international Treaty, through which Slovenia has granted part of its sovereign powers to an international organisation”.

<sup>48</sup> The German Constitution, in its original wording, utterly banned the extradition of a German citizen. The 47<sup>th</sup> review to the fundamental act of 29-11-2000, added to the unconditional ban provided for by 16 (2), the disposition according to which: “no German may be extradited to a foreign country. The law can provide otherwise for extraditions to a Member State of the European Union or to an international Court of justice, as long as *the rule of law is upheld* .

<sup>49</sup> Prior to the 2000 revision, Article 16 of the Basic Law was rather strict: “no German citizen may be extradited abroad”.

implementation of the EAW Framework Decision, it is worthwhile to analyse in depth and compare the relevant decisions<sup>50</sup> of the German, Polish and Czech Constitutional Courts.

## 5. The German case

As previously mentioned, shortly before the implementation of the Framework Decision on the European Arrest Warrant, art 16 (2) of the German Constitution had, thanks to a prophetic intuition, already been revised.

The new provision permits derogation to the ban on extraditing a German citizen to allow his surrender to a EU Member State or international Court, on condition that the fundamental principles of the *rule of law* be respected.

In 2003, the German Minister of Justice had rejected the request of extradition to Spain submitted by the Spanish police authority against a German and Syrian national accused by the Spanish authorities of participation in a criminal association and terrorism which were committed in Spanish territory. The reason for the decision was that back then the legislation for the implementation of the new provisions under art. 16(2) of the Constitution had not yet been issued and, therefore, the application of the article's previous version, unconditionally forbidding the extradition of a German citizen, could not be possibly questioned.

Following Germany's adoption of Framework Decision 2002/584 through the *Europäisches Haftbefehlsgesetz* of July 21, 2004, Hamburg's jurisdictional authorities granted the request for surrender of the individual to Spanish authorities on the basis of the new European Framework decision which, as anticipated, does not exempt Member States' citizens.

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<sup>50</sup> German Federal Constitutional Court (*Bundesverfassungsgericht*), ruling of July 18<sup>th</sup> 2005 (2236/04) in <http://www.bundesverfassungsgericht.de/en>, with summary in English.; Polish Constitutional Court (*Trybunał Konstytucyjny*), ruling of April 27<sup>th</sup> 2005 (P 1/05), available in a vast summary in English at: [www.trybunal.gov.pl](http://www.trybunal.gov.pl); Czech Constitutional Court (*Ústavní Soud*) ruling of 3-5-2006 (Pl. ÚS 66/04), available in English language, at: [www.conCourt.cz](http://www.conCourt.cz)

After appealing against this decision before the competent Länder Constitutional Courts in vain, the German citizen subject to the Arrest Warrant appealed to the Constitutional Court asserting, *inter alia*, the alleged violation of provisions as per art. 16 (2) of the Basic Law.

The appellant claimed that the transposition act of Framework Decision 2002/584 lacked democratic legitimacy for having introduced into national legislation a provision potentially depriving one's personal liberty and offending the principle of legal certainty, such as, for instance, the derogation rule to the principle of double criminality.

The federal Government intervened stating that the constitutional complaint was to be considered groundless, above all due to the binding nature of the decisions pursuant to the EU Treaty which, (strikingly enough, if stressed by the German government) "must have unconditional supremacy over national law, including constitutional principles".

Moreover the German government pointed out a twofold aspect: on one hand, the innovation of the surrender procedure, with no particular limitations, of Member State citizens, brought by the Framework Decision compared to the extradition procedure carried out pursuant to art. 16 (2) of the Constitution; on the other hand, the Government argued that the mentioned constitutional innovation determined the inapplicability of art. 16 (2) as a constitutional parameter of the Framework Decision and its implementing act.

Secondly, the federal Government noted that in case of any doubt about interpretation, the federal Court could always make a preliminary reference, although it had always refrained from doing so.

The German constitutional judges<sup>51</sup> must have been of very different opinion, if, after having deemed the constitutional parameter pursuant to art. 16 (2) perfectly applicable to the implementing national law, declared it unconstitutional since, the German legislator did not

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<sup>51</sup> As the *obiter dictum* of the constitutional judge Gerhardt shows the Constitutional Court was not unanimous in its opinion. See NJW 2005, 2302.

conform to the provision pursuant to which the extradition of a German national is only admissible as long as the rule of law is upheld<sup>52</sup>.

In particular the German judges made it clear that the third pillar's intergovernmental dynamic may, in no event, fall within the EC *acquis* of the first, thus recalling how the EU Treaty's express provisions on the framework decision's absence of direct effect, is due to the Member States' precise willingness to avoid the ECJ conferring direct effect on these sources as well, as it had determined EC directives' interpretation.

Furthermore, the constitutional judges maintained that, notwithstanding the high level of integration, the European Union still embodies a partial legal system pertaining to the field of international public law.

Accordingly, under a constitutional point of view and directly pursuant to article 16 (2) of the Basic Law, a concrete review on a case-by-case basis should be made to ascertain that the prosecuted individual is not deprived of the guarantees or fundamental rights he would have been granted in Germany, and that, except for obvious language problems and a lack of familiarity with the criminal law of the destination country, this may, in no event leads, to the worsening of the individual's situation.

Seemingly, the underlying theme of the whole reasoning about the decision is a sense of ill-concealed distrust in the legal systems of the other Member States as to the safeguarding of the

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<sup>52</sup> For an interesting comment on the relevant decision, see: F. Palermo, *La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo*, in *Quaderni Costituzionali*, 2005, at 897 ff. See also C. Tomuschat, *Inconsistencies. The German Federal Constitutional Court on the European Arrest Warrant*, in *European Constitutional Law Review*, 2006, at 209 ff.; J.P. Pierini, *Il mandato d'arresto europeo alla prova del Bundesverfassungsgericht tedesco: «schiaffo» all'Europa o cura negligente dei diritti del nazionale da parte del legislatore?*, in *Cass. pen.*, 2006, at 237 ff.; J. Woelk, *Parlare a nuora perché suocera intenda: il BVerfG dichiara incostituzionale la legge di attuazione del mandato d'arresto europeo*, in *Dir. pubblico comparato ed europeo*, 2006, at 160 ff.; S. Molders, *Case note, The European Arrest Warrant in the German Federal Constitutional Court*, in *German Law Journal*, 2006, at 45 ff. N. Nohlen. *Germany: The European Arrest Warrant case. International Journal of Constitutional Law*, Volume 6, 2008, 153 ff.

accused person. Therefore, the German legislator is blamed for infringing, by implementing the Framework Decision, the principle of proportionality, in that not having chosen the least restrictive among the possible options of the right for German citizens to be prosecuted and serve the sentence passed against them in their native land, and thus underestimating the citizens' special connection to their own state's legal order.

Apparently, according to the German constitutional judges, the legislator did not fully use the discretion allowed by the Framework Decision which permitted, in fact, judicial authorities to refuse execution where the European Arrest Warrant relates to offences: which “are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.”<sup>53</sup>.

In such circumstances, according to the FCC, a significant *domestic connecting factor* is established and “trust of German citizens in their own legal order shall be protected” (para. 86-87). In the German literature it has been harshly criticized that the Bundesverfassungsgericht based its reasoning mainly on historical arguments, thus overemphasizing the historically emerged close relationship between the German state and its citizens. As Ulrich Hufeld pointed out the Senat remained in an etatistic “Schneckenhaus” by focusing only on art. 16.2 GG as would the Grundgesetz in its literal shape reflect the meaning of the whole constitution.<sup>54</sup>

By reading the ruling from a different perspective, it is rather evident how, behind the attempt to verify the responsibility of the German legislator in the transposition activity, the Federal Court's actual aim was to halt the acceleration process, which followed the EAW Framework Decision's adoption, of European integration concerning the third pillar which, according to the same Court, “cannot overrule, given its mainly intergovernmental character, the institutional dynamic peculiar to a system of international public law”.

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<sup>53</sup>Provision as per art. 4 para. 7 of decision 2002/584/ JHA.

<sup>54</sup> U. Hufeld, Der Europäisches Haftbefehl vor dem BVerfG – NJW 2005, 2289, JuS 2005, 865, 866.

It was opinion of the Karlsruhe judges that in light of the safeguards of the subsidiarity<sup>55</sup> principle, “the cooperation in criminal matters established within the third pillar on the basis of a *limited* mutual recognition of criminal decisions, does not presuppose general harmonization of criminal laws of the Member States; conversely, it is a way to preserve national identity and statehood within the uniform European legal space” (para. 77).

It has been correctly pointed out<sup>56</sup> that the key word in this crucial part of the reasoning is the adjective “limited” through which the Constitutional Court has precisely set a limit to the “optimism” of European judges who, in the first ruling<sup>57</sup> dealing directly with the third pillar’s integration scope, expressly stated how “the *ne bis in idem* principle necessarily implies a high level of confidence between Member States and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (para. 33).

The message sent from Karlsruhe proved, beyond all doubts, that any member State’s attempt to imitate first pillar’s procedures in such a constitutionally sensitive context, by definition part of its (remaining) hard core of sovereignty, would not have been tolerated by the *Solange* judges. Although the majority of the Constitutional Court<sup>58</sup> made no mention of the ECJ ruling of June 16<sup>th</sup> 2005, it is quite a direct response to the “acceleration”, by way of the third pillar, which *Pupino* embarked on thirty days before. It could have been expected from the German

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<sup>55</sup>As Francesco Palermo observed, the constitutional judges consider this principle as having been complied with, thus sorting out a difficult situation: “in fact, the non-recognition of subsidiarity, therefore of the urgent need for a European discipline on the European arrest warrant, would have hampered it forever. Conversely, the judges deem Germany’s participation in European judicial cooperation a significant step towards the administration of justice within an integrated context, which makes it not only possible, but desirable as well”. See F. Palermo, *supra* note 51, at 899.

<sup>56</sup>J. Komarek, *European Constitutionalism and the European Arrest Warrant: in search of the limits of the “contrapunctual principles”*, in *Common Market Law Review*, 2007, at 9 ff, and 24.

<sup>57</sup> ECJ 11-2-2003 in the joint cases C-187/01 e C-385/01 *Hüseyin Gözütok e Klaus Brügge*.

<sup>58</sup>Judge Gerhardt took a dissenting opinion on the innovation brought about by the *Pupino* ruling asserting that the Court’s decision contradicts the ECJ ruling of June 16<sup>th</sup> 2005, where it is emphasised that the principle of Member States’ loyal cooperation in the area of police and judicial cooperation in criminal matters must also be respected by the Member State when implementing framework decisions within the third pillar.



Constitutional Court to at least mention and get involved with the outcome of the *Pupino* decision even if it after having articulated the conflict would have finally deviated from the approach of the ECJ<sup>59</sup>.

## 1.2. A comparison between the Polish and the Czech cases

To understand fully the implications for the relationship between the European and the domestic constitutional legal systems of the adoption of the Framework Decision on the EAW in Poland and the Czech Republic, as well as the reactions of their Constitutional Courts to the risk of conflict between the constitutional and European dimensions, it is necessary to take a step back to the process which led to the adoption of the Czech and Polish Constitutions in 1992 and 1997, respectively. Both Constitutions are characterised by a number of clauses aimed at the protection of long-sought sovereignty, attained after decades of subjugation to communist regimes. Both Constitutions make a distinction, as is the case for the constituent documents of most CEE countries, between internal and external sovereignty.<sup>60</sup>

Further, the next aspect to be taken into account is the “low profile approach” typical of these countries as regards the constitutional amendments leading to accession to the European Union. Some scholars maintain that there is a difference between the two countries in their preparation for EU accession, remarking on the high level of constitutional amendments achieved by the Czech Republic and the only merely average the Polish ones.<sup>61</sup> It should be emphasised however that – partly due to the hostile response of public opinion to their accession – with regard to the sensitive issue of the supremacy between EU law and the Constitution, both national legislatures only slightly amended the relevant constitutional parameters, leaving to the respective Constitutional Courts the heavy and unwanted burden of finding a solution to the inevitable

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<sup>59</sup> Of the same opinion U. Hufeld, see above footnote n. 54, at 867.

<sup>60</sup> For a cross-reference to independence see the preamble to the Czech Constitution and Articles 26 and 130 of the Polish Constitution; for the emphasis on State sovereignty, see Article 1 of the Czech Constitution, the preamble and Articles 104 para. 2 and 126 para. 2, of the Polish Constitution. For further reference see also: E. Stein, *International law in internal law*, in *American Journal of International Law*, 1994, 427.

<sup>61</sup> See A. Albi, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, Cambridge, 2005.

conflicts between the constitutional and European dimensions which such relaxed “super primary” parameters could only worsen.<sup>62</sup>

As to the specific question relating to the alleged constitutional invalidity of the EAW Framework Decision’s implementing act, the Constitutional Courts of Warsaw and Brno have handed down directly relevant judgments. Within the two legal systems, the implementing regulations did not bear notable differences, and the relevant constitutional parameters as to the extradition ban on nationals were to a certain extent similar. The Polish Constitution was (before the constitutional review which followed the decision of the Constitutional Court) lapidary. Article 55 stated, in fact, that “the extradition of a Polish citizen shall be forbidden”. In the Czech Republic, Article 14 (4) of the Charter of Fundamental Rights and Liberties, which encompasses all rights and liberties protected by the Constitution of the Czech Republic, states more generally that: “no Czech citizen shall be removed from his/her homeland”.

One distinguishing feature between the two countries was the extent of the debate on the opportunity to amend the two abovementioned constitutional provisions in view of the then forthcoming accession to the European Union. The Czech Republic never granted priority to the issue. In Poland, on the contrary, there was considerable debate. Revision of Article 55 of the Constitution had already been envisaged by some insiders, who stressed how an unconditional ban on extradition of nationals could potentially represent a hindrance to the European integration process within the third pillar, which in turn – as already emphasised – had been

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<sup>62</sup> As for the Czech Republic, in the 2001 revision of Article 10 a, a general and undifferentiated clause of openness to international organizations was introduced, which made no mention of the EC system’s peculiar features, or stressed, in any way, how the supremacy given to the Constitution could be combined with the doctrine of EC law primacy over domestic laws, as extrapolated, some decades ago, by ECJ case law which, as the rest of the European *acquis*, all the Central-Eastern European Countries have undertaken to follow pursuant to the Athens Accession Treaty of 2003. The same, more or less, applies to the 1997 Polish Constitution, the most recent Constitution among Central-Eastern European Countries’, therefore already inclusive *ab origine* of the European clauses. Conversely, Article 91 para. 3, as opposed to the more international approach of the Czech Constitution, makes express reference to the EC system and particularly to the off-shoot European law, stressing its direct effect and supremacy over ordinary national regulations. Again, no mention is made of the relationship between Constitution and Community law, especially primary law.

gaining strength since the enforcement of the Amsterdam Treaty. Conversely, others thought that the conflict could be settled during discussions. In fact, the second course was the one opted for, given the highly symbolic value of Article 55 which, in the Polish Constitution, enshrines those ideals of identity and sense of belonging deeply rooted within an ethnocentrically-oriented *demos* still bound to nationalistic<sup>63</sup> memories, which characterise the predominant view in central and eastern Europe.

Against this background, it is interesting to move on to draw parallels between the actual *reasoning* of the Constitutional Courts of Warsaw and Brno which, while starting from similar constitutional parameters, and with a practically equivalent object, reached opposite outcomes. The first judgment, in fact, annulled the national regulation; the second did not detect any constitutional illegitimacy.

The judges of the Polish Constitutional Tribunal<sup>64</sup> had to establish whether surrender, a substantive issue of the EAW, could be regarded as a subset of extradition, the latter being expressly forbidden by Article 55 of the Constitution if the person concerned is a Polish national. Having answered positively to the interpretative dilemma, the judges held that the constitutional concept of extradition was so far-reaching as to encompass the surrender of a Polish citizen, whose purpose, at least at the Framework Decision level, is to replace within the European legal space, the bilateral, intergovernmental dynamics typical of the mechanism of extradition.

After grouping under the same legal notion the two concepts of extradition and surrender, the second argument of the Polish Constitutional Tribunal was to point out how the admissibility of a national's surrender, provided for by the Framework Decision, undermined the rationale behind the ban in Article 55 of the Polish Constitution, pursuant to which the essence of the right not to

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<sup>63</sup> See A Sajo, *Protecting nation states and national minorities: a modest case for nationalism in Eastern Europe*, in *U. Chi. L. Sch. Roundtable*, 1993, 53 ff..

<sup>64</sup> One of the first studies on the decision is by S. Sileoni, *La Corte costituzionale polacca, il mandato arresto europeo e la sentenza sul trattato di Adesione all'UE*, in *Quaderni Costituzionali*, 2005, 894; more recently, A. Nuberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, in *International Journal of Constitutional Law*, 2008, 162 ff.

be extradited is that a Polish citizen must be prosecuted before a Polish Court. According to the Tribunal, Poland's accession to the European Union brought about a radical change. Namely, its accession not only accounts for, but also necessarily implies a revision of Article 55 to make the constitutional requirements conform to EU provisions. This constitutional revision, however, according to the Polish judges, could not be carried out using a manipulative and dynamic interpretation of the relevant constitutional principle but needs an *ad hoc* constitutional action by the legislature.

The *Pupino* judgment, which reasserts the obligation for national courts to adopt a consistent interpretation of the Framework Decisions, pursuant to Article 34 (b) EU, was yet to be adopted by the ECJ. Nevertheless, the opinion of Advocate General Kokott regarding the judgment had already been published.<sup>65</sup> The Polish constitutional judges, without directly mentioning the *Pupino* decision, considered the possibility of an obligation of consistent interpretation. However, they did not find it relevant in the current situation since, according to their reasoning, the obligation was limited by the ECJ itself, as it may not worsen an individual's condition, especially as regards the sphere of criminal liability.<sup>66</sup> As has been recently noted,<sup>67</sup> the Polish judges did not refer to specific judgments to show on what basis they had constructed this argument.

The relevant ruling to which the Polish Constitutional Tribunal might have deferred, the *Arcaro* decision of 1996,<sup>68</sup> did not perfectly apply to the EAW procedure, the implementation of which is conditional on the surrender of an individual about whom the question of criminal liability is pending before the Member State issuing the EAW. This criminal liability remains untouched, it

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<sup>65</sup> AG Kokott's opinion to case C-105/03, *Pupino*, in ECR, I-5285.

<sup>66</sup> Polish Constitutional Tribunal, *supra* note 16.

<sup>67</sup> J. Komarek, *supra* note 56, 16.

<sup>68</sup> C-168/95, *Arcaro*, 1996, in ECR, I-4705, which at para. 42 reads: "However, that obligation of the national Court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions".

cannot be expanded or diminished whether the person requested is finally surrendered or not. According to the constitutional judges, on the other hand, while national legislation is bound under Article 9 of the Polish Constitution to implement secondary EU legislation, a presumption of the implementing act's compliance with constitutional norms cannot be inferred *sic et simpliciter*. The Polish Constitutional Tribunal easily concluded that, by permitting the prosecution of a Polish citizen before a foreign criminal court, the national regulation implementing the EAW Framework Decision would have prejudiced the constitutional rights granted to Polish citizens, and therefore it could only be found to be unconstitutional.

In spite of having clarified the unconstitutionality of the matter, the Tribunal found that the mere annulment of the provision would have led to a breach of Article 9 of the Constitution, according to which "Poland shall respect international law binding upon it", and whose application, according to the constitutional judges, also encompasses Poland's obligations stemming from accession to the European Union. Therefore, in order to comply fully with such obligation, a change of Article 55 was considered necessary to provide for the possibility, departing from the general ban on extradition of nationals, of enabling the surrender of such persons to other Member States in the execution of an EAW.

Meanwhile, the Tribunal, by enforcing Article 190 (3) of the Constitution, set a deadline for the decision's effects of 18 months, to give the legislature time to adopt the necessary amendments while the provision remained temporarily in force. An appropriate amendment of Article 55(1) of the Constitution was expressly suggested by the constitutional judges to the constitutional legislature, so that this provision would envisage an exception to the prohibition on extraditing Polish citizens, to permit their surrender to other Member States of the European Union on the basis of an EAW<sup>69</sup>.

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<sup>69</sup> Amendments to Article 55 of Constitution were made within the deadline provided for in the decision, and as of November 7<sup>th</sup> 2006, Poland has agreed to the execution of EAW against its nationals, subject to two conditions, which do not appear to be in line with the EU regulation: the fact that the crime has been committed outside Polish territory and that it is recognised capable of being prosecuted under Polish criminal law.

One year later, the Czech constitutional judges founded their reasoning on a completely different set of grounds. After recalling a decision issued barely two months earlier (judgment of 8 March 2006), where they had carried out an express *revirement* of their own jurisprudence in order to meet the interpretation criteria required by the application of the equality principle as interpreted by the ECJ,<sup>70</sup> the judges were faced with the sensitive issue of the binding nature, and the related discretionary margin left to the legislator regarding cooperation in criminal justice matters, which were to be attributed within the scope of the framework decisions pursuant to Article 34 EU.

Showing a higher degree of openness to (and extensive knowledge of) European Community law, the Czech constitutional judges broadly touched upon the *Pupino* judgment, and although perhaps underestimating its added value, they pointed out how the obligation of national judges to interpret, *as far as possible*, national law in conformity with framework decisions adopted under the third pillar – and pursuant to such jurisprudence – would leave unprejudiced the issue relating to the enforcement of the principle of primacy of the EU law over (all) national legislation.

The Czech Constitutional Court, taking into account the doubts concerning the interpretation of the Framework Decision's nature and its scope, seriously considered the possibility of proposing – evidencing once again its will for dialogue with the EC's supreme judicial body – a preliminary reference to the ECJ, though later ruling out the option due to the fact that the Belgian *Cour d'Arbitrage*, as anticipated,<sup>71</sup> had already addressed the ECJ regarding the same issue. The Czech constitutional judges, then faced with the dilemma of whether they should suspend judgement concerning constitutionality while “awaiting” the ECJ's answer to the Belgian referral, or rather rule on the matter, chose the latter option. The most interesting aspect of the Czech decision is that the judges attempted to find amongst all the potential interpretations of the relevant constitutional norm (Article 14 (4) of the Czech Charter of Constitutional Rights) the one not which did not clash with Community law principles on the secondary legislation. In

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<sup>70</sup> See O. Pollicino, *Dall'Est una lezione sui rapporti tra diritto costituzionale e diritto comunitario*, in *Diritto dell'Unione Europea*, 2006, 819 ff.

<sup>71</sup> Preliminary reference by the *Cour d'Arbitrage* dated 29-10-2005.

particular, the judges highlighted how, without the support of an interpretation effort, the wording of Article 14 (4), according to which no Czech citizen shall be removed from his homeland, does not fully account for<sup>72</sup> the actual existence of a constitutional ban on the surrender of a Czech citizen to a foreign state, in execution of an arrest warrant, for a set period of time.

In the view of the Czech Constitutional Court, two plausible interpretations exist. The first and literal one, even though it might lead to upholding the ban on extradition within the constitutional norm, would have at least two disadvantages. Firstly, it would not take into account the “historical impetus” underlying the adoption of the Charter of Fundamental Rights, and especially of Article 14 (4). The Constitutional Court stressed, in fact, how a historical interpretation of the criterion under discussion clearly explained that, based on the wording of the Charter between the end of 1990 and the beginning of 1991, the authors who drafted the ban on a Czech citizen being removed from his or her homeland, far from considering the effects of the implementation of extradition procedures, had in mind “the recent experience of communist crimes” and especially of the “demolition operation” that the regime had perpetrated in order to remove from the country whoever represented an obstacle to the hegemony of the regime itself. Secondly, an interpretation of that sort would lead to a violation of the principle, clearly expressed for the first time by the constitutional judges, according to which all domestic law sources, including the Constitution, must be interpreted as far as possible in conformity with the legislation implementing the European integration evolution process. An obligation that the constitutional provisions be interpreted consistently with EC law, which the constitutional judges derived from the combined provisions of Article 1 (2) of the Constitution, was added because of the accession to the European Union and pursuant to which “the Czech Republic is compelled to fulfil obligations originating under international law”, and Article 10 EC on the principle of loyal cooperation between Member States and the European Union.

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<sup>72</sup> As it did, instead, according to the Czech judges, the provision of the corresponding article 23 (4) of the Slovak Constitution which, prior to the constitutional revision of 2001, made express reference of the extradition ban of Slovak citizens.

On the basis of a teleological approach, the Czech constitutional judges went on to identify the constitutional norm's most consistent interpretation of the implementing act, as well as of Framework Decision 2002/584, to the Polish Constitution. It is not surprising then, that the Court managed to find constitutional grounds to almost all problematic Framework Decision dispositions.

Accordingly, it is plausible to infer that the Czech Constitutional Court, in its firm intent to reach greater consistency between Article 14 (3) of the Constitution and the European Framework Decision, strained the literal content of both the constitutional dispositions and the domestic law under discussion. The argument was that, whereas the constitutional norm had been interpreted as a mere ban on the surrender of a Czech citizen to the jurisdictional authority of another Member State for the purpose of prosecution for a crime committed in the latter's territory, the grounds underlying the whole decision would have ceased, i.e. the equivalence in terms of protection of fundamental rights among EU Member States, reflecting also a substantive convergence of the various criminal legislations and procedures.

Unavoidably, this led to the acceptance by the Czech judges of the principle of mutual trust in the criminal legislation of other Member States' legal systems (rejected by their German judicial colleagues) through the direct reference to the ECJ decisions in *Gozutok* and *Brugge*, whose findings have been questioned by the "sceptical" approach of the German constitutional judges.

### 1.3. Comparative jurisprudential views

On a closer examination of the Polish and Czech Constitutional Courts' decisions on the EAW, two different expressions of the same acceptance of the primacy of the third pillar EC legislation, with no direct effect over domestic law, including the national constitution, can be identified. In the Czech case, the judicial strategy leading to primacy was that of resorting to consistent interpretation, along with the manipulation of the wording of the relevant Article 14 (4), so as to provide constitutional validity to an EAW issued against a Czech citizen.



In the case of Poland, instead, the Polish Constitutional Tribunal, “tightened” by the constitutional parameter which left no room for misunderstandings or creative ways of interpretation, asserted Poland’s respect for European law binding upon it in a different way. Accordingly, a constitutional change in the relevant parameter – which it was possible to include within the fundamental principles at the heart of the Constitution – was considered convenient for attaining the full conformity with the EU law requirements.

Needless to say, if the primacy of European Union legislation over internal law can, in theory, be quite easily assumed with regard to the European dimension, its fulfilment on a national level is conditional upon the Constitutional Courts’ acceptance and, in the end, openness to the “reasons of European law”.

It is possible to argue that, although the Czech and Polish courts took fundamentally different approaches in reaching their conclusions, both showed a certain willingness towards that openness. Conversely, the final decision of the German Federal Constitutional Court evidences the radically different, tougher stance adopted by the German constitutional judges as regards the EAW. With regard to the final outcome of the German decision, although the predisposition of the constitutional parameters to international and supranational pluralism would have allowed them somehow to save the Framework Decision’s implementing act, the constitutional judges decided to annul it. They were widely criticised for this, with critics asserting the rule-versus-exception rationale between the first and second passage of Article 16 (2).<sup>73</sup> Such an unconditioned, dismissive approach accounts for the presumption of the German Federal Constitutional Court that European law – and particularly that stemming from the third pillar – may, in no event, override the Constitution as the Basic Law. This outcome is not surprising. Unsurprisingly, as far as the counter-limit doctrine (*riserva dei controlimiti*) is concerned, the German Federal Constitutional Court is in fact in good company in Europe, and recently also the

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<sup>73</sup> The recent constitutional review of Article 16(2) added to the extradition ban of a German national the derogation rule of extradition to a EU Member State or before an international court, on the condition that the rule of law is upheld.

Constitutional Courts of some CEE States,<sup>74</sup> although with slightly different attitudes, have joined the club.

What is truly amazing, instead, as compared to that which emerged from the analysis of the Polish and Czech decisions, is the legal reasoning and the judicial style that led the German Court to declare the national law implementing the EAW as unconstitutional and void. First of all, the German judges confined the scope of the second paragraph of Article 16 (2), introduced by the 2000 constitutional revision, providing only under specific circumstances for the possibility of a German national's extradition, to a mere exception to the rule embodied by the statement "freedom from extradition" granted to all German citizens, as per the first paragraph of Article 16 (2).

As has recently been observed,<sup>75</sup> the clause in the second paragraph of Article 16 (2) differs significantly from the other derogatory clauses present within the German Constitution. The latter, in fact, serves the purpose of authorising strict restrictions to fundamental rights, whilst the former is instrumental to achieving the objectives set out in the European clause of Article 23 (1) of the Constitution.<sup>76</sup> The axiological link between the paragraph added in 2001 to Article 16 (2) and the conditional opening to the supranational dimension, as codified in the first paragraph of Article 23 of the Basic Law, appears, therefore, to be the main missing element in the German Court's legal reasoning which focused, instead, on another nexus, that between "the German

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<sup>74</sup> For an analysis of the constitutional conflict related to the multilevel protection of fundamental rights, see A. Tizzano, *La Corte di giustizia delle Comunità europee ed i diritti fondamentali*, in *Diritto dell'Unione Europea*, 2005, at 839 ff.

<sup>75</sup> C. Tomuschat, *supra* note 51, 212.

<sup>76</sup> According to which: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by law, subject to the consent of the Bundesrat. The establishment of the European Union, as well as changes in its Treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of article 79".

people and their domestic law (para. 67)” along with the need “to preserve national identity and statehood in the uniform European legal area (para. 77)”.

The ruling makes clear that the only standards the German Federal Constitutional Court is willing to uphold are precisely those relating to national identity and statehood which touch upon the core of society’s fundamental values, and which establish that strong sense of belonging, though somewhat ethnocentric, so dear to the Karlsruhe<sup>77</sup> judges as well. Accordingly, their distrust as to the scope of the protection of individual rights granted under the other legal systems in the European Union merges with a firm belief that the right to a commensurate protection from those different criminal law systems, which cannot afford an equivalent protection to the legal rights of a person under investigation, is the exclusive right of German citizens themselves.

The gap between this rationale and the EAW’s basic underlying legal values could hardly have been greater. Firstly, as regards the distrust, both the Framework Decision and its interpretation by the ECJ have called for mutual trust and solidarity among Member States, stressing their paramount importance as fundamental elements to the continuation of the Europe-wide cooperation in criminal matters. Secondly, as to the exclusive nature of the protections granted to German citizens, the essence of the European framework decision, based on a pluralistic, open concept of citizenship, is to grant additional guarantees to those, regardless their nationality, who have a special connection with the EAW’s executing State, as witnessed under the previously mentioned Article 5 of the Framework Decision. The said article, indeed, whilst specifying the guarantees to be granted by the State in particular cases, expressly provides for additional guarantees in the event that “the person subject to the arrest warrant for the purposes of prosecution is a national or resident of the executing Member State”<sup>78</sup>. as well as it is provided by Article 4 (6), of the Framework decision.<sup>79</sup>

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<sup>77</sup> In reference to the FCC decision of 12-10-1993, *Maastricht Urteil*, see particularly, J.H.H. Weiler, *Does Europe need a constitution? Demos, Telos and the Maastricht German Decision*, in *European Law Journal*, 1995, 219 ff.

<sup>78</sup> In this case, the additional guarantees arise where the surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State to serve the custodial sentence or detention order passed against him in the issuing Member State. It may be noteworthy how numerous Central-Eastern European legal systems have come to share such an open and pluralistic concept of citizenship, regardless the strong influence in terms of national identity and ethnocentrism typical of the *idem sentire* in Eastern Europe. Suffice it to say that

## Part two: Interconnecting judicial entities on the European side

### 1. Strasbourg and Luxembourg at the forefront of the Enlargement: an antithetical judicial approach?

Shifting from the domestic constitutional point of view to a supranational one, this paper will now focus on the reaction of the European Courts to the potential increase in the risk of constitutional conflicts between the national and supranational legal dimensions caused by the recent accession of ten new Member States to the EU. In this regard, in spite of the risk of simplification implied in every attempt at synthesis, it is possible to identify two potentially alternative judicial routes. On the one hand, a further centralisation of adjudication powers, which the European Court of Human Rights at Strasbourg seems to be favouring after the enlargement of the Council of Europe to the east, and, on the other hand, the appraisal of national constitutional values, which the European Court of Justice seems to have privileged since the major enlargement of 2004. A comparison of the different responses of the two European Courts to the same phenomenon appears instrumental to our main conceptual *file rouge* that attempts to analyse the consequences of enlargement, taking into account multiple, interacting legal regimes.

However, before doing so, a clarification is necessary. The following remarks claim to be neither exhaustive nor conclusive. At the risk of over-simplifying very complex, diverse and seldom consistent judicial attitudes, my only defence is that what truly matters for the purposes of this paper is the identification of a general (although not always homogeneous) trend.<sup>80</sup>

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Article 411e, of the Czech Criminal Code, as amended after the adoption of the Framework Decision, provides, among the grounds for refusing to execute the EAW, the condition that the person being investigated “is a Czech citizen or a resident of the Czech Republic”.

<sup>79</sup> As already pointed out, Article 4 par. 6 of the Framework Decision provides that “ the executing judicial authority may refuse to execute an arrest warrant issued for the purposes of execution of a custodial sentence or detention order, *where the requested person is staying in, or is a national or a resident of the executing Member State* and the State undertakes to execute the sentence or detention order in accordance with its domestic law”.

<sup>80</sup> The x-ray of the thousand pieces composing the judicial puzzle is then postponed.

Beginning with the reaction of the European Court of Human Rights to the enlargement, as it has already been stressed,<sup>81</sup> since the end of the Cold War, the Council of Europe has experienced a dramatic increase in the number of members. In 1989, the Council of Europe was an exclusively western European organisation counting 23 Member States. By 2007, its membership had grown to 47 countries, including almost all the former communist States of central and eastern Europe.

Here, my main assumption continues to be that the European Court of Human Rights has reacted to the Council of Europe's enlargement to the east with a more explicit understanding of itself as a pan-European Constitutional Court, as a result of both the exponential growth of its case load and the realistic possibility for it to ascertain systemic human rights violations in CEE countries. This has implied a shifting away from an exclusively subsidiary role as "secondary guarantor of human rights" to a more central and crucial position as a constitutional adjudicator.<sup>82</sup>

It is arguable that this change in the European Court of Human Rights' judicial attitude emerged, for the first time in 1993, in Judge Martens' concurring opinion in the *Branningan* case.<sup>83</sup> On that occasion, the majority of the Court, recalling a judgment from 1978,<sup>84</sup> stated that the choice to determine whether the life of the nations may be threatened by a "public emergency" has to be left to the wider margin of the Member States. By reason of their direct and constant contact with the current, pressing needs of the moment, in fact, it was observed, the national authorities are in a better position than international judges to decide both on the actual occurrence of such an emergency, and on the nature and scope of the necessary derogations to avert it. Conversely, in his concurring opinion, Judge Martens argued that:

Since 1978 "present day conditions" have considerably changed. Apart from the developments to which the arguments of Amnesty refer, the situation within the

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<sup>81</sup> R. Harmsen, *The European convention on human rights after the enlargement*, in *The international journal of human rights*, 2001, 18 ff.

<sup>82</sup> It was probably not an accident that the Court chose a highly controversial case against Turkey (*Loizidou v. Turkey*, judgment of 23-3-1995) to affirm, for the first time in its jurisprudence, the central place of ECHR as "an instrument of the European public order".

<sup>83</sup> Court of Strasbourg, *Branningan and McBride v. the United Kingdom*, judgment of 26-5-1993, par. 43.

<sup>84</sup> Court of Strasbourg, *The Ireland v. the United Kingdom*, judgment of 18-01-1978, par. 207.

Council of Europe has changed dramatically. It is therefore by no means self-evident that standards which may have been acceptable in 1978 are still so. The 1978 view of the Court as to the margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then Member States of the Council of Europe might be assumed to be societies which had been democracies for a long time and, as such, were fully aware both of the importance of the individual right to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of eastern and central European States that assumption has lost its pertinence.

Another call for a more proactive role for the European Court of Human Rights as a reaction to the Council of Europe's enlargement came from (again, the same) Judge Martens' separate opinion on the Court's 1995 decision in the *Fisher v. Austria*<sup>85</sup> case. To the then typical self-restraint of the Strasbourg Court, according to which "the European Court should confine itself as far as possible to examining the question raised by the Court before it",<sup>86</sup> Judge Martens objected that:

No provision of the Convention compels the Court to decide in this way on a strict case by case basis. This self-imposed restriction may have been a wise policy when the Court began its career, but it is no longer appropriate. A case law that is developed on a strict case-by-case basis necessarily leads to uncertainty as to both the exact purport of the Court's judgment and the precise content of the Court's doctrine.<sup>87</sup>

The message was indeed quite clear: an explicit invitation addressed to the Court to assume a more general constitutional and centralised role. But it was only some years later (very recently indeed), that the European Court of Human Rights seemed ready to accept that invitation. Since

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<sup>85</sup> Court of Strasbourg, *Fisher v. Austria*, judgment of 26-4-1995.

<sup>86</sup> Court of Strasbourg, *Fisher v. Austria*, par. 44.

<sup>87</sup> Court of Strasbourg, *Fisher v. Austria*, separate opinion of Judge Martens, par. 16.

2004, in fact, with regard to some areas of the law<sup>88</sup> and not surprisingly especially in certain judgments directed to CEE Member States, the Strasbourg Court has started to go beyond the strict case-by-case approach of past years. More precisely, in a decision of 2004, the Court held that a violation of the ECHR had instead originated in a systemic problem connected with the malfunctioning of domestic legislation which involved 80,000 persons. The Court suspended 167 complaints pending before it on the same issue until the respondent State secured, through appropriate legal measures and administrative practices, the implementation of the fundamental rights protected by the ECHR (in that case the right to property).<sup>89</sup> In particular, the Court argued that:

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause... In this context the Court's concern is to facilitate the most speedy and

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<sup>88</sup> First of all, the freedom of expression, under Article 10 ECHR, in relation to which the margin left to Member States has never been very broad, and, secondly, the right to property. In some other areas, as for example, the right to a private life, under article 8 ECHR, when issues of a morally and ethically delicate nature are raised (such as transsexuals, in vitro fertilisation and subsequent use of embryos), the margin of appreciation left to the Member States, even after enlargement, has remained very broad. See Court of Strasbourg, *UK v. Pretty*, judgment of 29-4-2002, and *UK v. Evans*, judgment of 10-4-2007). In other words, every time consensus is lacking within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, par. 44; *Frette v. France*, no. 36515/97, par. 41;). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Odièvre*, §§ 44-49 and *Frette* § 42). I am indebted to Prof. Andras Sájó for the distinctions underlined above.

<sup>89</sup> See Court of Strasbourg, *Broniowsky versus Polonia*, 22-6-2004, rec. 31443/96.

effective resolution of a dysfunction established in national human rights protection (par. 193).

Consequently, the impression is that recently, as a (late) reaction to the enlargement of the Council of Europe to the east, the European Court of Human Rights, with a view to supporting the respondent, very often a CEE<sup>90</sup> State, in fulfilling its obligations under Article 46, has sought to indicate the type of measure the same State might take to put an end to the systemic situation identified in the present case. In doing so, the Court seems to welcome a new activist approach, commensurate with the enlargement of the Council of Europe,<sup>91</sup> towards the Member States' legislative and judicial powers. Those States, in turn, seem gradually to lose freedom of choice as to the appropriate means to comply with a judgment notifying a breach of the ECHR<sup>92</sup> and determine the appropriate remedial measures to satisfy the respondent State's obligations under

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<sup>90</sup> See, *mutatis mutandis*, and in connection with a trial Court's lack of independence and impartiality, Court of Strasbourg, dec. 23-10 2003, *Gençel v. Turkey*, no. 53431/99, par. 27; dec. 8-4-2004, no. 71503/01, *Assanidze c. Georgia*, dec. 8-7-2004, in *Ilascu e al. c. Moldova and Russia*, no. 48787/99, where the Court went so far to order that "the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release" (par. 490). The further attenuation by the last mentioned judgment of Member State margin of appreciation did not pass unobserved. In his partially dissenting opinion, Judge Loucaides stated: "Lastly, I realise the objective impossibility for the second respondent State of enforcing the Court's judgment to the letter, going over the head of sovereign Moldova, particularly in order to put an end to the applicants' detention. In *Drozd and Janousek*, the Court said: 'The Convention does not require the Contracting Parties to impose its standards on third States or territories' (*Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, p. 34, § 110). When that is translated into the language of international law, it surely means that neither the Convention, nor any other text requires signatory States to take counter-measures to end the detention of an alien in a foreign country unless, upon reading our judgment, people welcome the appearance right in the heart of old Europe of a new condominium like the New Hebrides. But I very much doubt that that would be a desirable development."

<sup>91</sup> Membership in the Council of Europe has soared from 23 to 41 (including 17 Central and East European countries) between 1990 and 1999.

<sup>92</sup> According to previous constant case law, the Court of Strasbourg has regularly stated that "the contracting parts are free to chose the means whereby they will comply with a judgment in which the Court has found a breach". See, *ex plurimis*, Court of Strasbourg, *Marckx c. Belgium*, judgment of 13-6-1979, par. 58; *Campbell c. UK*, judgment of 22-3-1983, par. 34.



Article 46.<sup>93</sup> It is not a coincidence, then, if this approach was introduced in certain decisions addressed to CEE Member States.

As already stressed, the reason for the new judicial strategy described above has to be identified in the European Court of Human Rights' lack of the necessary trust in CEE constitutional-democratic standards. This is quite puzzling, one might say, considering that since 1989 the Council of Europe has represented the key reference point and a source of inspiration for the CEE's constitutional momentum. However, upon closer scrutiny, it is only apparently paradoxical: is there anyone more aware of a constitution's weaknesses than those who actively contributed to its birth?

The further centralisation of the Court's adjudication powers, along with the reduction of the appreciation margin, namely at the level of CEE Member States, may not be regarded as a foolish activist jump but rather as a considered step aimed at reducing the exploding case load, bearing in mind Sadursky's words: "If there is a domain in which concern over national identity and accompanying notions of sovereignty are obviously weak in central and eastern Europe is in the field of protection of individual rights".<sup>94</sup> The same does not apply to the different scenario of the EU constitutional dimension, where the penetration of European law into the domestic legal orders and the constitutional conflict between the national and the supranational levels do not seem destined always to expand, as in the case of the European Court of Human Rights intervention, the content of the constitutional rights, but rather, to the contrary, as the EAW saga shows, at least sometimes, to force constitutional changes with a restrictive result for certain Member States.<sup>95</sup>

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<sup>93</sup> See, along the same lines, the Court of Strasbourg, *Somogyi*, judgment of 18-5-2004, where the Court of Strasbourg "suggested" to Italy that where an applicant has been convicted despite a potential infringement of his right to participate in his trial, the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, in due course and in accordance with the requirements of Article 6 of the Convention.

<sup>94</sup> The main reason, according to Sadursky, is that "the legacy of Communism under which individual rights were systematically trampled on is still fresh in many peoples' minds". See. W. Sadurski, *The Role of the EU charter of fundamental rights in the process of the enlargement*, in G. A. Bermann, K. Pistor (Eds.), *supra*, note 1, 61 ff., at 80.

<sup>95</sup> Along these lines, see S. Sarmento, *European Union: The European Arrest warrant and the quest for constitutional coherence*, in *International Journal of Constitutional Law*, 2008, 171 ff.

Against this background, and with regard to the new “season” of a centralised judicial activism of the European Court of Human Rights, the relevant question is whether (and in the case of a positive answer, in which direction) the European Court of Justice has somehow developed a new judicial sensitiveness after the 2004 and 2007 enlargements. The addition of twelve, not always homogeneous, constitutional identities seems in fact to entail that the ECJ’s exclusive reference to the concept of common constitutional traditions is starting to become progressively less suitable, especially if it is considered, with particular emphasis on CEE Member States that: “After the fall of communism, national identity (often perceived in an ethnic rather than civic fashion) has been either the only or the most powerful social factor, other than those identified with social foundations of the *ancien regime*, capable of injecting a necessary degree of coherence into society and of countervailing the anomie of a disintegrated, decentralised and demoralised society”.<sup>96</sup> The situation is even more complicated because, within the CEE, there exist more identities asking for recognition: the majority one and the many minorities.<sup>97</sup>

Bearing these considerations in mind, the key question may be: how is the ECJ responding to the change, in a pluralistic identity-based direction, of the dynamic nature of constitutional tolerance?<sup>98</sup> It has been argued that, before the enlargement, the ECJ, in order to foster constitutional tolerance by Member States, applied a two-level argumentative strategy: the first level approach addressed national legislative and executive bodies, and the second, the national

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<sup>96</sup> W. Sadursky, *supra* note 21, 12.

<sup>97</sup> See M. Ganino, *Profili costituzionali ed allargamento dell’Unione Europea*, in M. Ganino, G. Venturini (Eds.), *L’Europa di Domani, Verso l’Allargamento dell’Unione*, Milano, 2002, 113 ff., 135.

<sup>98</sup> The constitutional ingredient which shapes the European legal order’s uniqueness, according to which, in Joseph Weiler’s usual brilliant terms, “constitutional actors in the Member States accept the European Constitutional discipline not because as a matter of legal doctrine.... They accept it as an autonomous voluntary act endlessly renewed by each instance of subordination .... The Quebecois are told in the name *of the people* of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name *of peoples* of Europe, you are invited to obey.... When acceptance and subordination is voluntary, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance”. See J. Weiler, *Federalism and Constitutionalism: Europe’s Sonderweg*, *Harvard Jean Monnet Paper* (10-2000), 13.

courts.<sup>99</sup> Briefly, it appears that, with regard to that first aspect, the ECJ seems to have understood the extent of the change in the relationship between the European dimension and the Member States' constitutional dimensions after 2004. As to the second, however, there is still a long way to go, even if certain steps in the right direction have already been taken. The next section of the paper is dedicated to the attempt to find some empirical support for these assumptions.

## 2. The (CEE) Member States' political bodies as ECJ interlocutors

It has been argued<sup>100</sup> that, in order to prevent potential "sovereignist" reactions by Member States, and namely in order to enhance this miraculous "voluntary obedience", in the last few decades the ECJ has resorted to applying the "majoritarian activist approach".<sup>101</sup> According to this approach, among the various solutions to a case, the European judges may opt for the final ruling most likely to meet the highest degree of consensus in the majority of Member States.<sup>102</sup> The European judges seem to have understood that if such an approach had been partially<sup>103</sup> able

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<sup>99</sup> See O. Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, in *German Law Journal*, 2004, 283 ff; Idem, supra note 7, 407 ff.

<sup>100</sup> G. Martinico-O. Pollicino, *Between constitutional tolerance and judicial activism: the "specificity" of the European judicial law*, in *European Journal of Law Reform*, 2008, 99 ff.

<sup>101</sup> Miguel Maduro identifies the same judicial approach in the different field of European economic constitution. See M. P. Maduro, *We, the Court. The European Court of Justice and Economic Constitution*, Oxford, 1998, 72 -78.

<sup>102</sup> In particular, in a previous work it has been tried to prove how the reference to the majoritarian approach has been able to explain how it is not unusual in European case law that a couple of cases, which are very similar in their factual and/or legal background are decided in an opposite, thus almost schizophrenic, way by the ECJ. The key to the apparent enigma has been found by reflecting upon the impact that a decision can have on the national legal systems by the application of the majoritarian activism approach, as is proved by the following case law analysis of two decisions in the field of protection of sexual minorities. See O. Pollicino, supra note 107, 283 ff.

<sup>103</sup> Doubts about the real persuasion attitude of the mentioned judicial strategy has been advanced by Matey Avbely, by arguing that "The damaging effect of the "supranational" counter-majoritarian difficulty on legitimacy appears to be doubled: the whole "national demos" is turned into minority and the prevailing value-based view - the identity of the majority of the "national demos", is compromised in favour of a distinct European demos." See M. Avbely, *European Court of Justice and the Question of Value Choices: Fundamental human rights as an exception to the freedom of movement of goods*, *Jean Monnet Working Papers* 6/2004, Jean Monnet Chair.

to convince Germans and Italians when they had been “invited” to obey the European discipline in the name of the peoples of Europe, the same “invitation” would have proven much less successful when applied to Estonians or Hungarians.

The post-2004 era has called, then, for a new *ad hoc* judicial strategy to combine with the pre-2004 majoritarian activist approach. After all, what new Member States need to be reassured about seems to be that even if, with regard to those national values relating to a peculiar constitutional identity to protect, they found themselves in a minority or isolated position, the European judges would not sacrifice them on the altar of the majoritarian-activist approach. It does not seem a coincidence, indeed, that some months after the 2004 enlargement, the Court stated, against an exclusively majoritarian logic, for the very first time, that “it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected”.<sup>104</sup>

The factual background of the *Omega* decision mentioned above is too well-known to come back to it now. It is enough here to recall that the question was whether the aim of protecting a constitutional right, in that case the right of human dignity, representing a top priority issue especially for one Member State (in that case, Germany), could possibly justify a restriction of freedom of services, a fundamental freedom but also fundamental right of the European economic constitution. The outcome of the decision is even more famous: “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity”.<sup>105</sup> What seems instead to have been undervalued in several commentaries on the case is the circumstance that the European judges, in order to acknowledge the protection of the single Member State’s constitutional values, had to manipulate their previous judgment which clearly reflected the then prevailing approach of the majoritarian (if not unanimous) logic at the heart of

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<sup>104</sup>Court of Justice, 14-10-2004 C-36/02, *Omega*, ECR, 2004, I-9609, par. 37.

<sup>105</sup> *Omega*, supra note 104, par. 41.

the justification grounds for the restriction of fundamental freedoms.<sup>106</sup> The ECJ was then able to give an authentic (manipulated) interpretation of its precedent explaining how:

Although, in paragraph 60 of *Schindler* the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.<sup>107</sup>

In other words, there emerges a shift in the judicial reasoning of the ECJ, from a pre-accession majoritarian activist approach to a post-accession reference to the needed protection, at least in the most sensitive cases, of the fundamental rights peculiar even to a single Member State's constitutional identity. Upon closer inspection, the attention to national values, far from being a post-2004 accession novelty, has always been a main feature of the ECJ case law related to the achievement of a European single market. This is, in particular, with regard to consumer protection and the preservation of public order as legitimate national justification for the hindrance to fundamental freedoms, especially freedom of establishment and freedom to provide services. It is enough to consider the case law related to gambling where, since 1994,<sup>108</sup> the Court has admitted that moral, religious and cultural factors, and the morally and financially harmful consequences for individuals and societies associated with gambling could serve to justify the existence, in the hands of the national authorities, of an appreciation margin sufficient to enable them to determine what kind of consumer protection and public order preservation they

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<sup>106</sup> ECJ, 24-3-1994, C-275/92, *Schindler*, ECR I-1039.

<sup>107</sup> *Omega*, supra note 104 par. 37.

<sup>108</sup> ECJ, *Schindler* supra note 157; 21-9-1999, case C-124/97 *Läärä and Others* ECR I-6067- Along the same lines, more recently, see 6-11-2003, *Gambelli*, case C-243/01, and 6-3-2007, *Placanica*, in Joined Cases C-338/04, C-359/04 and C-360/04, where the Court expressly states as “context, moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (par. 47)”. I am indebted to Alberto Alemanno for having pointed out the named decisions to me.

should apply. The innovative element of the post-accession phase, connected mainly with the need to provide a reassurance argument for the strong, identity-based demand of recognition coming from the new CEE Member States, is instead the willingness of the ECJ to take a step back if at stake is the protection of a national constitutional right. If it is true, as it has been objected<sup>109</sup> that: “the phase of justification before the ECJ is a phase in which the Court strikes a balance between competing values of the Member States and the economic values of the Union and makes the final determination”, the added value of the relevant post-accession case law<sup>110</sup> is that fundamental rights become a legitimate justified obstacle to the further enhancement of the European economic constitution even if that ground of justification is not at all enshrined in the founding Treaties.

The same vision, even more clearly expressed, was confirmed recently in a judgment of 14 February 2008,<sup>111</sup> which so far has gone strangely unnoticed. Its being not well known calls for a brief overview of the case. The dispute in the main proceedings concerned the importation by a German company of Japanese cartoons called ‘Animés’ in DVD or video cassette format from the United Kingdom to Germany. The cartoons were examined before importation by the British Board of Film Classification (BBFC). The latter checked the audience targeted by the image storage media by applying the provisions relating to the protection of young persons in force in the United Kingdom and classified them in the category “suitable only for 15 years and over”. The image storage media bear a BBFC label stating that they may be viewed only by persons aged 15 years or older. Dynamic Medien, a competitor of Avides Media, brought proceedings for interim relief before the *Landgericht* (Regional Court) of Koblenz (Germany) with a view to prohibiting Avides Media from selling such image storage media by mail order. Dynamic Medien submitted that the legislation on the protection of young persons prohibits the sale by mail order of image storage media which have not been examined in Germany in accordance

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<sup>109</sup> See M. Avbely, *supra* note 103

<sup>110</sup> *Omega*, anticipated by Case C-112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich*, ECR, 2003. See for an excellent analysis of the two decisions A. Alemanno, *A’ la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur. Quelques réflexions à propos des arrêts «Schmidberger» et «Omega»*, in *Revue du Droit de l’Union Européenne*, 2004, 1 ff..

<sup>111</sup> ECJ, 14-2-2208, C-244/06, *Dynamic Medien Vertriebs GmbH*, in [www.curia.eu.int](http://www.curia.eu.int).

with that law, and which do not bear an age-limit label corresponding to a classification decision from a German higher regional authority or a national self-regulation body ('competent authority'). By decision of 8 June 2004, the Koblenz *Landgericht* held that mail-order sales of image storage media bearing an age-limit label from the BBFC alone was contrary to the provisions of the law on the protection of young persons and constituted anti-competitive conduct. On 21 December 2004, the *Oberlandesgericht* (Higher Regional Court) of Koblenz, ruling in an application for interim relief, confirmed that decision. The Koblenz *Landgericht*, called to rule on the merits of the dispute and unsure whether the prohibition provided for by the law on the protection of young persons complied with the provisions of Article 28 EC, decided to stay the proceedings and to refer to the ECJ for a preliminary ruling. The German Court asked the ECJ whether the principle of free movement of goods laid down in [Article 28 EC](#) precludes the German law prohibiting the sale by mail order of DVDs and videos that are not labelled as having been vetted by the German authorities as to their suitability for young people. The German Court also asked whether the German prohibition could be justified under [Article 30 EC](#). The ECJ held, in the first place, that the German rules constitute a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC, which in principle is incompatible with the obligations arising from that article unless it can be objectively justified. The Court then considered whether the German measures could be justified as being necessary to protect young people, being an objective linked to public morality and public policy, which are recognised as grounds for justification in Article 30 EC. The Court held that the German measures were so justified. The Court stated in particular:

...that it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it (see, by analogy, *Omega*, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion.<sup>112</sup>

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<sup>112</sup> *Dynamic Medien Vertriebs GmbH*, supra 111, par. 48

Despite the reference to the analogy of the *Omega* case, in *Dynamic Medien* the ECJ seems have gone further with the appraisal of the national constitutional values of the particular Member State, in the direction of indirect reassurance towards the new Member States. The case presents a twofold innovation. Firstly, by making express reference to different levels of the protection of fundamental rights within Member States (rather than *way of protection* as in *Omega*), and by acknowledging for the first time a definite discretion margin to the individual Member State, the ECJ has achieved a double objective. On one hand, the Court refused to follow the highest standard-based conception of fundamental human rights<sup>113</sup> whilst, on the other, it has explicitly confirmed its willingness to adhere to the substantive nature of the fundamental rights. In Alexy's words,<sup>114</sup> they are substantively fundamental because they enshrine the basic normative structures of state and society.<sup>115</sup> It would be difficult not to catch the link between, on one hand, the Court's step back, facing the fundamental boundaries<sup>116</sup> of basic value-oriented choices of the Member States, in its obsessive enhancement of European law uniformity and, on the other hand, the aim to reassure (also) CEE States that their constitutional identity will not be sacrificed in the name of the achievement of the European economic values.

Secondly, the reference to the European Charter of Fundamental Rights is also very innovative in this regard. Departing from other cases where the ECJ has made explicit reference to the Charter,<sup>117</sup> here the mentioned reference is the sole mean to assert European primary law protection of the fundamental right in question.<sup>118</sup> In the author's view it is not a coincidence

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<sup>113</sup> See L.F.M. Besselink, *Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union*, in *Common Market Law Rev*, 1998, 629 ff., 636.

<sup>114</sup> See R. Alexi, *A theory of constitutional rights*, Oxford, 2002, 349, 350.

<sup>115</sup> M. Avbelj, *supra* note 103, 42.

<sup>116</sup> See J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in N. Neuwahl and A. Rosas (Eds.), *The European Union and Human rights*, 1995, 51, 52.

<sup>117</sup> ECJ, 27-6-2006, C-540/03, par. 38; 13-3-2007, C-432/05, par. 37; 3-5-2007, C-303/05; 11-12-2007, C-438/05, *Viking* and 18-12-2007, C-341/05, *Laval*.

<sup>118</sup> The Court of Justice (at par. 41) stated that "the protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24(1) of which provides that children have the right to such protection and care as is necessary for their well-being".



that, in light of this judicial strategy of reassurance being put in place, the ECJ started to make express reference in its reasoning, after years of indifference, to the Charter, almost immediately after the accession of the CEE Member States. As it has been astutely argued: “There is a high degree of congruence between the structure of constitutional rights in the post-communist countries of central and eastern Europe and the structure of the rights as displayed in the EU Charter”.<sup>119</sup>

In light of the scenario that the last pages have tried to delineate, it is perhaps possible to advance further in the attempt to systematise the reactions to the enlargement that have characterised the judicial approach of the ECJ. The ECJ seems in fact increasingly committed to work on a self-restriction of the EC primacy principle,<sup>120</sup> when it comes to the protection of identity-based

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<sup>119</sup> W. Sadurski, supra note 32, 83. See for arguments supporting this point W. Sadurski, *Charter and Enlargement*, in *European Law Journal*, 2002, 340, 348 ff.

<sup>120</sup> This ECJ recent attitude to the exploitation of EC primacy, combined with the opposite tendency of further centralization of the adjudicatory powers, favoured by the Court of Strasbourg, seems have reduced the distance dividing the characteristics of EU law and ECHR law in relation to their interface with domestic law. On the one hand, absolute primacy seems to no longer be a cornerstone of EU law and, on the other hand, the progressive realisation by the European Court of Strasbourg of its constitutional role has had the consequence of increasing the acknowledgement of the (relative) primacy of the European Court of Strasbourg’s interpretation over domestic national law. In support of such impression, one may recall a recent decision in which the Court of Strasbourg, after having ascertained that the Italian highest civil Court did not interpret Italian law consistently with its previous relevant case law through which it had many times sanctioned the excessive length of Italian judicial procedures, has permitted private suits against the Italian State in Strasbourg, even without having first exhausted all the instances of national jurisdiction. See the relevant judgments of the Court of Strasbourg in the *Scordino* saga, and, in particular, decisions 27-3-2003, 29-7-2004, 15-7-2004. It is from the Court of Strasbourg a way to say “if the national judge does not follow my jurisprudence, than it is not necessary to go in front of that judge before going in front of me”. The Italian Constitutional Court seems have finally accepted this new activist attitude of the Court of Strasbourg. Recently, in decisions 348-349 of 2007, it had the chance to state as the Court of Strasbourg case law, a part the eventual breach of the Constitution, is mandatory for the national judges. See, regarding these cases, O. Pollicino, *The Italian Constitutional Court at the crossroad between constitutional parochialism and cooperative constitutionalism. Case note on judgments no. 348 and 349 of 2007*, in *European Constitutional Law Review*, 2008, 363 ff. In sum, the reaction that enlargement has provoked to the European Court of Strasbourg seems to be a reduction, in some ways forced, of (in Maduro’s words) the degree of “institutional awareness”, according to which “Courts must increasingly be aware that they do not have a monopoly over rules and they often compete with other institutions in their interpretation”. See M. P. Maduro, *Interpreting European law: Judicial adjudication in a context*

constitutional dimensions of one or more Member States. A precise strategy of the ECJ, whose aim seems, in line with the *Solange* approach, to prevent further positions (also) of the CEE Courts by somehow “internalising”, as we have seen in *Omega* and *Dynamic Medien*, the “*controlimiti*” (counterlimits) doctrine in its case law.

In other words, the “evolutionary nature of the doctrine of supremacy”<sup>121</sup> seems to have undergone another transfiguration phase after the 2004 enlargement, from an uncompromising version<sup>122</sup> to a compromising one. It is not a coincidence that the Treaty establishing the European Constitution of 2004 provided, immediately prior to the EC primacy principle codification, at I-6, the following complementary principle:

The Union shall respect the equality of the Member States before the constitution as well their national identity, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the entire state functions, including the territorial integrity of the state, maintaining law and order and safeguarding national security.

Moreover, it does not appear to be coincidence either that in the “substantial reincarnation” of that Treaty agreed in Lisbon in December 2007, notwithstanding the lack of an express codification of the principle of primacy of EC law, the principle enshrined in Article 1-5 of the Treaty establishing the European Constitution has been textually provided by Article 4.2 of the Lisbon Treaty (with the further specification that national security remains the sole responsibility of each Member State).

In a different context, Mattias Kumm has stated the primacy principle’s new “season” following the 2004 enlargement, with a view to the new Treaty of Lisbon, requires that: “When EU law

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*of constitutional pluralism*, in *European Journal of Legal Studies*, 2008, 2 ff.. The latter approach, if in a certain sense it is forced by the objective difficulty to take into full consideration the constitution and institutional peculiarities of 46 Member States, is certainly focused on reducing the space that, in the reasoning of the Strasbourg judges, is reserved to the Member States’ Constitutions.

<sup>121</sup> J.H.H. Weiler, *The Community System, the Dual Character of Supranationalism*, in *Yearbook of European Law*, 1981, 268 ff., 275.

<sup>122</sup> J.H.H. Weiler, *The Transformation of Europe*, in *Yale Law Journal*, 1991, 2403 ff., 2414.

conflicts with clear and specific national constitutional norms that reflect a national commitment to a constitutional essential, concerns related to democratic legitimacy override considerations relating to the uniform and effective enforcement of EU law”<sup>123</sup>. In other words: “Guarantee of the constitutional identities of Member States in the constitutional Treaty should be interpreted by the ECJ to authorise national Courts to set aside EU law on certain limited grounds that derive from the national constitutions”.<sup>124</sup>

If this impression is to be confirmed in the future, the ECJ would have found, thanks to the new parameter provided by Article 4.2 of the Lisbon Treaty, the appropriate judicial mechanism to prevent the occurrence of the most frequent constitutional conflict between the EC and national levels – the dualistic tension between the irresistible, overriding vocation of the ECJ’s *Simmmenthal* mandate and the equally monolithic national constitutional mandate to preserve the core of fundamental domestic values from EC “invasion”.

As a matter of example, an EC norm, which would take precedence over a Member State’s constitutional provision which asserts its constitutional identity, would clash, in fact, with EU law itself, and with Article 4.2 of the Lisbon Treaty, which requires, as we have seen, that EU Law respects the national identity of the Member States. Consequently, in case of such a conflict, the hypothesis of annulment of a piece of EC law by the Member States’ Constitutional Courts would appear even less realistic. Conversely, the circumstance that a parameter of European law is violated would imply the competence of national ordinary judges, in their European mandate role, to set aside that piece of EC law clashing with the principle enshrined in Article 4.2 of the Lisbon Treaty.<sup>125</sup>

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<sup>123</sup> M. Kumm, *The jurisprudence of Constitutional conflict: constitutional Supremacy in Europe before and After the Constitutional Treaty*, in *The European Law Journal*, 2005, 262 ff., 286, 298.

<sup>124</sup> M. Kumm, *supra* note 123, 303.

<sup>125</sup> On the same opinion is A. Ruggeri, *Riforma del titolo V e giudizi di “comunitarietà” delle leggi*, paper presented at the seminar *Diritto comunitario e diritto interno*, Palazzo della Consulta, Italian Constitutional Court, 20-4-2007, p. 15. It should be noted that the above mentioned provision it is not the only one that in the treaty of Lisbon makes an express reference to the recognition of the national peculiarities. Art. 61, par. 1 of the new Treaty provides that «The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States».

### 3. The (CEE) national judiciatures as ECJ interlocutors

The previous sections have pointed out the changes that, following the 2004 and 2007 enlargements, have characterised the new approaches of the European judicature towards Member States' political powers. It now remains to consider if something has changed – or still needs to be changed – at European judicial level, with regard to the relationship between the European legal order and Member States judicial bodies, with particular reference to the CEE judiciatures. In this regard, a distinction has to be made between Constitutional Courts and the ordinary judges in CEE Member States. The former, as indicated above, seem well prepared to play a leading role in the new season of European cooperative constitutionalism through a creative and often activist approach. Further, as third-generation Constitutional Courts,<sup>126</sup> they are characterised by being born into the global constitutional movement which favours the interaction between legal regimes, but the same does not apply to the ordinary courts. It has been rightly observed, in fact, that the judiciary in CEE countries is still enslaved by textual positivism.<sup>127</sup> In other words, the CEE ordinary judges still maintain a rather formalistic approach, almost mechanical and deferent to the national legislature, not enthusiastic about the new chances of judicial communication offered by the European law and, in particular, by its preliminary ruling procedure, almost allergic to creativity as well as judicial activism, and far from any intent to participate in a transnational discourse. This is not exactly the best start to build up a virtuous process of mutual assistance between the legal constitutional dimension and the European one.

Against this background, my assumption is that the ECJ has already put forward actions aimed at urging CEE ordinary courts to cooperate, but that a lot still remains to be done, especially with regard to judicial style, in order to improve the virtuous cycle of reciprocal influence between the European and the national courts, including Constitutional Courts. With regard to achievements, we refer to the need, strongly felt in the pre-accession period, for a rule that CEE national judges

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<sup>126</sup> L. Solyom, *supra* note 35, 133 ff.

<sup>127</sup> Z. Kühn, *Words Apart, Western and Central European Judicial Culture at the Onset of the European Enlargement*, in *American Journal of comparative law*, 531 ff., 549.

might have perceived as an incentive not to disregard the correct domestic application of European law. The solution was found, one year before the major 2004 enlargement, in the *Kobler* case,<sup>128</sup> where the ECJ extended the case law in *Francovich*<sup>129</sup> and *Brasserie*<sup>130</sup> related to State liability in case of actions taken in breach of the national obligations stemming from European law to the judiciary of the Member States. In other words, the ordinary courts of the new Member States, at the moment of their entrance in the European judicial arena, have been welcomed by the updating of the ECJ's doctrine of Member State liability, which now enables an individual to bring suit for damages on a claim that a prior decision of a Member State's court violated European law.<sup>131</sup> It is difficult to deny that the decision's effect (or at least intention) was to motivate (also) CEE Member States' courts, which will have an obvious incentive for making referrals concerning doubtful questions of European Community law to the ECJ, in the attempt to avoid any possible subsequent liability.

This is what we should also read between the lines of the ECJ's decision of December 2003, where the ECJ found the infraction procedure brought by the Commission against Italy as legitimate, due, *inter alia*, to the persisting practice of the Italian *Corte di Cassazione* in breach

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<sup>128</sup>ECJ, 30-9-2003, *Köbler*, C-224/01. For an early, critical assessment of *Köbler*, see P. J. Wattel, *Köbler*, *CILFIT* and *Welthgrove: We Can't Go On Meeting Like This*, in *Common Market Law Rev*, 2004, 177 ff. For a more balanced appraisal, see M. Breuer, *State Liability for Judicial Wrongs and Community Law: the Case of Gerhard Köbler v. Austria*, in *European Law Review*, 2004, 29 ff.

<sup>129</sup> See Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci v. Italian Republic*, E.C.R., I-5357.

<sup>130</sup> See Joined cases C-46/93 and C-48/93, *Brasserie du Pecheur SA v. Germany* (C46/93) and *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.* (C-48/93), 1996 E.C.R., I-1029.

<sup>131</sup> See J.E. Pfander, *Köbler v. Austria: Expositional Supremacy and Member State Liability*, in *European Business Law Review*, 2006, 275 ff. Along the same lines, the Court of Justice, in its subsequent decision *Traghetti del Mediterraneo* held that "Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a Court adjudicating at last instance, by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that Court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the Court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed" (par. 46). See ECJ, 13-6-2006, *Traghetti del Mediterraneo*, Case C-173/03.

of Community law.<sup>132</sup> As it has been noted,<sup>133</sup> the possibility of infringement proceedings against the judicial misapplication of European law has been regarded with suspicion by the ECJ and excluded by mainstream scholarship<sup>134</sup>: “by the argument the co-operation and the trust between the Court of Justice and national Courts would have been disrupted. We may see this infringement procedure as a warning to national Courts in the new Member States to take Community law seriously.”<sup>135</sup>

If the abovementioned decisions represent the result of the substantive efforts of the ECJ to adapt its judicial attitude to the new post-enlargement era, what seems to remain inappropriate is the ECJ’s language towards the new judicial interlocutors. Especially on the strength of what still seems to characterise the CEE ordinary judiciatures, the actual judicial style and the argumentative structure of the ECJ legal reasoning do not appear fully adequate.

As Mauro Cappelletti perceptively wrote: “Unlike the American Supreme Court *and the European Constitutional Courts*, the ECJ has almost no powers that are not ultimately derived from its own prestige, [and the] intellectual and moral force of its opinions”.<sup>136</sup> With special regard to Member States’ judicial interlocutors, the main factors at the heart of the ECJ’s legitimacy still remain the clearness of the legal reasoning of its judgments<sup>137</sup> and the persuasive force of its arguments. This attitude strongly characterised the first years of the ECJ’s case law, when the European judges applied to their legal reasoning, by way of a didactic methodology, “a judicial style which explains as it declares the law”.<sup>138</sup> This is particularly true with specific reference to the procedure of Article 234 EC. It was not easy for the ECJ to induce national

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<sup>132</sup>ECJ, 9-12-03, *Commission against Italy*, 129/00, ECR, I-14637.

<sup>133</sup> J. Komarek, *Inter-Court Constitutional Dialogue after the enlargement- Implication of the Case of professor Kobler*, in *Croatian Yearbook of European Law*, 2005, 75 ff., 87.

<sup>134</sup> See H.G. Schermers, D.F. Waelbroeck, *Judicial protection in the European Union*, The Hague, London, New York, 2001, 630 ff.

<sup>135</sup> J. Komarek, *supra* note 133, 87.

<sup>136</sup> See M. Cappelletti, D. Golay, *Judicial Branch in the Federal and Transnational Union*, in M. Cappelletti M. Seccombe, J.H. Weiler (Eds), *Integration Through Law*, 333, note 281, Vol. 1, Berlin 1986 (Italic added).

<sup>137</sup> See, J.H.H. Weiler, *supra* note 122, 2425

<sup>138</sup> F. Mancini, *Attivismo e autocontrollo nella giurisprudenza della Corte di giustizia*, in *Riv. Dir. eur.*, 1990, 233.

judges to feel confident about such a new and sophisticated judicial conversation tool, but during years of “courteous pedagogy”,<sup>139</sup> they managed to persuade them.<sup>140</sup>

Apparently, over the years, the ECJ’s judicial style has progressively lost its original didactic and pedagogic character. The reasons seem easily identifiable: on one hand the national courts of first-generation Member States soon learnt to “digest” the impact of EC law’s novelty over time, thus gradually losing the didactic and pedagogic needs. On the other hand, the growing case load combined with the difficulty of finding at the same time a compromise, convincing and persuasive position in an enlarged ECJ has become an increasingly difficult task for the European judges. However, now, with 12 new eastern European national judiciatures that “will have the time to learn more than the mere basics of Community Law”,<sup>141</sup> the ECJ again needs to find a judicial style which explains, as well as states, the law and the persuasive strength of its arguments, which it somehow lost. A good example of this evolution of ECJ judicial style is, in line with our research focus, the awaited decision of the ECJ regarding the EAW.<sup>142</sup>

Owing as well to the great deal of interest aroused by the German, Polish and Czech Constitutional Courts’ decisions, there was a long wait for the ECJ’s decision, which had been requested under Article 35 EU by the Belgian *Cour d’Arbitrage*, on the validity of Framework Decision 2002/584. As the Advocate General Dámaso Ruiz-Jarabo Colomer stressed in his conclusions,<sup>143</sup> the referring Belgian court expressed doubts on the Framework Decision’s

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<sup>139</sup> M. Cappelletti, D. Golay, *supra* note 136, 333. See, for a detailed analysis of Article 234 procedure D. Wyatt, A. Dashwood, *European Community Law*, 1993, 142 ff., and T. Hartley, *The Foundations of European Community Law*, Oxford, 1998, 266 ff.

<sup>140</sup>In this regard, it should not be forgotten that the national Courts have followed the instructions from Luxembourg even when these instructions have been against their constitutional mandate. It is enough to recall here the *Simmenthal* case, Case 106/77, *Amministrazione delle finanze dello Stato v Simmenthal*, (1978) ECR 585, “The culmination of the principle of direct effect and supremacy, in which the ECJ held that the Italian Courts simply had to defy Italian constitutional rules to the *Corte costituzionale*”. See M. Claes, *The National Courts’ Mandate in the European Constitution*, Oxford, 2006, 4.

<sup>141</sup> J. Komareck, *supra* note 133.

<sup>142</sup>Court of Justice, 3-5-2007, c- 303/205, *Advocaten de Wererd VZW c. Leden Van de Ministerraad*, in [curia.eu.int](http://curia.eu.int)

<sup>143</sup>Conclusions in case C-303/05.

compatibility with the EU Treaty on both procedural and substantive grounds. The first of these questions related to the legal basis of the European Council's decision. In particular, the referring court was unsure that the Framework Decision was the appropriate instrument, holding that it should be annulled because the EAW should have been implemented, instead, through a Convention provided by Article 34 (2)(d) EU. In this case, in fact, according to the Belgian court, it would have gone beyond the limits of Article 34 (2)(b) EU, pursuant to which framework decisions are to be adopted only for the purpose of approximation of the laws and regulations of the Member States. Secondly, the Belgian court asked whether the innovations brought by the Framework Decision regarding the EAW, even when the facts in question do not constitute an offence under the law of the executing State, were compatible with the equality and legality principles in criminal proceedings in their role of general principle of European law as enshrined in Article 6 (2) EU.

More specifically, the alleged infringement of the principle of equality would have been due to the unjustified dispensation, within the list of 32 offences laid down in the Framework Decision, with the double criminality requirement, which is held instead for other crimes. Conversely, the principle of legality would have been breached owing to the Framework Decision's lack of clarity and accuracy in the classification of the offences. It was opinion of the Belgian court, in fact, that should Member States have to decide whether to execute an EAW, they would not be in the position to know whether the acts for which the requested person is being prosecuted, and for which a conviction has been handed down, actually fall within one of the categories outlined in the Framework Decision.

The Advocate General, in his conclusions, had no doubts about the high relevance of the preliminary request which should have been included, also in the light of the German, Polish, Cypriot and Czech rulings:

...in a far-reaching debate concerning the risk of incompatibility between the Constitutions of the Member States and European Union law. The ECJ must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation



of the Community legal system within parameters comparable to the ones which prevail in national systems.<sup>144</sup>

By a first reading the leads to much disappointment. The second reading does not really give a different impression. It was opined, indeed, that the ECJ had failed to engage fully in undertaking the role of “protagonist” assigned to it by the Advocate General and more harshly that “the Court’s decision may serve as an example of how judicial discourse should not be conducted, particularly when the issues at the stake involve decisions of national Constitutional Courts”.<sup>145</sup> The ECJ refused to declare the EAW invalid and, consequently, to reset the balance carried out by the Council through the adoption of the Framework Decision between the exigency of enhancing the cooperation in criminal matters and to respect the constitutional values of the Member States.

There are few doubts that the ECJ steered clear of protagonist leading roles, but given the inter-legal orders constitutional tension preceding the judgment, it could have been the right option that one followed if it would not have achieved that output through a succinct, not persuasive, cryptic and in some parts even apodictic reasoning in which the comparative argument it is an unjustified absent.

The ECJ settled the dispute over the appropriateness of the Framework Decision as a legal instrument to govern the EAW, stating that EU Treaty provisions may not be interpreted as granting the sole adoption of framework decisions falling within the scope of Article 31 (1)(e) EU.<sup>146</sup> It is true, the Court held, that the EAW could have been governed by a Convention as per Article 34 (2)(d) EU, but, at the same time, it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, where, as in this case, the conditions governing the adoption of such a measure are satisfied. The *carte blanche*, without further explanations, given

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<sup>144</sup> Conclusions in case C-303/05, par 8. Of the same opinion is Alonso Garcia in *Justicia constitucional y Unión Europea*, Madrid, 2005, expressly mentioned by AG in his conclusions.

<sup>145</sup> See D. Sarmiento, *European Union: The European Arrest Warrant and the quest for constitutional coherence*, in *International Journal of Constitutional Law*, 2008, 171 ff., 183.

<sup>146</sup> With regard to the progressive adoption of measures for the setting of offences and their punishments’ constituent elements in matters relating to organised crime, terrorism and drug trafficking.

to the Council in the choice of the appropriate legal basis to pursue the sensitive goal of enhancing the cooperation of the Member States in criminal matters does not seem the best strategic move in order to reassure the CEE national parliaments and judges about the European Union's commitment to the principle of legal certainty, so important in the constitutional structures of the post-communist legal orders. However, the more unsatisfactory and cryptic part of the reasoning is that related to contesting the alleged breach of fundamental rights by the EAW framework decision.

With regard to the alleged violation of the principle of legality, the ECJ operates an artificial translation of the field of the game from the European level to the national level, arguing that Article 2 of the Framework Decision, which abolishes the requirement of double criminality from the list of 32 offences, does not itself harmonise the criminal offences in question, in respect of their constituent elements or penalties to be attached:<sup>147</sup>

Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those offences and the penalties applicable are those which follow from the law of the issuing Member State. The Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. (para. 52).

This is a clever but risky means of sending back “the hot (constitutional) potato” to the national courts. It is clever because the fundamental issue of the respect by European legislation of the fundamental principle of legality of the criminal offences and penalties suddenly becomes, and almost magically so, a matter determined by the law of the issuing Member State, which must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU (para.

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<sup>147</sup> Under Article 2 (2) FD, the offences listed “if in the (issuing) Member State the punishment or the custodial sentence incurs a maximum of at least three years” provide for surrender pursuant to a EAW, regardless of the fact that the acts constitute an offence in both the issuing and the executing Member State.

53).<sup>148</sup> It is risky because this ECJ judicial attitude of “washing one’s hands of the problem”, without further explanation, does not exactly seem to be the right approach to foster the confidence of the national (especially of central and eastern European) courts, so essential in the enhancement of the European area of freedom, security and justice, in the fundamental rights commitment of the European Union.

In response to the third argument concerning the alleged violation to the principles of equality and non-discrimination of the EAW, owing to the unjustified differentiation between the offences listed under Article 2 (2) providing for the abolition of the double criminality requirement, on one hand, and all the other crimes where surrender is conditional on the executing Member State’s recognition of the criminal liability on which the Arrest Warrant is based on the other hand, the ECJ has played, in just one passage, that protagonist role the AG referred to in his conclusions. Such a “judicial activism regurgitation”, in the absence of a proper argumentative and persuasive basis and, in the light of the heavy inter-constitutional perturbation which anticipated the ECJ ruling, makes the interaction between the European dimension and the constitutional one on this delicate issue even more problematic. The ECJ, in fact, in an attempt to justify the rationale behind the abovementioned differentiation, made an express reference to the *mutual trust* between Member States as an indispensable tenet at the heart of any third pillar action – an argument openly questioned, as noted above, by the German Federal Constitutional Court – thus stating that according to the classification as per Article 2 (2):

The Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the *high degree of trust and solidarity* between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely

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<sup>148</sup> Accordingly, the European judges did not miss the opportunity to stress how the principles of legality and non-discrimination fall within the “supra-primary” parameters on the basis of which they ascertain the validity of an EC secondary law not only through the usual “transfiguration” of Member States’ constitutional principles into common constitutional practice first, and then EC law’s general principles, but also by the express acknowledgement of these principles, by articles 49, 20 and 21 of the Fundamental Rights’ Charter.

affecting public order and public safety justifies dispensing with the verification of double criminality (para. 57).

In other words, the different treatment of persons suspected of having committed offences featured in the list set out in Article 2(2) of the Framework Decision and those suspected of having committed offences other than those listed is justified, according to the apodictic, cryptic and unpersuasive reasoning of the ECJ, by a presumption of the existence of mutual trust in the Member States for the guarantees provided by their respective criminal law. Furthermore the said presumption was heavily contested less than two years earlier by the most prestigious Constitutional Court in Europe, the Federal Constitutional Court of Germany. There was not a single word, instead, which could have been read as an answer to the constitutional objections raised in relation to the EAW by many Constitutional Courts in Europe. As has been correctly argued, “the ECJ’s sparse reasoning in the decision contrasts with the firm and outspoken approach of the national Constitutional Courts”.<sup>149</sup>

The lack of persuasive strength in the reasoning and the lost talent for the original pedagogical intent, are not the only facets of the ECJ’s current style that hinder, in the current post-enlargement times, the communication between the European level and the domestic constitutional level. The EAW decision could in fact represent a (bad) model for speculation on the ECJ’s need eventually to expand its legal reasoning equipment to include a method until now too dangerously disregarded: the comparative one. It is well-known that the ECJ has always been sparing in direct reference to Member States’<sup>150</sup> comparative law, leaving this “delicate business” to the Advocate Generals’ conclusions.

Two reasons seem to support this choice. Firstly, in the early years, the ECJ devoted all its

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<sup>149</sup> D. Sarmiento, *supra* note 143, 182.

<sup>150</sup> P. Pescatore, *Le recours, dans la jurisprudence de la Cour de justice des Communautés européenne, à des normes déduites de la comparaison des droits des Etat membres*, in *Rev. In. Dr. Comp.*, 1980, 337; K. Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, *ICLQ*, 2003, 873, 887 ff.. Perhaps the more direct and broad reference to comparative law may possibly be found in one of the very first decisions of the ECJ. See Judgment of the Court of 12-7-1957, *Dineke Algeria and others v. Common Assembly of the European Coal and Steel Community*. - Joined cases 7/56, 3/57 to 7/57, in *ECR* 1957, 39, parr. 55-56.

argumentative efforts to stressing the peculiar features of the “new legal order”, distinguishing Community law from national and international law. The absence of reference to comparative law in the ECJ’s reasoning would be instrumental to that aim. Secondly, with the further enlargements and the risk of emphasising the reference to certain legal orders to the detriment of others, the ECJ very quickly understood that the strategic reference to the “common constitutional traditions” formula as a source of inspiration for European judges could have served to legitimise the European integration process in a more diplomatic way in the Member States’ eyes.

Now the question is whether, after the latest enlargements to the east of 2004 and 2007, the time has come for the ECJ to take seriously the comparative law argument in its legal reasoning. In the past, it has been possible to justify the exclusive reference to the common constitutional traditions under the “majoritarian activist approach” judicial strategy. Conversely, today, also in order to ensure a correspondence between the judicial argumentation level and the content-based level, in the light, on one hand, of the new value-based system increasingly committed to taking into consideration the single Member State’s constitutional identity and, on the other, of the always more heterogeneous national constitutional *humus*, the exclusive reference to the common constitutional tradition has seemingly become unsuitable. On the contrary, a more audacious recourse to the explicit comparative reference to Member States’ law would serve a twofold purpose: enhance the judicial acceptance of the European legislation within the CEE Member States thus providing a role-model to national Courts,<sup>151</sup> as well as fit the growing tendency towards an effective interaction between the European legal order and the national ones, the *file rouge* of the present paper.

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<sup>151</sup> M.J. Möllers, *The Role of Law in European Integration*, in *American Journal of Comparative Law*, 2000, 679 ff., 698.

## Concluding remarks

### a) First concluding remarks: models of conflict settlement between interacting legal systems and the idea of judicial dialogue

One aim of the paper has been the attempt to clarify a stereotype which unavoidably appears every time the judicial globalisation discourse<sup>152</sup> approaches the issue of the relationship between the European legal dimension and the national constitutional one.<sup>153</sup>

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<sup>152</sup> M. R. Ferrarese, *Magistratura e diritti: virtù passive e stato attivo*, in *Democrazia e diritto (special Issue Giudici e Diritti)*, 1998, 111 ff.; C. L'Heureux-Dube, *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, in *Harvard L. Rev.*, 2001, 2049 ff.; A.M. Slaughter, *A Global Community of Courts*, in *Harvard International Law Journal*, 2003, 191 ff.; Id., *A new Word Order*, Princeton, 2004; S. Choudry, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, in *Indiana Law Journal*, 1999, 821 ff.; A. McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, in *Oxford Journal of Legal Studies*, 2000, 499 ff.; A. Stone Sweet, *On Law, Politics and Judicialisation*, Oxford, 2002; Id., *Governing with judges: constitutional politics in Europe*, New York, 2000; E. Orucu, *Judicial comparativism in human rights cases*, London, 2003; F. Francioni, *International Law as a Common Language for national Courts*, in *Texas International Law Journal*, 2001, 587 ff.

<sup>153</sup> V. Skouris, *The position of the European Court of justice in the EU legal order and its relationship with national Constitutional Courts*, in *Zeitschrift für Öffentliches Recht*, 2005, 323 ff.; A. Stone Sweet, *Constitutional Dialogue in the European Community*, in J.H.H. Weiler, A. M. Slaughter, A. Stone Sweet (Eds.), *The European Court and national Courts-- doctrine and jurisprudence: Legal change in its social context*, Oxford, 2004, 304 ff.; G. Martinico, *Il dialogo fra le Corti nell'arena del Gattopardo: l'Europa fra novità costituzionale e nostalgie di comportamento*, in S. Staiano (Ed.), *Giurisprudenza costituzionale e principi fondamentali, alla ricerca del nucleo duro delle costituzioni*, Torino, 2006; F. Lichere, L. Potvin Solis e A. Rayanouard (Eds.), *Le dialogue entre les juges européens et nationaux: incantation ou réalité*, Bruxelles, 2004; G. Zagrebelsky, *Corti europee e corti nazionali*, in S.P. Panunzio (Ed.), *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo d'integrazione europea*, Milano 2002, 529 ff.; S.P. Panunzio (Ed.), *I diritti fondamentali e le Corti in Europa*, Napoli, 2005; P. Falzea, A. Spadaro e L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa*, Torino, 2003; V. Onida, *La tutela dei diritti davanti alla Costituzionale ed il Rapporto con le Corti sovranazionali*, in P. Bilancia, E. De Marco (eds.), *La tutela multilivello dei diritti, punti di crisi, problemi aperti e momenti di stabilizzazione*, Milano, 2004, 105 ff.; R. Alonso Garcia, *Il giudice nazionale come giudice europeo*, in *Quad. Cost.*, 2005, 111 ff.

In order to avoid the mistake of one who, looking at a finger pointing to the moon, focuses on the finger and not on the moon, it should be noted that the notion of judicial dialogue<sup>154</sup> is nothing but a signal which points out the presence of something else, often particularly problematic, behind it. It is then not a substantive goal in itself but rather a procedural tool to improve a status quo that is not completely satisfactory. In particular what seems to emerge from the analysis carried out in the paper is that, if there is something called European judicial dialogue, it very often occurs due to a (real or presumed) risk of constitutional collision<sup>155</sup> between the domestic and European level, especially with regard to the standard of protection of fundamental rights. It may also occur due to the willingness of national Constitutional Courts to make clear, by referral to the ECJ, what appears unclear in relation to the interpretation of EC law rather than (more poetically but less realistically) to aspire to the courts belonging to different, but interacting, constitutional jurisdictions to build a judicial “*Harmonia Caelestis*”.<sup>156</sup> Therefore, the involvement of the interconnecting entities (the Member States’ Constitutional Courts and the European Courts in Luxembourg and Strasbourg) in the European judicial dialogue is, generally, a reaction, and very rarely a spontaneous action, to either a situation of lack of legal clarity regarding the interpretation and the application in the domestic legal system

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<sup>154</sup> It is perhaps worth to make clear that the terms judicial dialogue and judicial communication are used here in a sense which is narrow in two main directions: firstly the reference is only to the judicial relations between interconnected “vertically” legal orders situated at different, not hierarchically based, levels (national, European and international); secondly the reference is only to the direct relationship between Courts and not to the broader situation of constitutional cross fertilisation and judicial borrowing between legal systems where the judges generally conduct a form of dialogue through mutual citations. See F. Jacobs, *Judicial dialogue and the cross fertilization of legal system: the European Court of Justice*, in *Texas Internal Law Journal*, 2003, 547 ff.; A. Rosas, *The European Court of justice in the context: forms and Pattern of judicial dialogue*, in *European Journal of Legal studies*, 2008.

<sup>155</sup> N. MacCormik, *Risking constitutional collision in Europe?*, in *Oxford Journal of Legal Studies*, 1998, 517 ss.

<sup>156</sup> See P. Hesterazy, *Harmonia Caelestis*, 2003. On the same line Cesare Pinelli, speaks about “Kingdom of Pangloss” and “Concordia Celeste”. See C. Pinelli, *La tutela multilivello dei diritti fondamentali. Una ricostruzione*, paper presented at the Conference “*La tutela degli interessi nel contesto europeo*”, 22-23 February 2008, University of Turin. Along the same lines, in a broader and philosophic based context, Jurgen Habermans and Jacques Derrida when they write that “the image of a peaceful co-operative Europe, open toward other cultures and capable of dialogue, floats like a mirage before all of us”. See J. Habermans and J. Derrida, *February 15 or what binds Europe together*, in *Frankfurterted Allemaine Zeitunn and Libération*, 31 may 2003.

of EC law or a collision (or to risk of it) between the European legal system and Member States constitutional systems.

Underlying the idea of a judicial dialogue, therefore, there is. The first is the willingness of one or more courts to clarify the scope of application of EC law or to resolve (although sometimes they aim to worsen it) an already existing conflict between different but interlocking legal orders, or to prevent one. The second is the tendency of the same courts not to passively accept that which originates from another judicial body legitimately charged with interpreting the provisions of a different, even if vertically interconnected, legal order<sup>157</sup>.

With specific reference to the case law related to the European Arrest Warrant saga, the relevant question is which models of settlement of conflict between legal systems emerge that are able to prevent the risk of constitutional conflicts. In the attempt to provide a conceptual conclusive framework of the different approaches of the German, Polish and Czech constitutional judges, the three decisions appear to be the expressions of the respective courts' different ways of tackling the delicate issue concerning the relationship between EU law and Member States' constitutional legal systems. With the ruling on the EAW, the German Federal Constitutional

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<sup>157</sup> It would be interesting to observe, at this juncture, in order to support this assumption that, in the "top ten" in the history of European judicial dialogue, often in the first positions rank, on the one hand, the judicial sagas in which the German, (BVerfGE 37, 271 *et sub.* ("Solange I"), 1974, BVerfGE 73, 339 ff ("Solange II"), 1986, BVerfGE 89, 155 ff ("Maastricht"), 1993), Italian Constitutional Court (8-6-1984, 170/1984, *Granital*) and Danish (Danish Supreme Court, 6-5-1998, *Carlsen*) constitutional and supreme Courts' (along with the more recent judgments of the French *Conseil Constitutionnel* - 10-6-2004, n. 2004-496 DC - and the Spanish *Tribunal Constitucional*, 13-12-2004, n. 1/2004) opposed the ECJ in relation to identifying the ultimate guardian of constitutional fundamental rights and, on the other hand, the conflicts (now less open than in the past) between the Luxembourg and the Strasbourg Courts. See on the last point C. Turner, *Human rights protection in the European Community: Resolving conflicts and overlap between the European Court of Justice and The European Court of Human Rights*, in *European Public Law*, 1999, 453 ff.; S. Douglas-Scott, *A tale of two Courts: Luxembourg, Strasbourg and Growing European Human Rights Acquis*, in *Common Market Law Review*, 2006, 626 ff. In a more provocative manner, if we had only witnessed the judicial deference of the Swedish and Finnish Supreme Courts, or the passive monistic international-based approach of the Netherlands Supreme Court (and of the Netherlands Constitution), we would have probably not have witnessed a real European judicial dialogue, but rather a boring monologue from the European Court of Justice (hereafter, "the ECJ").



Court proved that it advocates a certain “democratic statism”, as defined by Mattias Kumm. This is, to express it more clearly, “a normative conception of a political order establishing a link between three concepts: statehood, sovereignty and democratic self-government”.<sup>158</sup> Statehood and sovereignty<sup>159</sup> constitute, indeed, the *leitmotif* of the entire argument underlying the German judgment.

A decision based on such cornerstones could not but lead to the annulment of the national implementation of the EAW Framework Decision, as well as, more generally, it as has emerged from the decision’s analysis, to the refusal of any idea to “communitise” the European area which more than others reflects national statehood and sovereignty: the cooperation in criminal matters entailed by the Union’s third pillar. In such a state-oriented view of the European integration process, the Constitution represents the supreme *Grundnorm* conferring validity on any other, internal or external source of law, including on European law, namely through the *Solange* jurisprudence’s codification of Article 23 of the German Constitution.<sup>160</sup> The focus on the concept of *Staatvolk*, giving rise to *objective ethnic factors*<sup>161</sup> as legitimate grounds for the Constitution’s supremacy has, needless to say, further repercussions, beyond the relationship between Germany and the EU, on a horizontal dimension which connects the EU Member States. The most evident of these repercussions is that sense of poorly-hidden distrust, which permeates

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<sup>158</sup> M. Kumm, *Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German federal Constitutional Court and the European Court of Justice*, in *Common Market Law Review*, 1999, 351 ff., 366.

<sup>159</sup> For a recent contribution on the primary role that sovereignty plays within the European scenario which is characterized, more and more, by conflicts arising within legal orders, see A. Jakab, *Neutralizing the sovereignty question*, in *European Constitutional Law Review*, 2006, 375 ff..

<sup>160</sup> With regard to the FCC decision, J. Baquero Cruz is also very critical when he stresses how “the German Constitutional Court saw the case through the exclusive prism of German Constitution, misinterpreting the framework decision”. See J. Baquero Cruz, *The Legacy of the Maastricht Urteil decision and the Pluralist Movement*, EUI working paper, 2007/13.

<sup>161</sup> Judge Kirchhof, according to many, the “mind” behind the Maastricht decision of the Federal Constitutional Court in 1993, encompasses these factors within a common language, a shared culture, with common historical roots. See M. Kumm, *Who is the final arbiter of constitutionality in Europe? Three conceptions of the relationship between the German federal Constitutional Court and the European Court of Justice*, in *Common Market Law Review*, 1999, 351 ff., 367.

the entire judgment, of the other European legal systems' ability to secure an adequate level of protection of human rights. The sole guarantee left to the German citizen is the certainty of being, as far as possible, prosecuted, judged and eventually convicted by a domestic German Court.

On the opposite side, upon closer scrutiny, the Polish Constitutional Tribunal did exactly what the most extremist "pro-European activist" would ask for in case of an irreconcilable conflict between the Constitution and EU law. Does the Framework Decision clash with the constitutional norm of a Member State? Fine, we thus suggest amendment of the Constitution and, meanwhile, the annulled provision remains temporarily in force. EU law 1 – Constitutional law 0 and *game over*.

It is not by chance that a Polish scholar has observed how the request to the legislature to review the constitution and the temporal limitation of the effects of the decision proves that:

The Constitutional Tribunal in fact recognized the supremacy of EU law. [...] It thus accepted that the Constitution itself was no longer an absolute framework for control, if it hinders the correct implementation of EU law, it should be changed [...]. It seemed that in this judgment the Tribunal went further than the existing practice, it implicitly accepted the supremacy of EU law over constitutional norms.<sup>162</sup>

Upon closer analysis, the two approaches considered herein (the German and Polish ones), while so different in their identification of what is the supreme source of legal reference (in the former, the national constitution, in the latter, EU legislation), have something in common – the fact that both of them focus on identifying a supreme source of law. In other words, in both decisions, the

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<sup>162</sup> See K. Kowalik-Banczyk, *Should we polish it up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, in *German Law Journal*, 1360-1361. Along the same lines, Angelika Nuberger when writes as «the judgment might seem to suggest that the tribunal denies the supremacy of EU law and is adopting an euro-skeptical position, in fact, the opposite is true». - See A. Nußberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, in *International Journal of Constitutional Law*, 162 ff., 166.

game is played out on the field of the sources-of-law-based theory delimited by the identification of hierarchical, predetermined and unassailable relations among the norms involved. Correspondingly, such an idea of the relationship between EC law and national constitutional law is neither flexible nor open to comparisons. It is not flexible because it is determined by a clear-cut, “once and for all” definition of these relations, which does not permit derogations and forces upon the judicial interpreter the solution for the relevant conflict settlement. It is not open to comparisons because of the tendency to solve conflicts by referring solely to the domestic constitutional landscape. In this respect, it is worth noticing how both the Polish and German judgments: (1) did not recall relevant ECJ jurisprudence; (2) did not refer to decisions adopted by other European Constitutional Courts attempting to solve similar conflicts; and (3) never considered the possibility of a dialogue with the ECJ through a preliminary reference.<sup>163</sup>

Conversely, the three elements do converge in the Czech decision and represent specific and concurring clues to demonstrate that the Czech Constitutional Court opted to play the game of conflict settlement between domestic and EU law in a field characterised by an interpretation-based theory<sup>164</sup>, rather than a sources-of-law hierarchically based theory, as it seems has been favoured by their colleagues in Karlsruhe and Warsaw. The field chosen by the Czech

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<sup>163</sup> Actually, Warsaw’s Constitutional Tribunal would not have been in the position to use the preliminary procedure’s instrument provided for by Article 35 EU anyway, owing to the not particularly Euro-friendly attitude of the Kaczynski twins’ government, which, needless to say, had not carried out the (optional) jurisdiction attribution declaration to the ECJ, as per the same article of the Maastricht Treaty. The awaited change of strategy promised by the Civic Platform’s leader Donald Tusk, who won the last political elections in October, has yet to come.

<sup>164</sup> In Italy, one of the most extensive studies of this issue was done by Antonio Ruggeri. Amongst his numerous papers dealing with this subject, see at least the following, A. Ruggeri *Prospettive metodiche di ricostruzione del sistema delle fonti e Carte Internazionali dei diritti, tra teoria delle fonti e teoria dell’interpretazione*, in *Ragion Pratica*, 2002, at 63 ff.; Idem, *Tradizioni costituzionali comuni” e “controlimiti”, tra teoria delle fonti e teoria dell’interpretazione*, in *Diritto Pubblico Comparato ed Europeo*, 2003, 102 ff.. Such an axiologically-oriented view seems to share the reconstructive bases of MacCormick and of those supporting the constitutional pluralism rule in the framework of the relationship between the constitutional and supranational legal orders. See N. MacCormick, *Beyond the sovereign State*, in *Modern Law Review*, 1993, at 1; Idem, *Questioning Sovereignty, Law State and Nation in European Commonwealth*, Oxford, 1999. M. P. Maduro, *Contrapunctual Law: Europe’s Constitutional pluralism in Action*, 2003; N. Walker, *The idea of constitutionalism pluralism*, in *Modern Law Review*, 2002, 317 ff..

Constitutional Court is characterised, instead, from a substantive point of view, by the acceptance of the idea of constitutional pluralism as the paramount parameter for the settlement of constitutional conflicts, while, as to methodology and procedure, by a dialogic and communicative theory of inter-constitutional law is applied.

Firstly, from a substantive point of view, the Czech Constitutional Court, although never fully giving up focusing its reasoning on the classical concepts of sovereignty, limited transfer to the supranational system and the application of the “*controlimiti*” doctrine. The Court attempted to convey on an axiological basis, and without any vision of hierarchy between interacting legal systems, the ultimate rationale behind the EAW implementing national law on the one hand, and the constitutionally protected values on the other. To sum up, the Czech judges found that the fact that the Framework Decision does not always apply the double criminality requirement does not infringe the constitutional principle of legality in criminal law, as the absence of the latter rule does not affect the principle “with regard to the Member States of the EU, which have a sufficient level of values convergence and mutual confidence that they are all states having democratic regimes which adhere to the rule of law and are bound by the application to observe this principle”<sup>165</sup>.

The process of ascertaining conformity of national rules implementing EU norms to the constitution is not carried out through a strict application of the unassailable rule of EU law primacy over the whole domestic law, nor by assuming unconditioned supremacy of the constitution over any other source of law, but rather with the objective of identifying the best solution to fulfil “the ideals underlying legal practice in the European Union and its Member States”.<sup>166</sup>

With regard to the second, methodology-based, aspect, the Czech Constitutional Court fits its reasoning within a much broader normative framework than a literal interpretation of relevant constitutional parameters would have allowed. Through certain verbatim quotes of European and

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<sup>165</sup> M. Kumm, *The jurisprudence of Constitutional conflict: constitutional Supremacy in Europe before and After the Constitutional Treaty*, in the *European Law Journal*, 2005, 262 ff., 286.

<sup>166</sup> *Idem*

comparative constitutional jurisprudence, far from giving evidence of “constitutional arrogance”, the Czech Court has shown the willingness to be part of the project of *cooperative constitutionalism*, which seems to represent one way of avoiding constitutional conflicts between the European order and Member States’ constitutional systems. Certainly, it is not the easiest road to take, but it is most likely the only one having a chance to strike the right balance between different but interconnected legal systems, and to find consequently a “harmony in diversity”.<sup>167</sup>

The said approach can show, from a different point of view, the issue related to the reasons behind the judicial dialogue. If, in fact, as we have seen above, the substantive starting aims behind the judicial conversation between national and European courts are of a reactive and to some extent defensive nature (search for clarity and the willingness to prevent a constitutional collision), it should be added that in the prosecution of the some dialogue, this approach can achieve a further result, this time of a promotional and truly constitutional nature: the participation of the interconnecting unities in the judicial construction of a pluralistic European legal order. In this conceptual framework emerges the constitutive function of the courts in Europe: the possibility to create ex-post “rules of engagement” between the Member States and the EU legal order in the lack (or the misapplication) of the ex-ante fixed rules.

In particular it has emerged in the paper that one of the interpretative “rules of engagement” which seems to be preferred, especially after the enlargement, by the Member States’ Constitutional Courts in the attempts to avoid the risk of conflict between the domestic constitution and the European legal order, is the application of the doctrine of consistent interpretation of the relevant constitutional parameter. As an example, it is possible to recall the interpretative efforts of the Czech Constitutional Court judges to find amongst all the potential interpretations of the relevant constitutional norm (Art. 14 (4) of the Czech Charter of Constitutional Rights) the interpretation that did not clash with Community law principles and the contribution of EU secondary legislation.

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<sup>167</sup> See V. Onida, «*Armonia tra diversi*» e *problemi aperti. La giurisprudenza costituzionale sui rapporti tra ordinamento interno e comunitario*, in *Quaderni costituzionali*, 2002, 549.

A second consideration relates to the fact that, in the framework of the relationship between interacting legal systems, a growing distance is emerging between the (low) degree of openness towards EU law in the CEE Constitutions and the more generous tendency to accept the mechanisms of European law into domestic law which central and eastern European Constitutional Courts are currently showing.

In an attempt to be less obscure, let us apply this consideration to the EAW saga. Upon an initial, “static” reading of the relevant constitutional norms, it has often been pointed out in the paper how an ex-ante evaluation of the EAW Framework Decision provisions, as regards the binding obligation on the executing State, except for the cases strictly provided for, to surrender a national to the requesting Member State appeared more in line with the German Basic Law regulating extradition, than it appeared to be capable of complying with the corresponding provision of the Czech Fundamental Rights’ Charter.

More generally, while always maintaining the relevant constitutional norm’s perspective, it is evident that the “sovereignist” nature of the CEE national Constitutions, and specifically the Polish and Czech ones, left little room for their Constitutional Courts’ pro-European “enthusiasm”, when compared with the flexibility theoretically allowed the German Constitutional Court under the Basic Law’s relevant provisions, which was never noted for having a marked “sovereignty-focused” character (also in light of the historical context in which it took shape). Moreover, one should bear in mind that the “European clause” introduced at art. 23 of the Basic Law upon the ratification of the Maastricht Treaty in 1993, further acquired the already existing predisposition of the German Constitution to be influenced by the European and international law.

Notwithstanding the advantage of the German legal system as to the interpretation of the relevant constitutional parameters as compared with the CEE legal systems, and especially the Polish and Czech ones, the “leap” of the Warsaw and Brno Constitutional Courts, which has just been examined above, not only cancelled out this advantage, but it enabled Polish and Czech constitutional jurisprudence, despite a constitutional parameter which was rowing against, to accept the penetration of European law in domestic legal systems to a much greater extent than the German Federal Constitutional Court proved with its decision. In other words, this new

season of European constitutionalism seems to be marked by a sense of “exploration” in terms of new argumentative techniques and original judicial interaction between national and European courts, which follows novel “off-piste” routes from those outlined by the interpretative routes suggested by applicable constitutional parameters. To simplify even more, what is emerging seems to be a constantly growing bifurcation between the static reading of the constitutional clauses in the interconnecting legal systems and their dynamic judicial interpretation by Constitutional Courts.

One final remark should be made in relation to the domestic interconnecting judicial entities. If certain Constitutional Courts seem to take different views from their respective constitutional law-makers, it cannot be denied, however, that the same courts when considering the implementation stage of EU norms, very often ask the legislature enacting ordinary laws for greater cooperation, as well as the constitutional law-maker during the phase of the harmonisation of the domestic system with the new EU provisions.

Apart from the Czech Court, which managed to settle the dispute within its constitutional interpretation boundaries by (ultimately) resorting to the principle of consistent interpretation, the Polish and German judges reached out to the legislative approach, both at a constitutional (ex post) and ordinary (ex ante) level. The Polish judges expressly asked the constitutional legislator to amend, within an 18-month deadline, the constitutional principle for attaining full conformity with the Polish Constitution. The German judges instead formally addressed the ordinary legislator, thus “punishing” it – through the annulment of the national regulation for the adoption of a Framework Decision – for not using the discretion that the same legal provision allowed for, in order to safeguard the “domestic factor” connecting German citizens to their homeland.

That said, by observing these horizontal dynamics, which involve the judiciary and Member States’ lawmakers, what trend appears to be emerging? Perhaps the time when the European integration process could move forward solely based on national and Community courts’ activism (while, constitutional or ordinary, national and European legislators remained inactive) is over. The said courts, in fact, are perfectly aware of the difficulties of succeeding, as well as of the inconvenience of having the advancement of the European integration road map project

exclusively determined by judicial activism, and they increasingly ask for lawmakers' involvement in the coming season of cooperative constitutionalism in Europe.<sup>168</sup> However, for the legislator, being involved is not enough. As the EAW saga shows, Member States' Constitutional Courts, seem more and more concerned not only about the existence of a legislative intervention in the EC relevance area, but also about the *quomodo* of that intervention, which as was the case of Germany, cannot simply consist in a mere "telegraphic transmission" of a European legislation within the respective domestic legal system.

Second concluding remarks: enlargement and the effective rise of EU Human Rights policy.

Before ending our analysis, it is perhaps worth dwelling on possible further legal developments within the EU, apparently originated or consolidated by the recent enlargements to the east. Such development is entirely internal to the EU legal system and consists of the positive spill-over effect of the "conditionability" policy which played, as we saw above, a key role in the EU pre-accession negotiations with CEE candidate countries. Upon closer inspection, in fact, the European Union's constant and demanding monitoring of the CEE candidate countries' respect for human rights, under one of the Copenhagen criteria, has been nothing other than a de-facto exercise of the EU's own human rights policy, which internally has never been fully implemented nor legally legitimised. Besides the discrimination argument highlighted above, this lack of consistency between the European external and internal legal dimensions led to, as a positive effect, increased pressure on EU institutions to work further on the internal legal sphere to reduce the double standard, which earlier had been identified as the worst risk to a credible EU human rights policy.<sup>169</sup> Such internal pressure was also due to the fact that, as was noted,<sup>170</sup> "the imminence of the 2004 enlargement and the disparity between the level of scrutiny of external

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<sup>168</sup> This view is at the heart of the recent paper by A. Albi, *Supremacy of EC Law in the New Member States Bringing parliaments into the Equation of 'Co-operative Constitutionalism*, in *European Constitutional Law Review*, 2007, 25 ff.

<sup>169</sup> P. Alston, J. Weiler, *supra* note 17, 8-9.

<sup>170</sup> G. De Burca, *Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the EU*, in *Fordham International Law Journal*, 2003, 679.



and internal human rights policy as compared with existing Member States, had raised the additional question of whether the EU was suddenly to cease its pre-accession scrutiny and lose all interest in the policies of the candidate countries which had been so strictly monitored during the accession process, once they became full members”. On the other hand, applying the human rights scrutiny standard of the pre-accession period to new Member States alone would have represented a highly discriminatory EU internal policy, in sharp contrast with the principle of non-discrimination on the ground of nationality.

In other words,<sup>171</sup> as a reaction to the bifurcation described above, along with the need to uphold the principle of equality, with the advent of the new millennium, something has begun to change within the European Union, as regards legal practice and a new formal legal basis, to favour the development, long sought after by insiders, but as yet not achieved, of an EU institutional human rights policy. As has been argued, the first codification with regard to the respect for fundamental rights enshrined in Article 6 of the Maastricht Treaty, was already, at least partially, “a reaction by the Member States to the recent fall of the Communist regimes and to the likelihood of a wave of applications for membership from the countries of central and eastern Europe”.<sup>172</sup> If, however, the first codified reference to fundamental rights had something to do with the 2004 enlargement, the abovementioned EU internal reaction to the external human rights policy de-facto exercised over the CEE candidate countries, seems able to produce an exponential acceleration in this regard. It would, in fact, determine an effective promotional protection of fundamental rights within the EU, something quite different from the existing situation, where the respect of fundamental rights represents a legally-required condition (even if not always adequately enforceable) for the validity of EU legislation. Among the factors supporting the plausibility of such a development, one may recall the following, in chronological

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<sup>171</sup> Of the same opinion, even if motivated by different reasons, seems to be A. Von Bogdandy in his latest work, where he corrected his critics in his *The European Union as a Human Rights Organization?*, in *Common Market Law Review*, 2000, 130 ff, to the path drawn by P. Alston and J.H.H. Weiler supra note 17. See A. Von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*, Jean Monnet Working Paper 13/07, 25.

<sup>172</sup> G. De Burca, ‘*Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the EU*’, (2003-04) in *Fordham International Law Journal*, 679, 18 ff.

order:<sup>173</sup> (a) the growing attention to social rights' protection and the fight against discrimination, within the European Union<sup>174</sup>; (b) the possibility, as per Article 7 (as amended in both the Amsterdam Treaty and the Treaty of Nice) for the Commission to petition the Council to ascertain whether there is a serious risk of breaching the principles enshrined in Article 6(1); (c) the interpretation of the abovementioned revised provision, which was recently provided by the European Parliament. It recently declared in its annual report that: "It is the particular responsibility of the European Parliament, by virtue of the role conferred on it under the new Article 7(1) ... to ensure (in cooperation with the national parliaments and the parliaments of the applicant countries) that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter"<sup>175</sup>; (d) the launch of action programmes in areas, such as education, which had earlier been left to the exclusive competence of the Member States;<sup>176</sup> (e) the provision of Article 51 of the Charter of Fundamental Rights, according to which Member States and the European Union "respect the rights, observe the principles and *promote the application* thereof in accordance with their respective powers"; (f) along the same lines, the European Council's adoption, in November 2004, of the "Hague programme" to ensure security, freedom and justice within the European Union, the text of which provides: "incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the

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<sup>173</sup> According to Armin von Bogdandy, "there are some competences of the Union allowing for approaches to develop a harmonised diversity policy, especially Articles 7(1) and (2), 29, 34(2) TEU, Article 13(1) and (2) as well as Article 63 TEC." See A. Bogdandy, *supra* note 170, 34.

<sup>174</sup> It is enough to think, on the one hand, to the open method of coordination launched by the Lisbon Council of 2000 and to the growing relevance progressively acquired by the European Charter of Social Rights within the European Committee of Social Rights and, on the other hand, to the post-Amsterdam Article 13 EC and later the adoption of a) Directive 2000/43 ([2000]OJ L180/22), which prohibits discrimination on grounds of racial or ethnic origin, both within the labour market and in other important aspects of social life such as housing, healthcare and education, b) Directive 2000/78 ([2000] OJ L 303/16;) which prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation in employment and vocational training. Finally, a five-year Anti-Discrimination Action Programme was established with tasks such as research, awareness raising and building.

<sup>175</sup> Final Report on the Situation as Regards Fundamental Rights in the European Union, Eur. Parl. Doc. (A5-281/2003), P 4.

<sup>176</sup> In the aim of creating an "effective European legal area for the education", the Socrates and Leonardo da Vinci Program (with regard to professional formation) and the Copenhagen Declaration of 10-11-2000 and Bologna Process (with regard to higher education) constitute surely the main developing steps.

protection of human rights and fundamental freedoms<sup>177</sup> will place the Union, including its institutions, under a *legal obligation to ensure* that in all its areas of activity, fundamental rights are not only respected but also *actively promoted*.<sup>178</sup>; and (g) last but not least, the recent establishment of the European Agency of Fundamental Rights has contributed to help to consolidate and develop innovatively the trend outlined above.<sup>178</sup> The innovative development results in an assessment of the administrative law potential included in every effective (but until now, unevaluated at EU level) human rights policy, which may no longer be left to the creativity of the courts, but rather implemented (as originally advocated by Weiler and Alston<sup>179</sup> and more recently supported by Von Bogdandy's conversion<sup>180</sup>) by specialised bureaucracies in conjunction with non-governmental organisations.<sup>181</sup>

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<sup>177</sup> As it known, the Lisbon Treaty, despite its non-incorporation of the Charter, achieves substantially the same result providing at Article 6 that, "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

<sup>178</sup> The Agency was established by Council Regulation n. 168/2007 of 15-2-2007 and it has been working since 1 March 2007. See. O. De Schutter (Ed.), *Monitoring Fundamental Rights in the EU: the Contribution of the Fundamental Rights Agency*, Oxford, 2005.

<sup>179</sup> P. Alston, J.H.H. Weiler, *supra* 17.

<sup>180</sup> A. Von Bogdandy, *supra* note 171.

<sup>181</sup> See, for a positive anticipation of the above-mentioned trend, the establishment, of the network of fundamental rights experts which was created by the European Commission in response to a recommendation in the European Parliament's report on the state of fundamental rights in the European Union (2000) (2000/2231(INI)). Along the same lines, as recalled by Armin Von Bogdandy, Articles 8-10 of the Council Regulation establishing a European Agency for fundamental rights arranged for cooperation and the respective governmental and not governmental organisations, albeit only within the range of application of European Union law. See A. Von Bogdandy, *supra* note 171, 35.

In this sense, it would be plausible to imply, leaving a further analysis on the topic to a future occasion, that the 2004 enlargement has favoured the emergence of a new area of EU administrative law of fundamental rights.