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From Costa to Constitution:  
The Case Continues...

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# Summary

The doctrine of supremacy in Community law was established by the jurisprudence of the European Court of Justice and has evolved over time since the early case law of *Van Gend en Loos* and *Costa-ENEL*. The principle is an unwritten rule and a basic characteristic of Community law and has never been enshrined as a part of the European Treaties. It is evident that there will be clashes between the law established by the European Community and law in the Member States. In the event of conflict there must be a set of rules that specify what legal norm should take precedence over the other. Through its jurisprudence the ECJ has established the doctrine of supremacy that implies that Community law shall prevail over conflicting national provisions. The Member States are compelled to ensure the practical effectiveness of the principle of supremacy by upholding Community law. Since the doctrine of supremacy was a product of the Court and not the result of intergovernmental negotiations the reception and acceptance was mixed in national Constitutional Courts and overall was not met with unbridled enthusiasm. The doctrine has not been fully accepted by the Constitutional Courts in the Member States. Particularly, the standpoint of the ECJ has been challenged by the jurisprudence of the German Federal Constitutional Court, the *BverfG*.

Supremacy does not entail a subordination of all national law but merely implies that Community law shall take precedence over national law in an area where the Member States have conferred competence on the Community. Consequently, Community law cannot prevail over national law in a field where the Community is lacking competence. The scope of the boundaries of these competences is often open to discussion both among the courts and legal scholars. The issue of supremacy is therefore intertwined with the question of the legal limits of the Community, also known as the question of *Kompetenz-Kompetenz*. The ECJ has laid claim to *judicial Kompetenz-Kompetenz* that essentially means that it possesses the power to determine the unconstitutionality of Community law. The *BverfG* has staunchly opposed this claim and considers that Member States have not relinquished the right to challenge the constitutionality of Community provisions to the European Court of Justice. The issue has been the subject of intense debate among legal scholars. Schilling essentially believes that a Community that is based on limited attributed competences, and thus lacking *legislative Kompetenz-Kompetenz*, which means having the legal power to further extend its competences, cannot have a court that is empowered with *judicial Kompetenz-Kompetenz*. Consequently, Schilling argues that the Member States and their courts retain the right to declare Community acts unconstitutional on the grounds of *ultra vires*. This position has been met with differing opinions amongst academia. The most convincing argument has been laid forward by MacCormick who considers the European legal order to be a pluralistic framework and rejects a

hierarchical and subordinate relationship between the ECJ and national courts. MacCormick advocates interaction, dialogue and discourse rather than stalemate entrenchment.

The Convention on the Future of Europe has created a Draft Constitution for Europe by consensus. It will most likely be the natural reference point during the IGC. The Draft Constitution has included the primacy of EU law in Article I-10 thereby *de jure* establishing supremacy of Union law. Seemingly, the Draft Constitution does not settle the question of limits of Union competences and the issues of *legislative* and *judicial Kompetenz-Kompetenz*. It is now up to the European leaders to address these questions during IGC. Whatever the outcome the debate will undoubtedly continue.

# Abbreviations

|         |   |
|---------|---|
| ACP     | <i>African, Caribbean and Pacific States</i>                |
| BverfG  | <i>Bundesverfassungsgericht</i>                             |
| CFSP    | <i>Common Foreign Security Policy</i>                       |
| CMLR    | <i>Common Market Law Review</i>                             |
| EC      | <i>European Community</i>                                   |
| ECSC    | <i>European Coal and Steel Community</i>                    |
| ECJ     | <i>European Court of Justice</i>                            |
| EEC     | <i>European Economic Community</i>                          |
| EJIL    | <i>European Journal of International Law</i>                |
| ELJ     | <i>European Law Journal</i>                                 |
| EU      | <i>European Union</i>                                       |
| EURATOM | <i>European Atomic Energy Community</i>                     |
| IGC     | <i>Intergovernmental Conference</i>                         |
| ICJ     | <i>International Court of Justice</i>                       |
| PJCC    | <i>Police and Judicial Co-operation in Criminal Matters</i> |
| TEU     | <i>Treaty of the European Union</i>                         |

# 1 Introduction

## 1.1 Background

The principle of supremacy of Community law over national law in the Member States has never been enshrined in the Treaties. None of the three Treaties of Rome (ECSC, EURATOM and EEC) explicitly expressed that Community law should take precedence over national law nor was the principle endorsed by subsequent Treaty revisions. The Treaties are therefore said to be silent on the issue of the relationship between conflicting national law and Community law. Nonetheless, the principle of supremacy is an unwritten rule of Community law.<sup>1</sup> It has evolved through the jurisprudence of the ECJ. This has, on the whole, been an evolutionary rather than revolutionary process. It is evident that there will be clashes between Community law and national law. In the event of conflict there must be a set of rules that indicate what legal norm shall prevail over the other. The ECJ has created a system whereby the laws of the Community takes precedence over conflicting laws in the Member States. Consequently, the national courts are obliged to ensure the practical effectiveness of supremacy by upholding Community law. Since the doctrine of supremacy is a result of the case law of the ECJ and not the product of intergovernmental negotiations, national courts have had to deal with the principle of supremacy. Naturally, the reception of the doctrine of supremacy in the Member States has been varied.

Supremacy of Community law is not absolute *per se*. The European Community and today, the European Union are founded on the competences that have been attributed by the Member States through the Treaties. Community law cannot take precedence over national law in a field where the Community lacks competence. The scope of these conferred competences is open to differing interpretations.<sup>2</sup> Therefore, it is essential to address the question that stems from supremacy, i.e. who shall have the ultimate authority to determine the spheres of competence of the Community? Have the Member States relinquished this authority to the Community?

The Convention of the Future of Europe has, by consensus, established a Draft Constitution for the European Union. It remains to be seen what effect a ratified Constitution will have on supremacy and the issue of competences. The relationship between the ECJ and the national courts has

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<sup>1</sup> Andrew Oppenheimer, *The Relationship Between European Community Law and National Law: The Cases*, (1994) p. 3.

<sup>2</sup> Paul Craig, *The ECJ, National Courts and the Supremacy of Community Law*, p. 2 in Ingolf Pernice and Roberto Miccú (eds.), *The European Constitution in the Making*, (2003). Available at <http://www.ecln.net/rome2002/craig.pdf>. Last visited 8 January 2004, 5.20pm.



been an ongoing conversation and this discourse will undoubtedly persist even after an eventual ratification.

## 1.2 Aim and Delimitations

One of the primary aims of the thesis is to examine the evolution of the doctrine of supremacy by scrutinising the jurisprudence of the ECJ. Since the case law of the Court is only one side of supremacy, a study of the reception of the doctrine by the Constitutional Courts in the Member States is called for. What has been the reception of the doctrine in the Member States? Have they endorsed the standpoint held by the ECJ? It is merely impossible to give an exhaustible account of the standpoint of the national courts and the ECJ and that is not the purpose of the thesis. The aim is to give a clear overview of respective positions.

The issue of supremacy is also intertwined with the question of the legal competences of the Community. The thesis will address the question of whether the Community has the legal power to define its limits and whether the Court has the competence to determine if Community acts are *ultra vires* or is this right bestowed on the Member States and their courts?

From this background the Draft Constitution will be examined. How does the Constitution address the questions of supremacy and the matter of competences in the Union?

## 1.3 Method and Materials

The main emphasis of the thesis will be on the evolutionary process of the Community and national standpoints on supremacy and competences. The chapters that tackle the case law of the ECJ and the national courts, and the proposed Articles of the Draft Constitution are generally descriptive in character whereas the parts on competences attempts to be more analytical.

The thesis will examine the jurisprudence of the Court and some of the Member States. In Chapter 3, regarding the acceptance of the doctrine of supremacy in the Member States, I have chosen to look at four countries: Belgium, France, Germany and the UK. Belgium and France are *monist* countries whereas the latter are *dualist*. The UK is the only Member that joined after the Court's *Costa* ruling whereas the other three were among the original founders. Regarding the issue of competences I have primarily looked at the position held by the German Constitutional Court whose *Maastricht* ruling initially sparked the legal debate on the limits of Community competences.

The final chapter attempts to examine the Draft Constitution. I am aware that the wording of the Articles in the Draft Constitution may change and be revised several times before a final version of the Constitution is agreed

upon or even stricken altogether. However, I still believe it is important to examine the implications of these articles since it may shed light on the very essence of the questions of supremacy and competences.

The views of legal scholars, as expressed in both books and articles, will be given in order to add another dimension to the debate. Furthermore, relevant Treaty Articles will be examined.

## **1.4 Terminology**

The thesis is limited to Community law. The supremacy doctrine is not applicable to the Second and Third Pillars of the EC. The thesis will therefore refer to Community or EC law. This will change if the Draft Constitution is ratified. Accordingly, the Draft Constitution speaks of EU law.

The Court of the European Communities is referred to as the Court or ECJ whereas courts in the Member States will be referred to as courts or their original name.

## **1.5 Outline**

Chapter 2 will examine the evolution of the doctrine of supremacy as established by the ECJ.

Chapter 3 will look at the reception and acceptance of the doctrine by the Constitutional Courts in some Member States.

Chapter 4 considers the issue of the legal limits of the Community and the ECJ. Moreover, the chapter examines the *Foto-Frost* case and famous German *Maastricht* case on the limits of Community competences as well as some other relevant national cases.

Chapter 5 looks at the implications of the Draft Constitution established by the Convention on the Future of Europe in matters relating to supremacy of EU law and Union competences.

# 2 The Evolution of the Doctrine of Supremacy as established by the ECJ

The doctrine of supremacy in European Community law has evolved through the jurisprudence of the European Court of Justice in a vast number of cases. This chapter aims to examine these cases in detail in a chronological order.

## 2.1 *Van Gend en Loos*

### 2.1.1 The Doctrine of Direct Effect

The case of *Van Gend en Loos* from 1963 is seen as a great milestone in European law. It concerned the Dutch company Van Gend en Loos<sup>3</sup> that imported a chemical product from Germany into the Netherlands. The company claimed that the Dutch Customs and Excise had charged the company with increased customs duties, which was contrary to Article 25 (former Article 12) of the EEC Treaty. Article 25 bans the introduction of new custom duties and the increase of existing duties on the market. Van Gend en Loos therefore brought an action against the Dutch customs authorities before the *Tarief commissie* in Amsterdam, which is the highest court with regards to taxes in the Netherlands. The Dutch Court referred the matter to the European Court of Justice for a preliminary ruling. The question put to the ECJ concerned if Article 25 of the EEC Treaty had direct application within the territory of a Member State. In other words, the *Tarief commissie* asked if individuals in a Member State of the Community could lay claim to individual rights by invoking article 25 EEC Treaty before national courts. Consequently, the *Tarief commissie* asked the Court if the increased customs duties were contrary to Article 12.

The Court stated that the Treaty not only imposes obligations on the individuals of the Member States but confer upon them rights, which is up to the national courts to protect. Article 25 was said to produce *direct effects*. By doing so the Court made clear that the EEC Treaty could create individual rights. It held that Community law could, under certain conditions, create rights for individuals of the Member States that were to be protected by national courts. The Court of Justice justified its position by referring to the “*general scheme and spirit*” of the Treaty. The doctrine of direct effect is essential since Community law is primarily applied by national courts and authorities. If individuals would be deprived of the right

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<sup>3</sup> Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

to invoke Community law before these courts and authorities then they would no be able to invoke their individual rights. The justifications for attributing *direct effect* to Articles in the Treaty were the necessity to ensure the effectiveness and uniform application of Community in the Member States and legal integration in the Community.

Not all Community law and Treaty articles can produce *direct effect*. The ECJ has since then specified a set of rules when Treaty articles and directives can produce *direct effect*. If a provision is to have *direct effect* it must fulfil a number of criteria such as being “*clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure.*”<sup>4</sup>

The doctrine of *direct effect* was a product of the Court of Justice and is nowhere to be found in the Treaty. The German, Belgian and Dutch governments put forward their views to the ECJ on the matter. The Belgian government argued that the matter at hand concerned the question if the Treaty, i.e. international law, should take precedence over Dutch national law. Consequently, the Belgian government believed that the Dutch constitutional court had exclusive jurisdiction to settle this question. Furthermore, the government of the Netherlands held that the EEC Treaty was an ordinary international treaty. It also believed that the doctrine of direct effect, created by the ECJ and not the Member States, contradicted the intentions of the original members of the Community.

### **2.1.2 A New Legal Order**

The Court of Justice stated that the objective of the EEC Treaty was to create a common market and held that the Treaty is “*more than an agreement which merely creates mutual obligations and between the contracting states*” and referred to the Preamble of the Treaty that mentions both governments and peoples. Moreover, the Court affirmed that the European Economic Community (EEC) “*constituted a new legal order of international law*” and held that the Member States had limited their sovereign rights, albeit within limited fields and the subjects of this new legal order was not only the Member States but also their individuals. This has been considered as claim to sovereignty on behalf of the Community.<sup>5</sup> *Van Gend en Loos* is seen as bold and pioneering case in European law.

*Van Gend en Loos* did not settle the issue when national law of the Member States is in conflict with Community law. It has been claimed that the doctrine of supremacy followed logically from the *Van Gend en Loos* ruling.<sup>6</sup> In *Costa-ENEL* the ECJ would remedy the situation when a national rule clashes with EC law. We will see that Community law must

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<sup>4</sup> Paul Craig and Grainne De Búrca, *EU Law, Text, Cases and Material*, (2003), p. 185.

<sup>5</sup> *Ibid.* p. 277.

<sup>6</sup> Alter, Karen *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, (2001), p. 18.

take precedence over national law. If this would not be the case the doctrine of direct effect would have little meaning and the Member States would be able to set aside their Treaty obligations by creating new national provisions. As a result, that would make individual rights in the Treaty lose their meaning.

## **2.2 Costa-ENEL**

### **2.2.1 Establishing the Doctrine of Supremacy**

The case of *Costa-ENEL*<sup>7</sup> created the supremacy doctrine of European law. We will observe that the ECJ ruled that Community law is hierarchically supreme to the law of the Member States. In case of a conflict between national law and EC law, the latter will prevail and have supremacy over national law of the Member States. The supremacy issue was not affirmed in the *Van Gend en Loos* case since the referring Dutch Court had not posed the question to the ECJ for its preliminary ruling.

The facts of the case are the following. Costa was an Italian lawyer that refused to pay an electricity bill issued by the Italian electricity company ENEL. Costa had shares in the ENEL electricity company. Costa claimed that he did not have to pay the electricity bill because the Italian nationalisation law of the electricity industry was contrary to Community provisions. The Italian nationalisation law had been passed after the Italian ratification of the EC Treaty. Italian constitutional law applied the rule of *lex posterior derogat priori* i.e. the last passed law was to take precedence over an earlier passed law. The Italian court referred the matter to the ECJ for a preliminary ruling.

### **2.2.2 Reasoning of the Court**

It is worthwhile to give a full citation of the Court's remarks on the nature of the European Community and the creation of the doctrine of supremacy:

*“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*

*The integration into the laws of the each Member State provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord*

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<sup>7</sup> Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

*precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.”*

The Court reiterated the position made in *Van Gend en Loos* that the EEC Treaty has created its own legal system, a unique community that goes further than any other international agreement. This new legal system is an integrated part of the legal systems in the Member States and the national courts are obliged to uphold and apply Community law. Furthermore, the Court reiterated the standpoint made in *Van Gend en Loos* that the Member States have limited their sovereign rights, *albeit in limited fields* and created a legal order that binds both individuals and the Member States themselves.

The Court goes on to affirm that it would be impossible to grant primacy to a national rule that has been passed later than the Community measure. The Member States have accepted the Community legal system and must thereby abide by its rules. The Court goes on to state that the execution of Community law cannot vary from one Member State to another since it would impair the effectiveness of Community law and be contrary to a coherent legal system. That would jeopardise the achievement of the objectives of Article 10 EC (former Article 5) that states that the Member States must ensure fulfilment of their Treaty obligations. Furthermore it would lead to discrimination on the basis of nationality.

Furthermore, The ECJ argues that without supremacy Treaty obligations would not become “*unconditional*” but rather “*merely contingent*” if the Member States could set aside Community law by adopting subsequent national legislation.

The Court also declared that the precedence of Community law was declared in Article 249 EC (former Article 189). The Article confirms that a regulation shall be binding and directly applicable in the Member States. The Court considered that such a provision would be meaningless if a Member State could choose not to follow it on the ground of national law.

### **2.2.3 Views on the *Costa* ruling**

The magnitude of *Costa* cannot be overstated. Wiklund even considers the case providing the very foundation for the mere existence of the European Communities and the European Union.<sup>8</sup> In order for the objectives of the Treaty to be attained there is need for uniform application of Community law in the Member States. Weatherill states that the ECJ made an emphasis on the overall objectives of the Treaty when claiming that the Member States had limited their sovereign rights by establishing the Community. Furthermore, by creating a Community and institutions, the Member States have conferred upon them lawmaking powers. Weatherill argues that the

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<sup>8</sup> Ola Wiklund, *Advokaten Costa och suveräniteten*, in *Rättsfall att minnas: Till Jan Hellner den 28 oktober 1997*, (1997), p.153.

Costa ruling is an example of when the Treaty is silent on a specific matter but gives enough indications in the text as to what the answer to that question is.<sup>9</sup> Thus, he believes that the argumentation of the Court in the Costa ruling was valid. Craig and De Búrca state that, as in the *Van Gend en Loos case*, the Court avoids any reference to the constitutions of the Member States to distinguish whether the transfer of sovereignty to the Community was in accordance with the constitutions of the Member States. The standpoint made by the Court that the Member States have permanently limited their powers and has transferred sovereignty to the institutions of the Community highlighted the Court's conception of the Community as a whole.<sup>10</sup> The supremacy of Community law over conflicting national law is required for the successful function of the Community. Without a principle of supremacy the full effectiveness of Community law in the Member States would not be ensured.

Craig and De Búrca argue that the Court made a claim to its own interpretation of the general aims and spirit of the Treaty and thereby interpreted the intentions of the Member States when creating the Treaty.<sup>11</sup> Supremacy was justified by the spirit and aims of the Treaty. As observed by Craig and De Búrca, the Court claimed that it would be “*impossible*” for national law to take precedence over Community law. Craig and De Búrca mean that the “*spirit*” of the Treaty necessitates that the Member States respect the uniform application of EC law in order to give it full effect. Furthermore the Member States have accepted Community law on the ground of “reciprocity”. Craig and De Búrca go on to examine the “*aims*” of the Treaty, which he calls are integration and co-operation, which would be seriously undermined if a Member State could abstain from abiding Community law. Bernitz and Kjellgren have held the main reason for the uniformity of the application of EC law to be the argument that Community law cannot deviate from one Member State to another.<sup>12</sup> Bernitz and Kjellgren agree with the Court and states that that would jeopardise the purpose of the Treaty and lead to discrimination on the basis of nationality.

### **2.2.3.1 Supremacy and Article 249 EC**

Bernitz and Kjellgren go on state that the direct applicability of regulations as specified in Article 249 EC would loose its meaning if a Member State could take unilateral legislation measures. Article 249 EC states that a regulation shall have general application and shall be binding in its entirety and is directly applicable in the Member States. Craig and De Búrca believe that this argument by the Court is the only textual evidence for supremacy found in the EC Treaty but considers it weak. To support this argument they point out that Article 249 EC only makes a reference to Community

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<sup>9</sup> Stephen Weatherill and Paul Beaumont, *EU Law: the essential guide to the legal workings of the European Union*, (1999), p. 194.

<sup>10</sup> Craig and De Búrca, p. 279.

<sup>11</sup> *Ibid.* p. 278.

<sup>12</sup> Ulf Bernitz and Anders Kjellgren, *Europarättens grunder* (2002) p. 82.

regulations whereas the Court sought to create a general doctrine of supremacy of all binding Community law. In especially, the Court wished to establish supremacy of a Treaty article over conflicting national law. According to Craig and De Búrca direct applicability makes reference to the way in which Community law becomes part of the legal orders of the Member States without the requiring any national implementation procedure. However, Article 249 EC does not settle the relationship between a provision in the Treaty and of national law.

### 2.2.3.2 Teleological reasoning of the Court

Neither the doctrine of direct effect nor the doctrine of supremacy in European law was enshrined in the Treaty. The Treaty was silent on these issues. As a result of this, the Court has been criticised for its ruling by going farther than barely interpretation of the Treaty and going into a sphere of policy-making. Policy-making is seen, by most scholars, as inevitable but the main difficulty regards how far policy-making is appropriate.<sup>13</sup> Rasmussen believes that the Court made a policy choice in the Costa-ruling and pushed its gap-filling functions beyond the proper scope of judicial involvement.<sup>14</sup> However, as Weatherill has observed<sup>15</sup>, Rasmussen has since then accepted that no attempt should be made to change the Costa-ruling on supremacy.<sup>16</sup> Weatherill believes that when the Court came to the conclusion of supremacy it used “*purposive and contextual*” interpretation of the Treaty.<sup>17</sup>

Craig and De Búrca consider the reasoning of the Court to be bold and teleological rather than textual<sup>18</sup>. What this means is that the Court has viewed the spirit of the Treaty and aims of the Community rather than finding support for its position in Treaty articles. They believe there are little support for the bold assertion of the originality of the Community legal order and the supremacy doctrine in the text of the Treaty. The Costa ruling therefore was an audacious step by stating that the Member States have limited their sovereign rights to the Community and transferred power to its institutions.

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<sup>13</sup> Weatherill and Beaumont, p. 193.

<sup>14</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: a comparative study in judicial policymaking*, (1986) p. 28.

<sup>15</sup> Weatherill and Beaumont, p.194.

<sup>16</sup> Hjalte Rasmussen, *European Court of Justice*, (1998) p. 368.

<sup>17</sup> Weatherill and Beaumont, p. 193.

<sup>18</sup> Craig and De Búrca, p 279.



## 2.3 *Internationale Handelsgesellschaft*

### 2.3.1 Full Supremacy of EC law

In *Costa* the matter at hand regarded a clash between a provision of ordinary national law and a provision in the Treaty. However, the case of *Internationale Handelsgesellschaft*<sup>19</sup> concerned the question whether EC law should have supremacy over the constitutions of the Member States and especially if Community law takes primacy over the fundamental rights provisions in their Constitutions. The case is said to mark the classic claim of full supremacy of Community law.<sup>20</sup> The Court held that Community law should take precedence over all provisions in national law whatever its legal status even the Member States' constitutions.

The administrative court in Frankfurt-Am-Main, the *Verwaltungsgerichtshof*, referred a question to the ECJ for a preliminary ruling. The question concerned whether the ECJ considered a European regulation to be in violation of basic rights of individuals. According to the Community regulation firms that wished to have an export licence had to give an economic deposit. These export licences were in fact free. However, if the firm failed to import the goods then the firm would lose its deposit. The matter at hand regarded a firm that had lost its deposit. The German administrative court had in fact refused to accept the validity of the Community regulation, considering it contrary to German basic rights protection. The German court sought to get a preliminary ruling whereby the ECJ would state that Community law could not violate German basic law protections.<sup>21</sup> The ECJ thought it essential to put an end to the legal uncertainty.

The German administrative court did not get the answer it had wished for. The ECJ held that the law stemming from the Treaties is an independent source of law and that it cannot be overridden by rules of national law "*however framed*". Otherwise, it would be deprived of its character of Community law which, would lead to the Community itself be called into question. Consequently, the "*validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure*"<sup>22</sup>. This means that no matter what the nature and status of the legal provision of the Member State the directly applicable Community provision shall take precedence. Therefore, fundamental rights that are part of a constitution or the constitutional structure of a Member State cannot affect the validity of

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<sup>19</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>20</sup> Bruno De Witte, *Direct Effect, Supremacy and the Nature of the Legal Order* in Paul Craig and Grainne De Búrca (eds.), *The Evolution of EU Law*, (1999) p. 191.

<sup>21</sup> Alter, p 89.

<sup>22</sup> Paragraph 3 of the case.

Community law. Furthermore, the ruling made it clear that Community law has precedence even over national legislation that was adopted after the relevant Community provision.

The Court justified its ruling by referring to the fact that the unity and efficacy of EC legislation would be seriously harmed if a national court would be permitted to review its validity on the basis of specific provisions in the Member States' legal system.<sup>23</sup>

We will later see that the case of *Internationale Handelsgesellschaft* caused a rift between the European Court of Justice and the German Constitutional Court. The following case before the Court of Justice further developed the supremacy doctrine and clarified the practical implications of the supremacy doctrine.

## **2.4 Simmenthal II**

### **2.4.1 Obligation to “Disapply” for National Courts**

The cases of *Costa* and *Internationale Handelsgesellschaft* both clarified many questions relating to the relationship between law of the Member States and Community law. *Costa* laid the foundations of the supremacy doctrine by stating that Community law shall take precedence over national law. In *Internationale Handelsgesellschaft* the Court stated that Community law has primacy over all national law whatever the legal status of the national law. Thus, fundamental constitutional provisions in a national constitution cannot override EC law. The national court of the Member States must therefore enforce Community law even if there is a clash with their own national provisions. The *Simmenthal II*<sup>24</sup> ruling laid clear the practical implications of the supremacy doctrine.

The facts of the case are the following. Simmenthal was an importer of beef from France to Italy and was ordered to pay a fee for a veterinary inspection according to an Italian law. Simmenthal brought an action before the Italian *Pretore* court. The company considered the veterinary fee to be contrary to the EC Treaty and two Community regulations. The Italian court referred the matter to the ECJ for a preliminary ruling. The ECJ ruled that the fee was incompatible with EC law. As a result of this the court ordered that the fee should be repaid to the Simmenthal Company. However, the Italian tax authorities did not agree. They claimed that the Italian law should take precedence over the relevant Community provisions since the Italian law had been passed subsequent to the Community regulations. Furthermore,

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<sup>23</sup> The position held by the Court in *Internationale Handelsgesellschaft* has been reiterated in later cases e.g. Case C-473/93, *Commission v. Luxembourg* [1996] ECR I-3207, paragraph 38. Case C-224/97, *Ciola v. Land Vorarlberg* [1999] ECR I-2517, paragraph 24, Case C-446/98, *Fazenda Pública v. Câmara* [2000] ECR I-11435, paragraph 36-38.

<sup>24</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

they believed that the *Pretore* court could not refuse to apply Italian law that was in conflict with Community law. The tax authorities argued that it was up to the Italian Constitutional Court to declare the Italian law to be contrary to Community law. Until this had been done the tax authorities believed that Italian law should be applied. Consequently, the *Pretore* court referred the question to the ECJ once more for a preliminary ruling. The question put to the Court concerned the question whether Italian law should be disregarded even before the Italian constitutional court had been consulted on the matter.

The Court of Justice ruled that provisions in the EC Treaty and directly applicable measures of the institutions not only by their entry into force automatically make inapplicable any conflicting national law but also preclude the valid adoption of new national legislative measures that are incompatible with EC law. The Court therefore made clear that a national court does not have to wait for its Constitutional Court to set aside national law in order for the national court to apply conflicting Community law. The national court must apply community law. In other words the national court, whatever the hierarchical status of that court, must *disapply* its national law in favour of the conflicting Community law. The national court must *disapply* national law even if it has been passed after the Community law. However, the ECJ did not compel the national court to invalidate the national law but merely asked the national court not to apply the national provision.<sup>25</sup>

#### **2.4.1.1 “Organs of the State”**

The duty to *disapply* conflicting national law has been extended to apply to administrative authorities in the Member States as well as their national courts. The Court in the case of *Fratelli Costanzo*<sup>26</sup> made this clear. The case concerned a construction company that questioned the procedure in the Municipality of Milan to grant building contracts in preparation for the 1990 football World Cup held in Italy. Costanzo believed that the Municipality had violated a Council directive. The Administrative Court in Milan therefore asked the ECJ, in a preliminary ruling, if the directive bound the Municipal Authority in Milan.

The Court replied that obligations arising from the provisions of a directive are binding upon all authorities of the Member States. The interpretation of authority is broad and the ECJ included “*all organs of the administration, including decentralised authorities such as municipalities*”.<sup>27</sup> Naturally, it would be inconsistent if national courts were obliged to apply Community provisions but the national authorities were exempted from this obligation. It is however interesting to note that administrative authorities must apply

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<sup>25</sup> The ECJ has later reiterated its standpoint. E.g. Case 249/85, *Albako v Balm* [1987] ECR 2345, 2360 and Case C-184/89 *Nimz v. City of Hamburg* [1991] ECR I-297, 321. See Weatherill, p.435 and De Witte, p.190.

<sup>26</sup> Case 103/88, *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839.

<sup>27</sup> *Ibid.*

directly applicable EC law but are deprived of the possibility to ask the Court for a preliminary ruling according to Article 234 EC. Moreover, in the quite recent *Larsy*<sup>28</sup> ruling the Court of Justice held that even a national social insurance institution should *disapply* conflicting national law.

#### **2.4.1.2 Non-application not Invalidation of conflicting national law**

De Witte argues that even though the result of the *Simmenthal II* ruling is close to invalidation of national law, he considers that there is a clear distinction between *invalidity* and *non-application*.<sup>29</sup> Craig and De Búrca, like De Witte, believe that the doctrine of supremacy does not oblige national courts in the Member States to rule on the validity of a rule of conflicting national law nor to annul it.<sup>30</sup> The duty for the national court is merely to refuse application of the national provision that clashes with Community law.

The Court of Justice in the *IN.CO.GE 90*<sup>31</sup> case dealt with the difference between *disapplication* and *nullification* of national law. The ECJ held that it does not require national law that is in conflict with EC law to be declared void. The European Commission argued that a national provision that clashes with Community law should be considered invalid rather than simply inapplicable. The Commission wanted the conflicting national provision to be seen as non-existent. However, the Court of Justice did not agree with the Commission. The Court reiterated its stance on *disapplication* of national law established by the *Simmenthal II* case and rejected the claim that conflicting national law should be declared “*non-existent*”.<sup>32</sup> Weatherill argues that the Court, yet again, used the principle of effectiveness to justify its position.<sup>33</sup> However, the national provision that is in conflict with Community law may be continually applied in areas that are not covered by the Community norm. Moreover, it may apply again if the Community norm ceases to exist.<sup>34</sup>

It has been debated whether the *Simmenthal II* judgement did in fact extend the jurisdiction of the national courts. The Court was adamant not to force the national courts to invalidate the national law. It merely asked the courts not to apply conflicting national law. But, did this upset the jurisdictional structure in the national courts of the Member States? Craig and De Búrca believe that the ruling did indeed change or increase the jurisdiction of

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<sup>28</sup> Case C-118/00, *Larsy v INASTI* [2001] ECR I-5063, paragraphs 52-53.

<sup>29</sup> De Witte, p. 190.

<sup>30</sup> Craig and De Búrca, p. 283.

<sup>31</sup> Case C-10-22/97, *Ministero delle Finanze v IN.CO.GE'90 Srl* [1998] ECR I-6307, paragraph 21.

<sup>32</sup> *Ibid.*

<sup>33</sup> Weatherill and Beaumont, p. 436.

<sup>34</sup> The ECJ has later affirmed the principle established by *Simmenthal II* in Case C-197/96, *Commission v France*, [1997] ECR I-1489. See De Witte, p.190.

national courts.<sup>35</sup> Craig and De Búrca state that this became readily apparent in the *Factortame* ruling, which, is considered by many legal scholars as the most far reaching case made by the Court of Justice in the matter of supremacy.<sup>36</sup>

## 2.5 *Factortame*

### 2.5.1 A New Branch<sup>37</sup> of Supremacy?

As stated earlier the *Factortame*<sup>38</sup> judgement is seen as the most far-reaching case made by the Court with regards to the relationship between Community law and the law in the Member States. The Court held that a national court cannot deprive individuals of interim relief in a matter that concerns Community law if the only reason for not granting interim relief is based on a rule in national law. In that case the national court is obliged to set aside national law.

The case regarded Spanish fishermen who claimed that the registration procedure in the UK under the Merchant Shipping Act 1988 was discriminatory and non-compatible with Community law. The United Kingdom had arguably created a difficult registration procedure in order to avoid what is called “*quota-hopping*”. The British believed that ships that lacked genuine links to the UK were plundering British fishing quotas. The House of Lords held that, according to an old common-law rule, it had no jurisdiction to grant interim relief against the Crown, i.e. British government. The Spanish fishermen considered this to be incompatible with Community law. They argued that if they were not granted interim relief, i.e. to have the right to continue fishing, during the time the matter was pending before the English court they would suffer irreparable damage. Hence, the House of Lords referred the matter to the Court of Justice for a preliminary ruling. The questions put to the Court regarded the question if a national court could *disapply* a national rule that prohibits the national court from granting interim relief. According to British common law, a court does not hold the power to suspend an act of Parliament; it is beyond its jurisdiction.

The ECJ found in favour of the Spanish fishermen. It ruled that the *effectiveness* of EC law would be impaired if a rule of national law could hinder a national court from granting interim relief in a matter regarding Community law. The Court stated that national courts must set aside its national law if it has a case before it concerning Community law and the only reason for not granting interim relief is a rule of national law.

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<sup>35</sup> Craig and De Búrca, p. 282.

<sup>36</sup> Paul Craig, *supra* note no. 2, p. 5.

<sup>37</sup> De Witte, p. 191 uses the term “*branch*”.

<sup>38</sup> Case C-213/89, *R.v. Secretary of State for Transport, ex parte Factortame Ltd. And Others* [1990] ECR I-2433.

In this case the provision was completely clear under English law whereas the right to interim relief was unclear according to Community law. The ECJ reaffirmed its position in *Simmenthal II* and stated that directly applicable provisions of Community law make any conflicting provision of national law inapplicable. However, the duty to *disapply* is only a minimum requirement.<sup>39</sup> The British court must *disapply* the Act of Parliament since it was inconsistent with the EC Treaty. Craig and De Búrca state that *Factortame* had a considerable impact in the UK where parliamentary sovereignty is a fundamental constitutional principle.<sup>40</sup> They argue that the case was founded on the same way of thinking as *Simmenthal II* but simply spelt out the practical implications for the national legal orders.

### 2.5.1.1 A potential conflict with Community Law

The interesting issue here is the fact that the Court had to consider whether the House of Lords should *disapply* English law in favour of Community law that had not yet been established. Consequently, the question may be interpreted as concerning a potential conflict between Community legislation and that of the Member States. Brown and Kennedy argue that *Factortame* illustrates that effective remedies should be granted by national courts in order to safeguard even *putative* Community rights.<sup>41</sup> The case is said to establish the principle that national courts are obliged to ensure provisional protection of putative Community rights.<sup>42</sup>

### 2.5.1.2 Procedural Supremacy?

There are many different views on the impact of *Factortame*. De Witte states that the Court in *Factortame* invited the national courts to assume new judicial powers and create new law instead of merely choosing between two norms.<sup>43</sup> The position of the Court highlights its wish that national courts would do more than merely set aside its conflicting national laws. De Witte believes that *Factortame* clarifies the Court's aim to harmonise legal remedies in the Community legal order. He goes on to pose the question whether *Factortame* is a new branch of the doctrine of supremacy that one may call "*procedural*" or "*structural*". De Witte does not give an answer to this and claims that European law in this matter is in a state of fluctuation.

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<sup>39</sup> See *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR 409.

<sup>40</sup> Craig and De Búrca, p 283.

<sup>41</sup> L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, (2000) p. 317.

<sup>42</sup> *Ibid.* p. 364.

<sup>43</sup> De Witte, p 191.

## 2.6 Is the Treaty Silent on Supremacy?

The Treaty is said to be silent on the relationship between national law and the law of the European Community. We have seen that the doctrine of supremacy is a creation of the Court of Justice. But is there no reference to the primacy of Community law in the Treaty? Craig and De Búrca have briefly looked at some articles in the Treaty that may be said relate to the supremacy doctrine.<sup>44</sup> The objective here is not to delve into these articles but simply to give a short account of where this issue is touched upon.

Article 249 states that a regulation shall have general application and shall be binding in its entirety and is directly applicable in the Member States. Regulations are the only legal measures in the EC Treaty that are given direct application in the Member States. We have seen that the case of *Van Gend en Loos* established the principle of direct effect. Directives can have direct effect in certain circumstances. The Court in *Van Gend en Loos* referred to the “*spirit, general scheme, and the wording of the Treaty*”. The Court held that the Treaty itself presupposed the basis for direct effect to be inherent in the EC Treaty. The principles of direct effect and supremacy have been the result of theological rather than textual reasoning of the Court. The Court has interpreted the will and intentions of the Original Six when creating the Community legal order. The European Court of Justice is the motor of legal integration and its vast constitutional case law have undoubtedly further deepened the legal relationship of the Community.

The Court somewhat used textual reasoning in the *Costa* case. As stated earlier Craig and De Búrca have criticised this standpoint made by the Court and argued that Article 249 only makes a reference to Community regulations whereas the Court sought to create a general doctrine of supremacy of all binding Community law. Craig and De Búrca therefore reject that Article 249 should be seen as textual evidence for the doctrine and believes that the Article does not settle the relationship between a provision in the Treaty and of national law.<sup>45</sup>

## 2.7 Superiority of the ECJ

The doctrine of supremacy has developed through the jurisprudence of the Court of Justice since the early cases of *Van Gend en Loos* and *Costa*. One may pose the question why the national courts must accept the jurisprudence established by the Court. The most obvious answer according

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<sup>44</sup> Craig and De Búrca, p 283.

<sup>45</sup> An example where the Treaty regards the issue of the relationship between Community law and the law in the Member States is found in Article 307. The Article exempts the Member States from the duty to ensure precedence of EC law in certain areas. Furthermore, Article 297 gives the Member States the possibility to take certain measures under highly specific circumstances such as serious internal disturbances or war. Craig and De Búrca conclude that these articles are of limited scope whereas the doctrine of supremacy is broad and general.

to De Witte is namely, that the cases before the Court have come from answers to preliminary rulings that are binding to referring courts and also indirectly binding for national courts that are faced with similar legal questions.<sup>46</sup>

The ECJ held in the *CILFIT*<sup>47</sup> case that a matter that has been ruled upon by the Court could be relied on even if the facts of the case are not completely identical. If the Court has resolved the crucial point of law in a prior case then it can lay as a foundation for a later case before a national court. Craig and De Búrca see this as an encouragement to national courts to look to earlier rulings made by the ECJ to settle the case in accordance with Community law. This makes prior judgements of the Court to be *precedents* for national courts.<sup>48</sup> One may argue that the case positioned the Court of Justice in a hierarchically superior position to the national courts. Craig and De Búrca argue that this structure of precedents puts the Court on a higher wrung in a vertical legal system. The ECJ lays down the legally authoritative interpretation, which will then be followed by the national courts in their judgements. One must also bear in mind that Article 10 EC entails an obligation for the national courts to follow the interpretation of Community law established by the ECJ in the spirit of loyalty.

### **2.7.1 Possibility to Sidestep the Court**

The *CILFIT* ruling has somewhat clarified the issue of preliminary rulings. Alter remarks that national courts decide of their own prerogative when to refer cases to the ECJ for a preliminary ruling.<sup>49</sup> This means that the ECJ needs to be invited to issue an interpretation of European law. This is a procedural issue between the ECJ and the Member States. Mayer argues that there is always potential risk of disobedience by the national courts.<sup>50</sup> The courts themselves decide how to formulate the legal question put to the Court and can also decide if they wish to accept the interpretation of Community law made by the Court or not. If the national courts decide not follow the rulings of the ECJ they are in breach of Articles 226 and 227. The Member State can then be held responsible for a breach of Community obligations. Furthermore, a national court that willingly ignores referring a matter before it concerning a contentious question of Community law violates Article 234.3.<sup>51</sup> Oppenheimer claims that supremacy, established through the jurisprudence of the Court, was often affirmed only in a

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<sup>46</sup> De Witte, p 194.

<sup>47</sup> Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

<sup>48</sup> Craig and De Búrca, p. 440.

<sup>49</sup> Alter, p. 55.

<sup>50</sup> Franz Mayer, *The European Constitution and the Courts: Adjudicating European constitutional law in a multilevel system*, Jean Monnet Working Paper No 9/03, p. 21. <http://www.jeanmonnetprogram.org/papers/03/030901-03.pdf>. Last visited 7 January 2004 20.23pm.

<sup>51</sup> *Ibid.* p. 4.



theoretical context and expressed that real conflicts between national and Community law seldom arise.<sup>52</sup>

Alter argues that the ECJ is highly dependent on the national courts to accept its jurisprudence. This dependence significantly creates limits for the jurisprudence of the Court. The following chapter will examine to what extent the doctrine of supremacy has been accepted by the national courts in the Member States.

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<sup>52</sup> Oppenheimer, p. 5.

# 3 Acceptance of Supremacy by the Constitutional Courts of the Member States.

## 3.1 Acceptance: The Other Side of the Coin

The doctrine established by the European Court of Justice is only one side of supremacy. This chapter aims to examine the attitude of the Constitutional Courts of the Member States and how they have received the doctrine of supremacy. Have they fully accepted supremacy or is the relationship between the ECJ and the national Constitutional Courts tenuous and strained? Supremacy has been more contentious and problematic in some Member States than others. The aim here is also to study the main areas of convergence and divergence and to shed light on the general outlines by examining a few landmark cases before the constitutional courts in Belgium, Germany, France and the United Kingdom. Have the national courts accepted the ECJ's notion on the relationship between national law and Community law since the Court's concept of supremacy envisage a subordination of all national law to Community law?<sup>53</sup>

In 1995, the Court of Justice submitted a report to the Inter-Governmental Conference on the revision of the Treaty of the European Union. The Court held that “*the success of Community law in embedding itself so thoroughly in the legal life of the Member States as a uniform body of rules upon which individuals may rely on their national courts.*”<sup>54</sup> De Witte points out that the Court of Justice thereby acknowledges the vital factor of effective application of supremacy of Community law to be the attitude of the national courts and authorities.<sup>55</sup> They are a force to be reckoned with. This chapter will therefore examine the position of the national courts.

Slaughter, Stone Sweet and Weiler believe that the national courts have played a part as important as the ECJ in the process of establishing the doctrine of supremacy.<sup>56</sup> They call the relationship an “*ongoing conversation*” between the ECJ and the national courts. Of course, this conversation cannot be one-sided. Oppenheimer believes that in most Member States the case law of their own constitutional courts had a greater

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<sup>53</sup> Neil MacCormick, *Questioning Sovereignty*, (1999) pp.110 and 115.

<sup>54</sup> *Report of the Court of Justice on Certain Aspects of the Application of the Treaty of the European Union*, May 1995, 2.

[http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj\\_rep.html](http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html). Last visited 8 January, 2004 5.25pm.

<sup>55</sup> De Witte, p. 193.

<sup>56</sup> Anne-Marie Slaughter, Alec Stone Sweet and Joseph H.H. Weiler (eds.), *The European Courts and National Courts: Doctrine and Jurisprudence*, (1997) prologue p. V.

importance for the acceptance of the doctrine of supremacy then the vast jurisprudence of the ECJ.<sup>57</sup> It is therefore called for to scrutinise the case law of the Member States. The large benefit of examining the acceptance of the doctrine by the national courts is that their views on supremacy make the issue more complex and diverse, and add another dimension to the debate. This debate is bi-dimensional in character with the ECJ on one side and the Member States on the other. The aim here is not to delve too deeply into the constitutional structures of the Member States but to give a general view of their position on the relationship between their domestic law and Community law.

### 3.2 Monism and Dualism

The *monism-dualism* divide concerns essentially international public law. The aim here is merely to shed some light on how international treaties become part of the legal order of the ratifying states, the signatories. The EC Treaty is an international treaty albeit in a new form. The way in which the EC Treaty becomes a part of the state's legal system depends on its constitutional system.

According to the principle of *monism* an international treaty becomes part of the legal order of the signatory through ratification of the treaty or general constitutional provisions. This means that no explicit implementation into the legal order is required. The country directly applies the international law. Thus, neither incorporation nor transformation is required. A monist state may therefore receive provisions in an international treaty automatically into the municipal legal order. A *dualist* approach, on the other hand, means that the international treaty becomes a part of the legal order of the state once it is implemented in domestic law.<sup>58</sup>

The pioneering cases of *Van Gend en Loos* and *Costa* held that the European Community constituted a new legal order of international law. This new legal system is an integral part of the legal orders of the Member States. Article 249 EC requires no implementation measures for regulations to have direct applicability in the Member States. Similarly, *Costa* established the supremacy of Treaty provisions over conflicting national law. No incorporation or transformation measures into the legal systems of the Member States are therefore required. These cases illustrate the *monist* standpoint of the ECJ.

Belgium and France are said to embrace a *monist* view whereas the UK and Germany are *dualist* countries. There are stark contrasts with regards to acceptance of supremacy between the Member States. We will see that a

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<sup>57</sup> Oppenheimer, p. 4.

<sup>58</sup> This is done through transformation or incorporation. Incorporation means that the treaty is implemented in domestic law and is considered to be domestic law. Transformation means that the laws of the state made in accordance with the provisions in the international treaty.

*monist* country, Belgium, has accepted supremacy whereas the doctrine has met with harsh resistance in the *dualist* Germany.

### 3.2.1.1 Supremacy in International law

In international law the concept of primacy is a recognised principle. The International Court of Justice (ICJ) has stated, “*It is a generally accepted principle of international law that in the relationship between powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty*”.<sup>59</sup> This principle is relevant when discussing the relationship between states. De Witte argues that this shows that Community law prevails over the national laws in the Member States on an international level and that Article 249 EC Treaty is an expression of this. De Witte goes on to argue that *Costa* concerns the “*internal primacy of EC law*”.<sup>60</sup> What this means is that national courts have the duty to enforce Community law even if they clash with provisions in national law. Hence, when there is a conflict between law of the Member States and EC law the latter is to prevail even over a more recent provision in national law.

## 3.3 A Contractarian Approach

We have seen that the doctrine of supremacy had no real textual foundation in the Treaty. The six founding members may well have regarded the principle of supremacy as more than they bargained for. Consequently, the members that joined the Community after the early case of *Costa* could not have considered the principle of supremacy as an “*unexpected surprise*” when signing the adhering Treaties.<sup>61</sup> De Witte argues that by joining the Community and signing the *acquis communautaire* the new members voluntarily agreed to supremacy.<sup>62</sup> He considers supremacy to be part of the contract signed by the adhering Member States and constitute constitutional preparations for membership. For example, it would be absurd for the new Member States to join in 2004 to question the principle of supremacy since it, undoubtedly, is an inherent part of the Community legal order.

## 3.4 Belgium: Loyal Application of Supremacy?

The Belgian view on supremacy is said to correspond most truly to the *monist* position of the ECJ.<sup>63</sup> This was made evident in the *Le Ski*<sup>64</sup> case from 1971. The case before the *Cour de Cassation*, the Belgian Court of Appeal, concerned a conflict between Article 25 EC (former Article 12) and

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<sup>59</sup> *Greek and Bulgarian Communities*, PCIJ, Series B, No.17, 32.

<sup>60</sup> De Witte, p 183.

<sup>61</sup> *Ibid.* p. 196.

<sup>62</sup> *Ibid.* p. 196.

<sup>63</sup> Craig, *supra* note no. 2, p. 2.

<sup>64</sup> *Fromagerie Franco-Suisse Le Ski v Etat Belge* [1972] CLMR 330.

a Belgian law that imposed a tax on imported milk products from the European Community. Since Article 25 EC clearly prohibits new customs duties the Belgian law clashed with an article in the EC Treaty. The *Cour de Cassation* held that the provisions in the Treaty prevailed over domestic legislation.

There are no provisions in the Belgian constitution that settles the relationship between domestic and international law.<sup>65</sup> The *Procureur Général*, Ganshof van der Meersch, argued that the court therefore should take the opportunity to rule on the matter. He argued that international law was fundamentally superior to national law and believed the primacy of international law to be inherent in the very nature of international law.<sup>66</sup> This is a *monist* standpoint. Consequently, he argued that in the event of a clash, between Belgian law and Community law, the EC Treaty should take precedence. He justified the primacy of Community law by pointing to *Costa*. By signing the Treaties the Member States had agreed to limit their sovereign powers, in areas determined by the EC Treaty, by transferring rights and obligations to the Community legal system. Thus, the Member States must ensure that Community law is enforced. Secondly, the *Procureur Général* argued that the law established by the Community was binding on all national courts and must prevail over conflicting domestic law. The Community had created a new legal system. By doing so, he reiterated the stance made by the ECJ in the *Costa* ruling.

Craig argues that the Cour was highly influenced by the reasoning of the *Procureur Général*.<sup>67</sup> The *Procureur Général* iterated a *monist* view of the relationship between the domestic Belgian law and international law and stated that a norm cannot be valid and invalid at the same time. Craig argues that the reasoning of the Belgian *Cour de Cassation* illustrate a very *communautaire* standpoint that greatly correspond to that of the ECJ.

### 3.5 Strong German Opposition

In Germany the Federal Constitutional Court, the *Bundesverfassungsgericht*, had accepted the supremacy of Community law over “*basic*” German law as early as 1971 as a result of its *Lütticke*<sup>68</sup> ruling. The court held that a lower German court had wrongfully given priority to a national tax provision over Article 95 EC. The *BverfG* held that German courts are obligated to follow Community law in the event of a clash with German “*basic*” law thereby accepting supremacy of Community law over subsequent German law. However, it has been harder for the German

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<sup>65</sup> Craig, *supra* note no.2, p2 and Hervé Bribosia, *Report on Belgium*, in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler, (eds.), *The European Courts & National Court Doctrine and Jurisprudence*, 1997 pp. 4 and 21-22.

<sup>66</sup> *Le Ski*, paragraph 345.

<sup>67</sup> Craig, *supra* note no. 2, p. 2.

<sup>68</sup> Case No. 2 BvR 225/69, *Alfons Lütticke GmbH*.

Constitutional Court to accept Community supremacy over conflicting provisions in the German Constitution.

### 3.5.1 *Solange I*

There have been many battles over the relationship between German constitutional law and Community law. Article 24 of the German Constitution permits transfer of legislative power to international organisations, for example the European Community, but legislation passed by the international organisation must respect the German constitution. What happens if power transferred to the Community under Article 24 clashes with provisions in the German Constitution? This issue was addressed in the case of *Internationale Handelsgesellschaft mbH*.<sup>69</sup> The case was initially before the ECJ who gave a preliminary ruling. In response to the preliminary ruling the German Administrative Court held that Community law (the system of deposits) contravened basic rights expressed in the German constitution. Thus, the Administrative Court seized the German Constitutional Court, the *BverfG*, to rule on the issue.<sup>70</sup> This famous ruling is known as the *Solange I*.

Essentially, the court proclaimed a judicial authority to protect fundamental rights that are guaranteed in the German Constitution. In the event of a clash between Community provisions and basic rights in the German Constitution the national constitutional provisions would take precedence. The court thereby stipulated national constitutional limits to the doctrine of supremacy.<sup>71</sup> Furthermore, the *BverfG* held that as long as Community law does not clash with German constitutional law there, evidently, is no problem. Consequently, the *BverfG* believed that both courts, i.e. the ECJ and the German Constitutional Court, has an obligation to try to reach consensus between the two legal orders when establishing their respective jurisprudence in an order of co-operation. It would not be a qualified assumption to say that the ECJ would not agree to create its case law in agreement with constitutional courts. The striking claim made by the *BverfG* relates to the statement that the German Constitutional Court rejects unconditional supremacy of Community law. The *BverfG* stated that *as long as*<sup>72</sup> fundamental rights in the Community had not progressed as far as the rights expressed in the German Constitution, German lower courts could refer the matter to the *BverfG* to settle the issue. Therefore, in an eventual clash between fundamental rights guaranteed in the German Constitution and Community law, the provisions in the German Constitution would prevail. Moreover, the *BverfG* would not abandon its jurisdiction and retains

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<sup>69</sup> *Internationale Handelsgesellschaft, mbH. V. Einfuhr und- Vorratstelle für Getreide und Futtermittel (Solange I)* [1974] 2 CMLR 540. For facts and background to the case see Chapter 3.3.

<sup>70</sup> The *BverfG* is the highest court in Germany and its cases are binding to all other German courts, authorities, and states.

<sup>71</sup> Mayer, p. 12.

<sup>72</sup> "Solange" in German.

the right to determine and qualify the limits of supremacy of Community over conflicting German constitutional law. Alter claims that the ECJ stepped into the *BverfG*'s domain and its ruling of *Internationale Handelsgesellschaft* went too far when establishing the supremacy of Community law over the constitutions in the Member States.<sup>73</sup>

The *BverfG* held that basic rights for individuals can be guaranteed on many levels. Therefore, it cannot be harmful if these rights can be respected even farther according to national law. However, it isn't really that simple. The position of the German court illustrated its willingness to set aside Community law and thereby rejecting supremacy in specific cases that concern fundamental rights. This means that the Constitutional Court denies the ECJ exclusive competence to interpret Community law. One may question whether the case threatened the Community legal order. Kokott argues that *Solange I* foreshadow the stance later made by the *BverfG* in the famous *Maastricht* ruling on the boundaries of the legal competences of the Community (*kompetenz-kompetenz*) that will be examined in depth in Chapter 4.<sup>74</sup> The case illustrated the pompous aspiration of the *BverfG* to place itself somewhat above the ECJ. To use an Orwellian expression; are some courts more equal than others? One may also argue if the German view on fundamental rights should be seen as superior to the rest of the Community.

Reich argues that the case illustrates the German suspicious belief that the ECJ is encroaching on its constitutional law.<sup>75</sup> The *BverfG* criticised the Community for lacking codification of fundamental rights. The German Constitutional Court therefore believes it has not relinquished the power to invalidate both its own constitutional law, as well secondary Community law, if it considers it to be contrary to provisions in the German Constitution. The ironic paradox here is that the Constitutional Court did not consider there being a constitutional violation.<sup>76</sup>

### **3.5.2 *Solange II*: Victory for the ECJ?**

The aftermath of *Solange I* was mostly plagued by criticism of the *BverfG*'s ruling. The position of the *BverfG* on supremacy partially changed with the

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<sup>73</sup> Alter, p. 91.

<sup>74</sup> Julianne Kokott, *Report on Germany*, in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler, (eds.), *The European Courts & National Court Doctrine and Jurisprudence*, 1997 p. 84.

<sup>75</sup> Norbert Reich, *Judge-made 'Europe à la Carte': some remarks on Recent Conflicts between European and German Constitutional law provoked by the Banana Litigation*, *European Journal of International Law*, Vol. 7, 1996, No.1. See Part II. <http://www.ejil.org/journal/Vol7/No1/art6.html>. Last visited 8 January 2004, 3.24pm.

<sup>76</sup> It is worthwhile to note the dissenting opinion in the *BverfG*. The minority argued that the standpoint taken by the majority in the *BverfG* represented a blatant breach of the jurisprudence of the ECJ. They considered the ruling to be manifestly illegal since the *BverfG* reserves itself the power to constitutionally control Community law. See Mayer, p. 12-13.

ruling of *Solange II*.<sup>77</sup> The facts of the case were fairly similar to *Solange I*. The question regarded violation of basic rights guaranteed in the German Constitution.

In *Solange II* the *BverfG* held that fundamental rights was adequately protected by the ECJ. It stated that *as long as* the Community, and especially the ECJ, generally ensure an effective protection of fundamental rights the *BverfG* would no longer exercise jurisdiction to decide on the applicability of Community law. The *BverfG* did not renounce its jurisdiction but merely stated that it will not exercise its jurisdiction as long as the ECJ protects fundamental rights. The German Constitutional Court held that it would not review secondary Community law *as long as* there is equivalent protection of basic right in Community law as is guaranteed in the German Constitution. The court clarified its arguments in the later *Maastricht* ruling that will be examined under Chapter 4. The Court acknowledged that the ECJ had in fact established its own system of protecting basic rights and regarded that these rights were adequately protected. The German Constitutional Court would refrain from exercising jurisdiction and refer matters regarding the constitutionality of Community law to the ECJ. Thus, lower German courts should not seize the *BverfG* to review the constitutionality of Community provisions. Although, by using the phrase “*so long as*”, the *BverfG* reserved itself the last word in the case of a clash with the ECJ.

Kokott sees the case as the “*highest point of harmony and convergence*” between the ECJ and the *BverfG*.<sup>78</sup> The case was well received among academia and most legal scholars view *Solange II* a victory for the ECJ.<sup>79</sup> Reich, however, considers that many legal scholars overlooked the fact that the Constitutional Court did not entirely give up its jurisdiction to review the constitutionality of Community law.<sup>80</sup> Reich believes the court to rely on a principle of equivalence. If the matter regarding fundamental rights is unclear the *BverfG* may well exercise jurisdiction. Moreover, Reich concludes that the *Solange II* judgement does not imply a German embrace of the doctrine of supreme as established by the ECJ. This is clearly illustrated in the court’s *Maastricht* ruling from 1993 whereby the court held that it still possessed jurisdiction to invalidate Community acts that violated fundamental rights. Furthermore, the German Constitutional Court stated that it has the power to invalidate Community law on the grounds that the Community has exceeded its competences. The *Maastricht* rulings and the *Banana Market* case, relating to the question of the competences of the Community will be examined in Chapter 4.

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<sup>77</sup> *Wünsche Handelsgesellschaft*, Decision of 22 Oct. 1986, (*Solange II*) [1987] 3 CMLR 225.

<sup>78</sup> Kokott, pp. 85 and 90.

<sup>79</sup> Alter, p. 96.

<sup>80</sup> Reich, part II.



## 3.6 French Reluctance towards Supremacy

The French *Cour de Cassation* accepted the supremacy of Community law in its ruling *Cafés Vabre*<sup>81</sup> from 1975. However, supremacy was not fully accepted by the French *Conseil d'Etat* until 1989.<sup>82</sup> France is said to be one of the Members that have had greatest difficulty in accepting the full supremacy of Community law.

### 3.6.1 *The Cafés Vabre Case*

The Cafés Vabre Company imported soluble coffee from another Member State of the Community. According to the French Customs Code a tax had to be paid on each consignment of coffee. By doing so, the French law subjected the goods to a greater tax than soluble coffee manufactured in France. The tax on imported coffee therefore exceeded similar taxes imposed on French products. The Cafés Vabre Company therefore claimed that the French Customs Code violated Article 90 of the EC Treaty that prohibits taxes that have the equivalent effect of custom duties. The *Procureur Général* Adolphe Touffait agreed and claimed that the Treaty should take precedence over a conflicting article in the French Customs Code. He argued that this could be achieved by applying article 55 of the French Constitution but claimed that by choosing this option the rank of Community law would be dependent on the French constitution. The *Procureur Général* argued that this method would be the French “*constitution and on it alone that depends the ranking of the Community law*”.<sup>83</sup>

The *Procureur Général* opted for another solution and urged the *Cour* to accord primacy of Community law on the basis of the very nature of the Community legal order. He used the reasoning of *Costa*. The Member States had permanently limited their sovereign rights by transferring power to the Community institutions. Therefore, an act that was adopted unilaterally by a Member State and subsequent to the EC Treaty could not take precedence over Community law. To support his viewpoint the *Procureur Général* stressed that the ECJ had confirmed supremacy over domestic law in the

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<sup>81</sup> Decision of 24 May, 1975, *Administration des Douanes v. Société ‘Cafés Jacques Vabre’ et SARL Weigel et Cie.* [1975] 2 CMLR 336.

<sup>82</sup> The French constitutional system is somewhat complicated. There are three Supreme Courts, the *Cour de Cassation*, the *Conseil Constitutionnel* and the *Conseil d'Etat*. They have all distinct jurisdiction and different roles in the French constitutional structure. The *Cour Constitutionnel* is the only court that has the power of judicial review. But, individuals cannot seize the *Cour Constitutionnel* to challenge French legal compatibility with Community law. The *Conseil d'Etat*, on the other hand, is the only court where individuals can challenge if French laws are compatible with Community law. The *Cour de Cassation* is kept from being a fundamental force due to its limit jurisdiction. It has jurisdiction in civil and commercial appeals as well as penal and social appeals. See Alter, p. 127.

<sup>83</sup> Paragraph 354 of the case.

Costa ruling and also referred to the Belgian case of *Le Ski* and the German *Lütticke* ruling.

The *Cour* agreed to the unlawfulness of the French law. Alter claims that the case strongly endorsed the supremacy of Community law over French law. But, the *Cour* did not follow the viewpoint of the *Procureur Général*. It held that Article 90 of the EC Treaty should take supremacy over a conflicting French law. However, the reasoning used by the *Cour* did not correspond to the *communautaire* standpoint of the *Procureur Général* but stated that by virtue of Article 55 in the French Constitution the EC Treaty had greater authority than municipal French law even though it had been adopted later than the Treaty. As a result, the *Cour de Cassation* granted supremacy on the grounds that the French constitution itself accorded supremacy. On the other hand, the *Cour* stated that the separate legal system of the Community is binding to national courts and directly applicable to individuals in the Member States.<sup>84</sup>

Alter interpreted *Cafés Vabre* as fundamental breakthrough.<sup>85</sup> The case illustrated that the *Cour de Cassation* agreed on supremacy but used a different method of justification than the ECJ. Supremacy stemmed from a provision in the French constitution itself. This was a *monist* standpoint. The *Cour* therefore did not opt for a *communautaire* approach to substantiate its standpoint.<sup>86</sup> It did not refer to the special character of the Community legal order.

### 3.6.2 The View of the Conseil d'Etat

The *Conseil d'Etat*<sup>87</sup> has had great difficulty accepting supremacy. It clearly pointed out in the *Semoules*<sup>88</sup> case from 1968 that supremacy of Community law over conflicting French legislation was unacceptable. The case concerned a French law that violated Community law. The *Conseil d'Etat* held that it lacked jurisdiction to invalidate French legislation. As a result, the *Conseil d'Etat* considered that it had no jurisdiction to find French law to be incompatible with Community law. By taking this stance the *Conseil d'Etat* argued that it had no jurisdiction to accord supremacy of Community law over French law.<sup>89</sup> We must bear in mind the *Simmenthal II* case from 1977 that clearly pointed out that a national court has an obligation *disapply* even subsequent national law that clashes with Community provisions. Alter argues that, by refusing to question the validity of the French law, the *Conseil d'Etat* purposely ignored the type of situation the ECJ had explicitly

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<sup>84</sup> Alter, p. 149.

<sup>85</sup> *Ibid.* p. 149.

<sup>86</sup> Craig, *supra* note no 2, p 2.

<sup>87</sup> The jurisdiction of the Conseil d'Etat involves reviewing proposed legislation. See Alter, p. 129.

<sup>88</sup> Decision of 1 March 1968, *Syndicat Général de Fabricants de Semoules de France* [1970] CMLR 395.

<sup>89</sup> It argued that it was the jurisdiction of the *Conseil Constitutionnel* (the third Supreme Court in France) to consider whether constitutional aspects of French law are compatible with Community law before the legislation is made.

aimed to avoid when establishing the doctrine of supremacy.<sup>90</sup> The *Conseil d'Etat* held this position until 1989 when it ruled in the *Nicolo* Case.

### 3.6.2.1 Nicolo: The Final Breakthrough

The *Nicolo*<sup>91</sup> case stood as a watershed when the *Conseil d'Etat* finally accepted supremacy of Community law in 1989. The case concerned a French voter that seized the *Conseil d'Etat* to annul the French elections to the European Parliament on the grounds that the French electoral law was incompatible with the EC Treaty.

Frydman, the *Commissaire du Gouvernement*, referred to the prior case of *Semoules* and urged the *Conseil* to adopt a different interpretation of Article 55 of the French Constitution. Frydman believed that Article 55 should now be interpreted as giving authorisation for courts to review the compatibility of French laws with not only Community law but with all international treaties. By doing so, Frydman argued that the position of the *Conseil d'Etat* would correspond to that of the *Cour de Cassation*. The *Conseil* followed the views of the *Commissaire du Gouvernement*.

Plötner points out a flaw in the *Nicolo* ruling compared to the *Cafés Vabre* case.<sup>92</sup> The *Nicolo* decision only made reference to the French constitutional text and not explicitly to the jurisprudence of the ECJ. Furthermore, although the French legal foundations of supremacy is of no proven practical consequence, Plötner bounces harshly on the *Conseil d'Etat* by claiming that its position is “*anti integrationist*”<sup>93</sup>. He believes the *Conseil* never surrendered nor reviewed its position but created its own “*French Garden*”. Craig and De Búrca conclude that the main obstacles to supremacy have been jurisdictional limitation of the French courts and not the opposition to supremacy of Community law over conflicting national provisions.<sup>94</sup>

## 3.7 British Acceptance

The United Kingdom joined the European Community in 1973, after the ECJ's *Costa* ruling. The UK embraces a *dualist* system. The European Communities Act that incorporated Community law into English law was passed in 1972. Nonetheless, the reception of the doctrine of supremacy was rather difficult to accept. Parliamentary sovereignty is the sacred cow of the British constitutional system. It implies that the Parliament has the power to

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<sup>90</sup> Alter, pp. 150-181.

<sup>91</sup> *Raoul Georges Nicolo & another, Conseil d'Etat* decision 20 October 1989, [1989] Recueil Lebon, [1990] 1 CMLR 173.

<sup>92</sup> Jens Plötner, *Report on France*, in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler, (eds.), *The European Courts & National Court Doctrine and Jurisprudence*, 1997 p. 47.

<sup>93</sup> *Ibid.* p. 47.

<sup>94</sup> Craig and De Búrca, p. 289.

do everything but to bind itself for the future. Craig and De Búrca point out that parliamentary sovereignty can seem to be a threat to supremacy since a later Act of Parliament can contradict Community law.<sup>95</sup>

The principal case that concerned the relationship between the Community and the UK was the already mentioned *Factortame* case from 1991. In response to the ECJ's preliminary ruling the House of Lords re-evaluated its position.<sup>96</sup> The novel position of the Court stated that, in matters covered by Community law, interim relief could in fact be granted against the British Government. It has been heavily debated if this stance represented a loss of sovereignty.<sup>97</sup>

### 3.7.1 The Statement by Lord Bridge

Lord Bridge in the response to the ECJ ruling stated that many regarded the ruling as “*novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament*”.<sup>98</sup> Lord Bridge calls this a “*misconception*”. Even if the principle of supremacy was not always inherent in the EC Treaty it “*was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community*” (primarily referring to the *Costa* ruling). Furthermore, he takes a contractarian stance and accepts that by passing the European Communities Act in 1972 the UK voluntarily accepted limitations to its sovereignty. Thus, it is the obligation of any UK court to grant precedence to Community law that is in conflict with British law. Therefore, the duty to uphold the protection of rights under Community law is no way a new obligation or concept.

Craig and De Búrca claim that the obligation for British courts to uphold Community law stems from the obligation to respect the will of the Parliament rather than recognising that supremacy stems directly from the EC Treaty.<sup>99</sup> Thus their responsibility and loyalty is to Parliament rather than the ECJ. Craig states that the *Factortame* case illustrates “*a good example of how readily the national courts can embrace their new found authority*”.<sup>100</sup> In the later *OEC* judgement the House of Lords established that there is no obstacle, on British constitutional grounds, for an individual to seize any UK court in order to establish a breach of Community law.<sup>101</sup> The House of Lords thereby laid firm the right for all national courts to

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<sup>95</sup> Ibid. p. 302.

<sup>96</sup> *R v. Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 AC 603.

<sup>97</sup> Paul Craig, *Report on the United Kingdom*, in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler (eds.), *The European Courts & National Court: Doctrine and Jurisprudence*, (1997) p. 202.

<sup>98</sup> *R v. Secretary of State for Transport, ex parte Factortame Ltd* [1991] AC 603, Statement by Lord Bridge.

<sup>99</sup> Craig and De Búrca, pp. 307-308.

<sup>100</sup> Craig, *supra* note no. 96, p. 216.

<sup>101</sup> *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WLR 409.

review primary British legislation, not only the House of Lords. Craig believes the *OEC* case to be a perfect example where the “*highest national courts have slipped into their new role*”.<sup>102</sup>

### 3.8 Conclusion

This chapter has looked at the acceptance of the doctrine of supremacy by some of the Constitutional Courts in the Member States. One can ascertain that the views of the Member States do not exactly correspond to the *communautaire* reasoning of the ECJ. Thus, there are discrepancies between the ECJ and the Member States on the matter of supremacy. This becomes even more evident when examining the issue of *Kompetenz-Kompetenz* of the Community that ultimately concerns whether the Community has the legal authority to determine the boundaries of Community competences. MacCormick argues that this question poses a profound challenge to the mutual understanding of the Community legal order.<sup>103</sup> He believes there must be mutual respect for the interlocking legal systems of the Member States and that of the Community. However, we will see in the following chapter that this relationship in many ways is “*interblocking*”.

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<sup>102</sup> Craig, *supra* note no. 96, p. 217.

<sup>103</sup> MacCormick, p. 102.

## 4 *Kompetenz-Kompetenz*: The Dividing Line between the Community and the Member States

The previous chapters have examined the evolution of the doctrine of supremacy through the jurisprudence of the Court of Justice and its reception and acceptance in the Member States. This has been an evolutionary rather than a revolutionary process and is a bi-dimensional debate that has gradually evolved over time. The doctrine of supremacy can be described as a principle that gives precedence to Community law over the law of the Member States within its proper sphere of competence. Thus, supremacy is not absolute *per se*. Hence, supremacy does not imply a universal subordination of Member State law to Community law.<sup>104</sup> Naturally, Community law cannot take precedence over national law in a field where the Community lacks competence. The Community can lack authority both internally and externally. When the Community acts beyond its sphere of competence or legal authority it is said to act *ultra vires*. An *ultra vires* measure that is adopted by the Community cannot be valid. The justification for supremacy given by the ECJ relates to the rule of law and the necessity of a coherent Community legal order. Without supremacy the uniform application of Community law would be at stake.

The ECJ case law on supremacy has defined the obligations for national courts to enforce Community law. The national courts have, in parts, accepted the case law of the ECJ on supremacy. However, the ECJ and the national Constitutional Courts have not finally settled the question that stems from the supremacy issue i.e. who has the final right to define the sphere of competence of the Community? This is called the question of *Kompetenz-Kompetenz*<sup>105</sup>.

*Kompetenz-Kompetenz* essentially means having the legal power (competence) to define and determine the borders of one's own competence.<sup>106</sup> Craig and De Búrca believe the issue of *Kompetenz-Kompetenz* to relate the question of allocation of competences between the Community and the Member States.<sup>107</sup> Kokott interprets *Kompetenz-Kompetenz* as meaning "*quis judicabit*" that signifies who or which court should decide in a finally authoritative way the norms of Community law.<sup>108</sup>

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<sup>104</sup> MacCormick, p. 117.

<sup>105</sup> The concept is of German constitutional origin and translates as competence-competence. See Bernitz and Kjellgren, p. 32.

<sup>106</sup> Ibid. p. 106.

<sup>107</sup> Craig and De Búrca, p. 284.

<sup>108</sup> Kokott, p. 93.

Essentially the matter regard who has the competence to determine the unconstitutionality of Community law when Community institutions act *ultra vires*. Schilling calls this the “*Decisive Question*”.<sup>109</sup> Does this right reside with a Community organ such as the ECJ or is it bestowed on the Member States and their Constitutional Courts? The ECJ held in its *Foto-Frost* ruling that it believes it has exclusive competence to make Community law invalid. Contrary to the position of the ECJ, the German Constitutional Court believes that the right to determine the constitutionality of Community law should rest with the national courts in the Member States and questioned the competences of the Community in its famous *Maastricht* ruling. The German Constitutional Court argued that the power to invalidate Community law should rest with the Member States and their constitutional courts rather than with the ECJ.

The question of *Kompetenz-Kompetenz* relates to the very nature and core of the Community legal order. Ultimately the aim of this chapter is to try to establish whether the Community has the competence to define the limits of its competence. Essentially, who is the ultimate umpire in the Community legal system?

## 4.1 The Nature of the *Kompetenz-Kompetenz* problem<sup>110</sup>

First of all it is imperative to try to specify the question of *Kompetenz-Kompetenz*. The European Community is based on attributed competences from the signatories of the Treaties, i.e. the Member States. Thus, the competence of the Community stems from the Member States. The ECJ held in the pioneering case of *Van Gend en Loos* that the Community legal order is based on attributed competences and held that the Member States have limited their sovereign rights albeit in limited fields. In the same case the ECJ laid claim to the autonomy of the Community legal order. Effectively, one may ask if a Community that is founded on attributed competences and, hence, lacks the power to determine the legal limits of its own competences can have a court that holds the final authority to determine the constitutionality of Community provisions. Schilling argues that the fact that the Community lacks *legislative Kompetenz-Kompetenz* is a strong prerequisite for the ECJ not to have *judicial Kompetenz-*

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<sup>109</sup> Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations in Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling - - Weiler/Halter Debate*. Harvard Jean Monnet Working Paper No 10/96. Available at: <http://www.jeanmonnetprogram.org/papers/96/9610.html>. Last visited 7 January 2004, 10.23am.

<sup>110</sup> Craig uses a similar subtitle. See Paul Craig, *What Constitution does Europe Need?* (2003). Section II of the article. Available at <http://www.euractiv.com/cgi-bin/cgint.exe/985391-708?204&OIDN=251064&-home=search>. Last visited 8 January 2004, 10.12am.

*Kompetenz*, i.e. the competence to define the legal limits of the Community.<sup>111</sup>

The spheres of competences have gradually expanded over the years of the Community. This is seen by many as the result of “*conscious decisions*” by the Member States to enhance integration.<sup>112</sup> Thus, competences are not inherent in the Community legal order. The case law of the ECJ has greatly contributed to this evolution. Rasmussen argues that the primary objective of the Court is essentially to promote European integration by to strengthening the Community, increasing the scope and effectiveness of EC law and, enlarging the powers of Community institutions.<sup>113</sup> Although, there have been “*conscious decisions*” by the Member States to enhance European integration, the question remains where the scope of these competences end. One must bear in mind that the creation of the Common Market would not have been achieved without the far-reaching case law of the Court.

Traditionally, the *Kompetenz-Kompetenz* issue has concerned international law and international organisations. Only states, and not international organisations, have traditionally been said to have *Kompetenz-Kompetenz*. Therefore, an international or supranational organisation has the competence attributed by its member states and has not the legal power to acknowledge itself further competences.<sup>114</sup>

## 4.2 Internal and External Competences

The Community shall act within the limits of the powers conferred upon it by the Member States according to Article 5 EC. The Article is an expression of the principle of subsidiarity. However, Article 5 seemingly limits the scope of power of the Community but does not give any guidance of what body should have the final say to determine whether or not the Community has acted within the limits of its attributed authority. The ECJ shall, according to Article 220 EC ensure that Community law is observed when interpreting and applying the Treaty. However, as we have seen in previous chapters, the Treaty is silent on many issues such as the question of supremacy. The ECJ is therefore said to have a “*gap-filling role*”, in order to fill the gaps where the Treaty itself gives no explicit guidance.<sup>115</sup> Through the case law of the Court it has established a constitutional structure for the European Community.

Naturally, the Community must refrain from acting in areas where it lacks competence both internally and externally.<sup>116</sup> Internally, Community

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<sup>111</sup> This question brought up by Schilling will be examined under Chapter 4.3.

<sup>112</sup> Craig, *supra* note no. 109, Section II of the article.

<sup>113</sup> Rasmussen, *supra* note no. 16, p. 293.

<sup>114</sup> Kokott, p. 93.

<sup>115</sup> Craig and De Búrca, p. 97.

<sup>116</sup> Bernitz and Kjellgren, p. 106.



institutions must respect their respective field of competence. For example, if the Council has adopted an act without consulting the European Parliament in conflict with the co-decision procedure it has acted outside its competence.<sup>117</sup> Equally, the Community shall not act in areas that it has not been explicitly attributed through the Treaty. Hence, if Community institutions create provisions beyond their attributed competences they surpass the external competences of the Community. The external Community competences concern the relationship between the Community and the Member States and essentially relates to the question of *Kompetenz-Kompetenz*. The ECJ can declare a Community act invalid according to Article 230 EC on the grounds that a Community institution had exceeded its authority, and thereby exceeding its internal competence. Therefore, the ECJ has internal competence to declare invalid measures adopted by Community institutions. Furthermore, the ECJ has the right, according to Article 230 EC, to invalidate measures adopted by a Community institution in areas where the Community as a whole lacks competence. This was the case in the *Tobacco Advertising* case.<sup>118</sup>

The facts of the case are the following. Germany wanted the ECJ to annul a directive on tobacco advertising. The objective of the directive was to harmonise the law relating to advertising and sponsoring of tobacco. The ECJ agreed with Germany and declared the directive invalid on the grounds of Article 5 EC that states that Community powers are limited to those specifically conferred on it. The Court clearly held that aim of the directive was not to regulate the internal market, which was mentioned as the purpose of the directive, but designed to protect and improve public health. Public health is an area where the Community lacks authority to harmonise measures. Thus, the institutions had acted beyond their competence and thus the measure was consequently annulled by the ECJ according to Article 230 EC.

The question of the internal competences of the Community relate to the principle of legality in Community law.<sup>119</sup> It is imperative that the competences of the Community and the competences of the Member States can be clearly defined and delimited.<sup>120</sup> In specific areas the Community is attributed exclusive competence, for example the internal market, whereas in many others the competence is shared between the Member States and the Community. Article 5 EC relates to the principle of subsidiarity. However, Craig and De Búrca argue that the Article gives little guidance to the question when the Community should act in a given area.<sup>121</sup> Moreover, Craig and De Búrca call for a better delimitation of the powers of the Community. The *Tobacco Advertising* case illustrated the wish of the ECJ

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<sup>117</sup> Bernitz and Kjellgren, p.106, give this example.

<sup>118</sup> Case C-376/98, *Germany v European Parliament and Council (Tobacco Advertising Directive)* [2000] ECR I-8419

<sup>119</sup> Bernitz and Kjellgren, p. 107

<sup>120</sup> This was one of the questions brought up by the Nice and Laeken European Councils in 2001.

<sup>121</sup> Craig and De Búrca, p. 285.

to work against “*creeping competences*” of the Community.<sup>122</sup> It held clear that the Community cannot adopt measures that are based on legal norms other than those expressly conferred to the Community through the Treaty. Otherwise, the rule of law may well be under threat if Community measures are founded on false pretences such as in the *Tobacco Advertising* case where the Court regarded the real objective to be public health and not to purposely improve conditions for the internal market.

Moreover, Article 308 states that the Council can take appropriate measures, acting unanimously, if an action of the Community is necessary to obtain for the course of the operation of the common market and neither the objectives of the Community nor the Treaty provide powers to take such an action. Not all articles in the Treaty provide the Community with specific legislative powers in certain fields. An example of this is consumer protection. Initially consumer protection was not enshrined in the EC Treaty. However, long before Article 153 EC (consumer protection) was adopted, the Community took actions in the field of consumer protection such as food labelling. Hence, Article 308 EC was used to give legislative power in fields before they were regulated through Treaty amendments. The legal basis for this was of Article 308 EC.<sup>123</sup> Craig and De Búrca believe Article 308 EC to provide the Community with valuable legal authority in a field where it lacks specific legislative powers.<sup>124</sup>

However, the use of Article 308 EC of the Community has been criticised by Weiler.<sup>125</sup> He argues that the Article has been too widely interpreted by the Community. The measure taken by the Council must be founded on an objective not expressly stated in the Treaty. The Community cannot adopt measures in conflict with the subsidiarity principle. Furthermore, this authority does not give a general power to the Community to act in areas that lay outside the objectives of the Treaty. Craig and De Búrca argue that the wide interpretation used by the ECJ has not given enough limitation on the Council.<sup>126</sup> There is of course a threat of “*creeping competences*” if the Article is used too broadly.

Furthermore, the Community can be said to have implied powers in certain areas. These powers have already been expressly conferred to the institutions of the Community. The Community may take actions on the grounds that a certain Treaty article contains an implied power for the Community to adopt measures. Thus, the implied power signifies that there

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<sup>122</sup> Ibid. p. 285.

<sup>123</sup> Hypothetically, if the “*mad cow*” crisis would occur today and the Treaty lacked an article on consumer protection then the Community could take actions to protect consumers on the legal foundations found in Article 308.

<sup>124</sup> Craig and De Búrca, p. 125.

<sup>125</sup> Joseph H. H. Weiler, *The Transformation of Europe*, (1991) Yale Law Journal 2403, 2445-6. Extract also in Paul Craig and Grainne Búrca, *EU Law, Text, Cases and Material*, (2003), p. 125.

<sup>126</sup> Craig and De Búrca, p. 127.

must be an underlying power on which the implied power is based. These powers are mostly used in the field of external relations.

The following chapter will examine the standpoint of the ECJ and the dichotomised position held by the German Constitutional Court as well as highlighting the intense legal debate on *Kompetenz-Kompetenz*.

### 4.3 Who is the Final Arbiter?

The previous chapter has looked at the internal and external competences of the Community. According to Article 5 EC, the Community must act within the competences the Treaty has attributed to it. Moreover, a measure adopted by the Community can be annulled if Community institutions have exceeded their competences. However, it is far from clear where the extent of the boundaries of Community competences lay and this is often open to different interpretations. Craig believes the crucial question to be who should have the final authority to decide whether a Community measure is *intra* or *ultra vires*.<sup>127</sup> The issue relates to the right of final power to decide the constitutionality of Community law. Ultimately, who holds the authority to define the legal limits of the Community? Essentially, who is the final arbiter to determine the constitutionality of Community law, the Member States or the ECJ?

#### 4.3.1 Claim to *Judicial Kompetenz-Kompetenz* by the ECJ

The ECJ clearly affirmed in its *Foto-Frost*<sup>128</sup> ruling that it holds exclusive competence to determine the legal limits of the Community. By doing so, the ECJ gave its “*imperious answer*” to the “*Decisive Question*”.

In the *Foto-Frost* case a German court referred a question to the ECJ for a preliminary ruling. The question put to the Court concerned whether it held the power to declare that a Commission decision was invalid. The German court believed a Commission decision to be incompatible with a Community regulation. The response of the ECJ was resolute. The national courts may well consider the validity of a Community measure, and if the national court believes the grounds in support of invalidity are unfounded, the national court can reject the claim. By doing so the national court recognises the validity of the Community measure and do not question its existence. Hence, the ECJ affirmed that national courts do not have the power to declare acts of the Community institutions invalid and this right is exclusively reserved for the ECJ. The Member States can bring actions against the act according to Article 230 EC.

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<sup>127</sup> Craig, *supra* note no. 2, p. 2.

<sup>128</sup> Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübek-Ost* [1987] ECR 4199.

Hence, the ECJ believes it has an exclusive right to invalidate a Community measure on whatever grounds. It is also clear that the ECJ believes it has the competence to determine whether or not the Community has acted *ultra vires*. Thus, the right to challenge the legality of a Community act rests with the ECJ and not the Member States. Weiler believes *Foto-Frost* clearly illustrates that the European Court of Justice believes it has the exclusive competence to determine the legal limits of the Community.<sup>129</sup> As Weiler has noted, the Court recognises that it has what is called *judicial Kompetenz-Kompetenz* that means having the competence to determine the limits of the competences of the Community.<sup>130</sup> Thus, the ECJ believes it has, what Schilling calls, *strong interpretative* autonomy. According to Weiler, the reason why the ECJ has asserted that it has *judicial Kompetenz-Kompetenz* is to ensure the uniform applicability of Community law in the interests of a coherent legal system and the uniform application of Community. Kumm states that it is the same reason used to justify the doctrine of supremacy.<sup>131</sup> This claim had a rather frosty reception in the German Constitutional Court.

Kumm argues that Articles 220 and 234 give the ECJ the legal authority to give an authentic interpretation of the Treaty.<sup>132</sup> Craig and De Búrca consider that the Court believes that Article 220 gives it the legal power to define the limits of its own judicial limits.

A head of the creation of the Amsterdam Treaty the ECJ stressed the “*need to ensure uniform interpretation and application of Community law and of the conventions which are inseparably bound up with the achievement of the objectives of the Treaties presupposes the existence of a single judicial body, such as the Court of Justice, which can give definitive rulings on the law for the whole of the Community.*”<sup>133</sup>

### 4.3.2 National Perspectives on *Kompetenz-Kompetenz*

The acceptance of the doctrine of supremacy by the courts in the Member States has been looked at previously. The purpose of this section is to try to ascertain the view of the national courts on *Kompetenz-Kompetenz*. Do they accept the position of the ECJ and recognise that it has the power to define

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<sup>129</sup> Joseph H. H. Weiler, *The Constitution of Europe: “Do the new clothes have an emperor?” And other essays on European integration* (1999) p. 288.

<sup>130</sup> *Ibid.* p. 288.

<sup>131</sup> Mattias 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 and the Fate of the European Market Order for Bananas*. Harvard Jean Monnet Working Paper No. 10/98. Part II section 3. <http://www.jeanmonnetprogram.org/papers/98/9810.html>. Last visited 8 January, 2004 4.19pm.

<sup>132</sup> *Ibid.* Part II section 3.

<sup>133</sup> *Report of the Court of Justice on Certain Aspects of the Application of the Treaty of the European Union*, May 1995, 2. [http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj\\_rep.html](http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html). Last visited 8 January, 2004 4.32pm.

the limits of Community competences? Or, do they consider the power to finally determine the constitutionality of Community law to reside with them as opposed to the ECJ? Essentially, who has the right to determine whether the Community has acted *ultra vires*? Stone Sweet states that the national courts naturally regard themselves as the “*guardians of their own constitutional orders*”.<sup>134</sup> He believes that the national courts have been especially cautious to reserve for themselves the power to ultimately determine the constitutionality of Community measures.

#### **4.3.2.1 The Maastricht Treaty 1992 Constitutionality Case**

The natural point of departure here is the ruling of the German Constitutional Court in the *Maastricht Treaty 1992 Constitutionality case*.<sup>135</sup> The facts of the case are the following.<sup>136</sup> Four German members of the European Parliament and a former senior official of the European Commission, Dr Brunner, launched a complaint before the German Constitutional Court. The matter regarded Germany’s accession to the Maastricht Treaty, which they believed would violate German constitutional law. The Bundestag had earlier approved the Treaty of Maastricht and amendments to the German Constitution. The complainants argued that the constitutional amendments violated several fundamental rights protected in the German Constitution. The German Constitutional Court rejected the claim as unfounded, thereby paving the way for German accession to the Treaty of Maastricht.

However, the court held that the Federal Constitutional Court in cooperation with the ECJ guarantees an efficient protection of individual’s fundamental rights. Whereas the ECJ enforces basic rights in every individual case, the *BverfG* safeguards the general standard of basic rights in the European Union. Wieland believes that it thereby reiterated the standpoint taken in the famous *Solange II* judgement from 1986.<sup>137</sup> It is the primary responsibility of the ECJ to protect fundamental rights but nonetheless, if the ECJ fails to adequately safeguard these rights the *BverfG* may well step in. Thus, the *BverfG* acceptance of the ECJ as a guardian of fundamental rights is conditional. Arguably, the court has not changed its position; it rather implies that the *BverfG* has defined the implications of *Solange*. The judgement may therefore be seen as a natural extension of the *Solange* rulings. Craig and De Búrca argues that the court does not dispute the fact that Community law takes precedence over conflicting German law but the Community must act within its proper sphere of competences for the court

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<sup>134</sup> Alex Stone Sweet, *Constitutional Dialogues in the European Community*, in Anne-Marie Slaughter, Alex Stone Sweet and Joseph H. H. Weiler, (eds.), *The European Courts & National Court Doctrine and Jurisprudence*, (1997) p. 319.

<sup>135</sup> *Brunner v The European Union Treaty* (Maastricht decision) [1994] 1 CMLR 57.

<sup>136</sup> For a thorough analysis of the case see for example Kokott and Stone Sweet.

<sup>137</sup> Joachim Wieland, *Germany in the European Union- The Maastricht Decision of the Bundesfervassungsgericht*. *European Journal of International Law* (1994), p. 3.

Available at: <http://www.ejil.org/journal/Vol5/No2/art6.pdf>.

Last visited 8 January 2004, 11.23am.

to apply Community law.<sup>138</sup> Therefore, Community law cannot violate fundamental rights provisions in the German Constitution.

This German limited acceptance of the doctrine of supremacy also relates to the legal limits of the Community. The *BverfG* held that it has not relinquished the right to review the constitutionality of Community measures on the grounds that the Community has acted *ultra vires*. Craig and De Búrca call this an *ultra vires* control.<sup>139</sup> Thus, the German Constitutional Court believes it retains the right to invalidate Community measures and to safeguard that the Community does not act beyond its scope of competences that has been conferred on it by the Member States. By taking this standpoint the court firmly rejected the position held by the ECJ in the *Foto-Frost* ruling. Consequently, individuals may seize all German courts if they consider Community acts void on the grounds that the Community had exceeded its legal authority. Weatherill argues that this claim to a general authority to confine the limits of the Community undermines the doctrine of supremacy and the exclusive right for the ECJ to determine the legality of Community measures.<sup>140</sup> Moreover, the *BverfG* held that it would especially review the application of Article 308 EC in order to stop “*creeping competences*” of the Community.<sup>141</sup> The case meant that the *BverfG* placed itself on a higher wrung than the ECJ on matters relating to constitutionality and affirmed that the Member States would be still the ‘Masters of the Treaties’.

To put it mildly, the *BverfG* did not embrace the claim by the ECJ that it holds the power to determine the sphere of competences of the Community. If the ECJ lacks *judicial Kompetenz-Kompetenz* this power must lay elsewhere. Hence, the German Constitutional Court will ensure that Community has not exceeded its legal authority when adopting measures. Essentially, *judicial Kompetenz-Kompetenz* would rest with the Member States themselves. The court thereby stressed that Community measures that have been passed beyond the legal competence of the Community will not be valid nor applied in Germany. The *BverfG* has unilaterally given itself the power to determine the unconstitutionality of Community acts on the grounds of *ultra vires*. Hence, the German Constitutional Court rejects the position that it is fully bound to respect the jurisprudence of the ECJ. The assertion that the *BverfG* has an unconditional right of final say ultimately proves a threat the doctrine of supremacy of Community law. Weiler and Haltern shrewdly call this replacing a European *diktat* with a national one, which they consider to be more hazardous to the Community as a whole.<sup>142</sup>

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<sup>138</sup> Craig and De Búrca, p. 294.

<sup>139</sup> Ibid. p. 295.

<sup>140</sup> Weatherill and Beaumont, p. 445.

<sup>141</sup> Paragraph 99 of the case.

<sup>142</sup> Joseph H.H. Weiler and Ulrich R. Haltern, *The Autonomy of the Community Legal Order –Through the Looking Glass*, section IV in *Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling - - Weiler/Halter Debate*. Harvard Jean Monnet Working Paper No 10/96. Available at: <http://www.jeanmonnetprogram.org/papers/96/9610.html>. Last visited 7 January 2004,

One must bear in mind that soon there are 25 constitutional courts in the European Union that potentially will have far from assenting opinions. Therefore, the interpretation made by the *BverfG* may well be seen as a menace to the Community legal order. Mayer argues that there is no room for co-operation between the ECJ and national courts on the matter of *ultra vires* acts since “*declaring an act invalid always implies a defect in the act*”.<sup>143</sup> If one national court in a Member State declares an invalid on the grounds of *ultra vires*, the act would be invalid in all other Member States. A Community act cannot be invalid in one Member State but at the same time be valid in the rest of the Community. Mayer thereby concludes that the Maastricht ruling is a “*frontal attack*” on the ECJ in the matter of ultimate jurisdiction and would moreover reduce its jurisdiction.

It would seem that the Constitutional Court has not changed its position on the *judicial Kompetenz-Kompetenz* of the ECJ nor extended its jurisdiction and is not prepared to yield this power to the ECJ. From a German perspective there is status quo since the *Solange* rulings. Kokott argues that the German Constitutional Court has never accepted the *Kompetenz-Kompetenz* of the Community.<sup>144</sup>

The Maastricht ruling has been widely criticised but one must consider that this issue arose since the question of delimitation of powers between the Community and the Member States is far from apparent. One may consider the case as an illustration of the reality-expectations-gap of the Community as a whole and the ECJ in particular. The position taken by the ECJ on *judicial Kompetenz-Kompetenz* in *Foto-Frost* does not necessarily correspond to the views of the Member States. Wieland believes the case to be the result of the German assumption that the judicial activism of the ECJ had gone too far.<sup>145</sup> However, the benefit of the Maastricht decision was that it sparked an intense debate on the nature of the Community legal order. Weiler and Haltern even believe the stir caused by the ruling to be healthy in the way that it caused a more even conversation between the ECJ and national courts.<sup>146</sup>

#### **4.3.2.2 Banana Market case**

German courts once again threatened the doctrine of supremacy and the ECJ’s standpoint on *Kompetenz-Kompetenz* in the *Banana Market* ruling.<sup>147</sup> Germany wanted the ECJ to annul a Council directive on the organisation for a market for bananas in the Community. The directive offered

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<sup>143</sup> Mayer, p. 16.

<sup>144</sup> Kokott, p. 107.

<sup>145</sup> Wieland, p. 3.

<sup>146</sup> Weiler and Haltern, section IV.

<sup>147</sup> Case C-280/93, *Germany v Commission* [1994] ECR I-4873.

preferential treatment to producers of bananas in the ACP<sup>148</sup> countries and thereby giving less favourable terms to producers in Central America. Germany opposed the directive since German banana suppliers have a history of importing bananas from Central America with advantageous tariffs. The banana producers in the ACP countries were closely linked with French, Spanish and Portuguese interests. The directive was duly criticised for aiding these interests. As a result of the directive the price of bananas had increased in Germany. The ECJ rejected the claim to annul the directive on a number of grounds.

Despite the ECJ ruling, German suppliers brought actions before the German Tax and Administrative Courts. The suppliers argued that the ECJ ruling deprived them of basic rights in the German Constitution. In 1996, the German Federal Tax Court defied the ECJ and held that the ruling on bananas violated the GATT and WTO agreement and stated that German courts should not apply *ultra vires* acts adopted by the Community. By doing so, the court opposed supremacy and asserted that the ECJ lacked *judicial Kompetenz-Kompetenz* and in its judgement referred to the German Constitutional Court's *Maastricht* ruling.<sup>149</sup> The matter had originally been in front of a lower regional court that had granted interim relief for the banana suppliers against the German customs and excise. The Federal Tax Court had upheld the ruling of the lower regional court. However, surprisingly the regional court referred the matter again to the ECJ for a preliminary ruling.<sup>150</sup>

Although the ECJ partially annulled the regulation, it is apparent that the German courts blatantly showed a lack of respect for the rulings of the ECJ and defied the obligation to follow its earlier rulings.

The lower regional court was not content with the ECJ's preliminary ruling and referred the matter to the *BverfG* that finally held the claim to be inadmissible.<sup>151</sup> Craig and De Búrca believe the decision by the Constitutional Court to signify a renewed relationship between the two courts based on co-operation.<sup>152</sup> De Witte considers that the aftermath of the *Maastricht* decision caused confusion in the lower courts of Germany and this is manifested with the *Banana*-cases.<sup>153</sup>

#### **4.3.2.3 The Danish Carlsen v Rasmussen case<sup>154</sup>**

Denmark got its own Maastricht ruling when the Danish Supreme Court held that it possessed the authority to determine whether the Community has

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<sup>148</sup> The EU and the ACP states have a long history of co-operation regulated in the Lomé Conventions. Today, the Cotonou Convention has replaced the Lomé Conventions.

<sup>149</sup> *Order of the Federal Tax Court*, 9 January 1996, 7 EuZW 126 [1996].

<sup>150</sup> Cases C-364 & 365/95, *T. Port GmbH v. Hauptzollamt Hamburg-Jonas* ECR I-1023

<sup>151</sup> Decision of June 7, 2000.

<sup>152</sup> Craig and De Búrca, p. 297.

<sup>153</sup> De Witte, p. 203.

<sup>154</sup> Case 1 361/97, *Carlsen v. Rasmussen*, 6 April 1998.



exceeded its legal limits when adopting Community measures. Therefore, the court rejected the position taken by the ECJ in the *Foto-Frost* ruling. The Danish Supreme Court held that the ultimate power to determine the sphere of competences of the Community would rest with the national courts in the Member States. Thus, if the Community exceeds its authority according by Denmark through its Act of Accession to the European Union, the court considered that Danish courts retained the right not to apply such a measure. An example of where the court would abstain from applying a Community measure would be the case where a Community measure would clash with basic rights provisions protected in the Danish Constitution.<sup>155</sup> Therefore, the Danish Supreme Court considered it to have the power to be the ultimate umpire to review constitutionality of Community law.

#### 4.4 A Vivid Legal Debate

There has been an intense and lively debate on the question of *Kompetenz-Kompetenz* triggered by the rulings of the German Constitutional Court and the ECJ. The aim of this chapter is to shed light on this debate by given an account of the different views held on the matter.

Schilling goes to great lengths to establish that the Community lacks *Kompetenz-Kompetenz* on the grounds of international law. Neither the object nor purposes of the founding fathers were to give the Community legal powers to determine its own judicial limits. The ECJ has essentially only the authority to interpret Community law correctly. The Court shall establish the presumptive will of the Masters of the Treaties, i.e. the Member States themselves. The ECJ does not have inherent right to determine the judicial limits of the Community. Schilling concludes that the Member States have not relinquished *Kompetenz-Kompetenz* to the Community. Thus, this right is bestowed on the Member States who individually have the power to finally determine the sphere of competences that they have attributed to the Community. Hence, Schilling agrees with the Maastricht ruling of the German Constitutional Court and rejects the standpoint made by the ECJ that it is the final arbiter to determine the sphere of competence of the Community.

Although the end result is clear the reasoning used by Schilling is not entirely convincing. Schilling uses a vast array of arguments to justify his position. The aim here is to give an account of the reasoning used by Schilling since his article) sparked an intense debate that relate to the question of who is the ultimate umpire to determine the sphere of Community competences. This is called the “*Decisive Question*”.<sup>156</sup>

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<sup>155</sup> Craig and De Búrca, p. 313

<sup>156</sup> When the question of *Kompetenz-Kompetenz* is discussed by academia most writers refer to the Schilling-Weiler/Haltern debate. It is therefore highly worthwhile to give a thorough account of this intense debate that brings up many pertinent questions. Moreover, the opposite views of the authors give the reader a clearer and more diverse view of the nature of the *Kompetenz-Kompetenz* problem.

Schilling argues that the ECJ has consistently claimed that international law has no part to play in Community law.<sup>157</sup> This was stated in the early case law of the Court.<sup>158</sup> The paradox is that the Community was created by a series of treaties concluded according to international law. Schilling states that these treaties are autonomous in the sense that they are not continuously dependent on the national legal orders and have somewhat taken on a life of their own.<sup>159</sup> The evidence of the autonomy of the Community legal order is that the Member States must adjust their national legal orders in accordance with the Community provisions, which even involves adapting their constitutions. However, the ECJ assumption of the autonomy of the Community legal order may well be criticised. Kumm gives an account of the most frequently used criticism of the ECJ claim to an autonomous Community legal order.<sup>160</sup> If one regards the Treaties as legal instruments concluded between sovereign states that have not relinquished the right to terminate the Treaties, and by doing so ending the Community, the power lies entirely in the hands of the Member States. Accordingly, Community law cannot be supreme. Consequently, the ECJ cannot therefore possess the power to be final arbiter.

#### **4.4.1 Interpretative or Derivative Autonomy of the Community?**

Schilling believes the European Treaties to have *derivative autonomy* meaning that the autonomy of the Community derives from the Member States and goes on to question whether they additionally have *interpretative autonomy*. *Interpretative autonomy*, in this sense, essentially means having the exclusive legal authority to interpret Community law including the Treaties. Schilling calls this “*strong interpretative autonomy*” that essentially amounts to *Kompetenz-Kompetenz*.

Schilling states that autointerpretation is the method used to interpret international treaties in the absence of treaty institutions. This is where the European Community differs. The Community has institutions, and in particular the ECJ that, has authority conferred on it by the Member States to interpret provisions under Community law and shall, according to Article 220 EC, “*ensure that in the interpretation and application of this Treaty the law is observed*”<sup>161</sup>. This ultimately leads to the question how the existence of the ECJ affects the Member States ability to interpret Community law.

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<sup>157</sup> Schilling, section A.

<sup>158</sup> See Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>159</sup> International treaties are binding on contracting parties once they are ratified and as long as they remain valid.

<sup>160</sup> Kumm, Part II, Section 4.a).

<sup>161</sup> As noted by Bernitz and Kjellgren p. 69 note 35, the French language version of the article affirms this more clearly by expressing that the Court must “*assure le respect du droit*”.

One may pose the question whether Article 220 can be interpreted as giving textual evidence for *judicial Kompetenz-Kompetenz* of the Court.

Schilling goes on to question on what grounds of international law can be said to be the basis for proper interpretation of the Treaties. Schilling argues that this type of interpretation must be based on the Vienna Convention on the Law of Treaties. According to Article 3(1) one must look at “*the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”. When looking at the “*ordinary meaning*” of Article 228 EC that states that the ECJ has the right to take necessary actions if a state has failed to fulfil an obligation under the EC Treaty, Schilling assumes the ECJ can be seen as the “*ultimate umpire of the European system*” which is the equivalent of granting the Community *interpretative autonomy*. However, Schilling rejects the claim that the Community has *judicial Kompetenz-Kompetenz*. He argues that the object and purpose of the Community as expressed in Article 2 EC are primarily economic in nature and hence restricted to those fields. Therefore, one should not see the Treaties as giving unrestricted authority to the Community. The purpose of the ECJ is essentially to interpret Community law in a correct manner and not to assert the legal boundaries of the Community. Moreover, Schilling states that the Constitutions of the Member States generally do not grant *Kompetenz-Kompetenz* to the Community.

Somewhat, paradoxically Schilling argues that the rule of law will be under threat if *judicial Kompetenz-Kompetenz* is granted to the ECJ. Instead, Schilling argues that the highest national courts in the Member States should have the final word on the legal competences of the Community. How then may 15, and soon 25, national court guarantee the rule of Community law more uniformly than the ECJ?

Weiler and Haltern have criticised Schilling’s reasoning. They recognise that the answer to the “*Decisive Question*” is of great political and legal significance since the question where the boundaries of the legal limits of the Community lay is “*notoriously difficult*”.<sup>162</sup> Contrary to Schilling they argue that most legal scholars believe the power to determine the boundaries of the Community lay with the ECJ. They agree with the Court’s ruling in *Foto-Frost* that the ECJ has an exclusive authority to make Community law invalid on the grounds of *ultra vires* thereby granting the Court *judicial Kompetenz-Kompetenz*. They find that international law in fact gives this power to the ECJ.

#### **4.4.2 Textual Evidence for *Judicial Kompetenz-Kompetenz*?**

Schilling argued that the Article 228 does in fact indicate the ECJ to be the ultimate umpire. Weiler and Haltern argue that if a Member State was to set

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<sup>162</sup> Weiler and Haltern, section I.

aside a Community measure on the grounds of *ultra vires* that a Member State could be held accountable according to Article 228 EC and would be forced to comply with the ECJ. Do they thereby believe that Article 228 EC gives textual evidence for *judicial Kompetenz-Kompetenz* of the Court? *A contrario* this statement can be read as indicating that the Member States cannot invalidate an *ultra vires* Community measure and that this power lies solely on the ECJ.

Weiler and Haltern correctly believe that Schilling omitted the implications of Articles 234 and 230 EC in his analysis. They believe it is worthwhile to consider why the ECJ was created and given such a wide jurisdiction namely the power to review the validity and legality of Community measures. The wording of Article 230 EC is general and gives an indication that the wish was not to expressly limit the power of review of the Court. Weiler and Haltern staunchly reject the claim by Schilling that the right of *judicial Kompetenz-Kompetenz* to lie with the national courts because why didn't the founding fathers spell this out when they created the Treaties? But, reversely, you can throw this argument right back at them. If the Member States really had the intention of giving the power of *judicial Kompetenz-Kompetenz* to the Court why was not this mentioned expressly in the Treaty? Weiler and Haltern are aware of this counterargument and consider that this in fact is implied in the Article 230 EC since the grounds for judicial review is stated as “...**lack of competence, infringement of an essential procedural requirement, infringements of this Treaty or of any rule of law relating to its application, or misuse of powers**”. One must bear in mind that this Article relate to the illegality of a Community act and Weiler and Haltern state that the first ground to declare an act as such is where the Community has acted beyond its competence. This lack of competence relates both to the internal and external competence of the Community. This is where the reasoning of Schilling is flawed according to Weiler and Haltern. Schilling considers that the Member State may challenge a Community measure on the grounds of illegality in front of the ECJ but if this remedy fails preserves the right for a national court to declare the measure invalid. Does this really lay the grounds for uniform application of Community law? Weiler and Haltern consider this type of interpretation of Article 230 to be contrary to the ordinary meaning of the Article and its whole judicial review context.

Furthermore, it is not without difficulty to ascertain what interpretation is correct. Weiler and Haltern state that the *travaux preparatoires* of the Treaty can fortunately not be consulted to settle this matter and need not be since the answer is evident.<sup>163</sup> The “...*mutual bargains of the contracting parties cannot be hostage in the hands of oft-partisan courts*”.<sup>164</sup>

Weiler and Haltern argue that if the Member States did not agree with the Court's view of its powers and authority why have they not used the

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<sup>163</sup> Weiler and Haltern, section III.

<sup>164</sup> *Ibid.*

reoccurring revisions of the Treaties to change this situation. One must bear in mind that the Amsterdam and Nice Treaties as well as the work of the Convention on the Future of Europe have passed after the *Foto-Frost* ruling (even the Maastricht Treaty in the *Foto-Frost* case) and the German Constitutional Court's ruling in the Maastricht case. This does in fact add weight to the Weiler/Halter argument. Why have the Member States refrained from settling this potential dispute when so many others have been duly settled if they do not agree with the standpoint of the Court? Consequently, if the Masters of the Treaties do not amend the Treaty and once and for all settle this uncertainty than they may well be interpreted to silently giving their consent to the position of the ECJ that it truly is the final arbiter to determine the unconstitutionality of Community law. Craig acknowledges that the Member States have, in fact, consciously extended Community competences in many areas such as public health, culture, consumer protection and employment.<sup>165</sup> These conscious decisions by the Member States are the concrete result of discussions at the Intergovernmental conferences.

Article 234 EC forces national courts to refer matters regarding Community law to the ECJ for preliminary rulings in order to ensure the uniform applicability of Community law in the Member States. Weiler and Haltern somewhat rhetorically asks if the national courts that are obliged to refer a matter to the ECJ that regards if a Community measure is *ultra vires* really should have right to determine whether such an act is in fact *ultra vires*. This would naturally make the preliminary ruling system illusory, absurd and clearly unwanted if in the end the national courts themselves have the power to invalidate Community law. Weiler and Haltern therefore believe such an interpretation to clearly be against the object and purpose of Article 234 EC. Weiler and Haltern believe these are the explanation why Schilling omitted Articles 230 and 234 EC in his reasoning. However, MacCormick believes it is up to the ECJ to be the final arbiter in Community law but up to the constitutional courts in the Member States to interpret the interaction of the validity of Community law with the higher-level norms of validity within its national constitutional system.<sup>166</sup> By doing so, he seems to agree with Schilling but falls into the trap set by Weiler and Haltern.

#### **4.4.3 *Legislative Kompetenz-Kompetenz* of the Community Institutions and *Judicial Kompetenz-Kompetenz* of the Court**

Weiler and Haltern then go in to dissect the claim by Schilling that the purposes of the Community as expressed in Article 2 EC is merely economic in nature and therefore restricted to these fields. Schilling believes that this is an argument against the *judicial Kompetenz-Kompetenz* of the Court since the Member States clearly did not wish to give the Community unlimited powers. Weiler and Haltern believe this statement to be flawed

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<sup>165</sup> Craig, *supra* note no. 109. Section II of the article.

<sup>166</sup> MacCormick, p.118.

and attempts to distinguish between *legislative Kompetenz-Kompetenz* of the institutions of the Community and *judicial Kompetenz-Kompetenz* of the ECJ. Furthermore, the authors believe in no way that the ambitions of the Community to be by and large economic only.<sup>167</sup>

The core of the Schilling argument, according to Weiler and Haltern, is the question why a Community that is based on limited attributed powers and with no *legislative Kompetenz-Kompetenz* can have a court that has *judicial Kompetenz-Kompetenz*? *Legislative Kompetenz-Kompetenz* essentially means having the legal authority to extend its own competences. *Judicial Kompetenz-Kompetenz*, as stated earlier, means having the legal power to be the final settler of conflicts concerning those limited competences of the Community giving the “*imperious answer*” to the “*Decisive Question*”. Weiler and Haltern believe this statement to be not only flawed but also false. Craig concurs with Weiler and Haltern. Craig rejects the claim that an international organisation such as the European Community that is based on attributed powers and therefore lacks *legislative Kompetenz-Kompetenz* cannot have a court that has the power of *judicial Kompetenz-Kompetenz*.<sup>168</sup> However, he does not elaborate further.

The grounds held by Weiler and Haltern for this statement to be false is in part that it lacks proof and that it is based on assertion rather than reason. However, the authors do not give clear evidence for a valid counterargument. Weiler and Haltern naturally believe it is difficult to define the legal boundaries of the Community and acknowledge that this will always be disputed. Of course, there are different shades of grey. Weiler and Haltern seem to agree to the statement made by Schilling that the Community lacks *legislative Kompetenz-Kompetenz* although not openly confessing to it. If there are these shades of grey why not have a centralised court, in the interest of settling these conflicts, that is empowered to define where these borders lay, they ask? They claim that this is even more valid when there is considerable majority voting and a Treaty that is “*notoriously difficult*” to interpret. Furthermore, Weiler and Haltern argue that the narrower the purposes and jurisdiction are, the more willing the Member States will be to assign judicial review to a court because the venture would not be so hazardous. One may, of course, rightfully discuss whether the “*purposes and jurisdiction*” of the Community is really narrow but that is another matter. Weiler and Haltern state that by contrast, if the Community had wider authority then the Member States may will be indecisive to assign wide powers to a court. Proof of this is undoubtedly areas such as foreign policy where the ECJ has no jurisdiction.

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<sup>167</sup> One may argue that the real reason for the creation of the Community was to create what Immanuel Kant called a perpetual peace in Europe rather than having centuries of perpetual European civil wars. Many, especially the older generation, see that as the *raison d'être* of the Community. I believe Schilling's argument that the Community is primarily economic to be far from the truth and there are no reasons to justify this statement further by giving vast amounts of justifications.

<sup>168</sup> Craig, *supra* note no. 2, p. 12.

Schilling, in his rejoinder to Weiler and Haltern's article, argue that although the *legislative Kompetenz-Kompetenz* of the Community is not a prerequisite for the *judicial Kompetenz-Kompetenz* of the Court, it provides a strong assumption for it. Schilling claims that the power of a court to ascertain whether a measure is "*unconstitutional*" is at the edge between judicial and legislative spheres of competences. What happens if the Court makes valid a Community act that has been passed beyond the competences of the Community? The Community measure would then only be transformed from being invalid to valid by a decision of the Court. If the Court possesses this power it certainly holds legislative power according to Schilling. From this perspective the Schilling argument is powerful. The ECJ is a Community institution but can it really hold greater powers than the Community itself that is built on the foundation of attributed competences? Schilling comes to the conclusion a Community institution such as the ECJ cannot, and should not, have the competence to enlarge the powers of the Community. The ECJ should therefore not have the authority to make an *ultra vires* Community act valid. Schilling also finds evidence of this stance in Article 220 EC that states that the ECJ "*shall ensure that in the interpretation and application of this Treaty the law is observed*".<sup>169</sup>

Although, the jurisprudence have somewhat created a constitutional order both Schilling, and Weiler and Haltern reject the claim that the Community was born that way. The argument brought up by Schilling is in many ways valid. Essentially it concerns a gap of legitimacy in the Community.<sup>170</sup> Rasmussen has stated "*it will always be problem-prone when laws of paramount societal importance are judge-made if the judges' politico-constitutional mandate to do so is not rock solid*".<sup>171</sup> One may duly ask whether a Community that lacks *legislative Kompetenz-Kompetenz* should have a court that has *judicial Kompetenz-Kompetenz*. Where lay the mandate of the Court and is it really "*rock solid*"? The issue of supremacy and the right to determine one's own legal competences are not small issues but relate to the very core of the Community legal order. If these doctrines are built on swampy land then the whole tower may well wobble quite a bit.

#### **4.4.4 The Presumptive Will of the Member States**

The final argument asserted by Schilling relate to the presumptive will of the Member States when creating the Treaties. Schilling believes that no Member State could have agreed to transfer of power to the Community to rule on the infringement of rights protected in the constitutions of the Member States. Schilling used an argument made by Advocate General Warner in the *ICRA* case.<sup>172</sup> Warner states that a fundamental right that is

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<sup>169</sup> Added emphasis.

<sup>170</sup> Expression used by Weiler and Haltern, section II.

<sup>171</sup> Rasmussen, p. 321. *supra* note no 16.

<sup>172</sup> Case 7/76, *Industria Romana Carni e Affine, S.p.A v Amministrazione delled Finanze dello Strato*, [1976] ECR 1231, 1230..(Opinion of Advocate-General Warner of 22 June 1976 on the preliminary ruling requested by the *Ufficio di Conciliazione*). See Weiler and Haltern, note 231.

protected and recognised in a national constitution must also be protected and recognised under Community law.<sup>173</sup> Otherwise, Weiler and Haltern claim, the Member States would have transferred authority to the Community to violate national constitutions. This is naturally the intention of neither the Community nor the Member States. If not, fundamental human rights would be in jeopardy.

However, Weiler and Haltern reject the statement made by Advocate-General Warner. In the *Hauer*<sup>174</sup> case the Court stated that the matter of possible infringement of fundamental rights by an act of the Community could only be judged in *the light of Community law itself*. The Court held that if special criteria for assessment of legislation or constitutional law of a particular Member State was introduced that would damage the unity and efficacy of Community law. Furthermore, the Court believed that it would lead to the destruction of the unity of the Common Market and moreover jeopardise the cohesion of the Community. At a first glance, one may well be surprised by the standpoint taken by the Court. But, Weiler and Haltern bring up a clear and logical example of what might happen if constitutional provisions in two Member States clash. They use the *Grogan*<sup>175</sup>, the abortion rights case, as an illustrative example. Imagine if in one Member State the right of abortion is guaranteed in the constitution whereas another Member State has taken the right-to-life stance in its constitution. Hence, Weiler and Haltern rhetorically ask which of these rights the ECJ should choose. Therefore, the stance made by Advocate-General Warner is far from feasible since the ECJ would be little more than a modern King Solomon. However, MacCormick seems to disagree with Weiler and Haltern, and argues that the Court should not arrive at interpretative rulings without considering the potential impact on constitutions in the Member States.<sup>176</sup>

Somewhat innovative, Weiler and Haltern launch their own solution to the competence issue. They propose establishing a Constitutional Council for the Community that would only have jurisdiction issues of competences and thereby enhancing the legitimacy of decisions relating to competences of the Community.<sup>177</sup>

#### **4.4.5 Legal Pluralism and *Kompetenz-Kompetenz***

The Community has often been called an autonomous legal order to that of the Member States. MacCormick discusses the implications of *legal pluralism*, which means the relationship between the Community and national legal orders. Craig believes this issue to give a more theoretical dimension to the question of *Kompetenz-Kompetenz*.<sup>178</sup> The notion of *legal*

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<sup>173</sup> Ibid. at 1237.

<sup>174</sup> Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727. Cursive added.

<sup>175</sup> Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v Stephan Grogan et al.*, [1991] ECR 4685.

<sup>176</sup> MacCormick, p. 120.

<sup>177</sup> Weiler and Haltern, section IV *in fine*.

<sup>178</sup> Craig, *supra* note no. 2, p. 12.



*pluralism* implies that “*distinct but genuinely normative legal orders*” can coexist, side by side.<sup>179</sup> Hence, legal norms can both be found on a national and Community level. Thus, both the Member States and the Community possess “*constitutions*” that, according to MacCormick, essentially mean having legal norms that establish and give authority to institutions. MacCormick believes that the *acquis communautaire* has evolved over time and constitute a constitutional framework for what he calls the “*European Commonwealth*”.<sup>180</sup> The subsequent amendments of the Treaties and the jurisprudence of the ECJ, such as the doctrine of supremacy, have developed this constitutional framework. As we have seen in the previous chapter answers to distinct legal questions may be fundamentally different in each legal system. This was clearly illustrated when examining the national reception of the doctrine of supremacy as established by the ECJ. Ultimately, the issue concerns the question who holds the highest power, i.e. the matter of *Kompetenz-Kompetenz*.

MacCormick questions the theory of *legal pluralism* by considering that supremacy may be interpreted as ranking Community law above national law. One may consider the national legal system as sub-systems of the Community legal order.<sup>181</sup> However, MacCormick argues that the doctrine of supremacy should not be interpreted as an “*all purpose subordination of member-state-law to Community law*” thereby rejecting total subordination of the Member States’ constitutions<sup>182</sup> He argues that supremacy in fact concerns the interaction of legal systems, which, must be considered in its true context. According to MacCormick, the ECJ only possesses the authority to interpret legal norms that have been the result of conferral from the Member States. Thereby, MacCormick rejects that the ECJ has a “*norm-creating competence-competence*” and granting only “*interpretative competence*”. MacCormick argues that the relationship between the national legal systems of the Member States and the legal order of the Community is interactive rather than hierarchical and rejects any kind of “*all purpose superiority of one system over an other*”.<sup>183</sup> The national legal systems and the Community legal order are distinct and partially independent of one another but also partially overlapping and interacting.<sup>184</sup> However, it is the task of the ECJ to have the ultimate authority to interpret Community law in the last resort. This does not completely exclude the national courts in the Member States that must interpret Community law and its interaction on the basis of the valid national constitutional norms. Craig interprets this statement as meaning that the national courts do not relinquish the power to test the validity of Community law with the national constitutional norms.<sup>185</sup> But what happens if a national court considers a Community measure to be

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<sup>179</sup> MacCormick, p. 102.

<sup>180</sup> Ibid. p. 98.

<sup>181</sup> Ibid. p. 116.

<sup>182</sup> Ibid. p. 117.

<sup>183</sup> Ibid. p. 118.

<sup>184</sup> Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, European Law Journal, Vol. 1, No. 3, November 1995, (1995) p. 265.

<sup>185</sup> Craig, *supra* note no. 2, p. 13.

invalid on the grounds of *ultra vires*? MacCormick believes that the national courts must in good faith consider the international obligations to the other Member States when determining whether a Community measure is consistent with national law. Essentially, the national courts should only question a Community norm when it considers it manifestly illegal. This pluralistic standpoint seems not to settle the question that concerns who really is the final arbiter.

The interactive relationship between the national and Community legal orders gives neither the power to be final umpire. This seems to be a logical flaw in MacCormick's argument but is maybe closest to reality.<sup>186</sup> Bernitz and Kjellgren acknowledge the standpoint taken by MacCormick that considers the national and Community legal orders to be parallel hierarchies that interact with each other.<sup>187</sup> Craig and De Búrca believe that the MacCormick theory of legal pluralism to be a more appealing alternative than the "*stalemate of nation-State-centred versus EU-centred monism*".<sup>188</sup> Thus, the MacCormick solution provides the foundation for a more flexible and interactive conversation between the national courts and the ECJ and tries to rule out potential trench war tactics. Kirchof, like MacCormick, argues for more co-operation and mutual respect between the courts.<sup>189</sup> He rejects the all out supremacy of Community law that renders national law non-legal. Thus, both national courts and the ECJ have an adjudicatory responsibility of their own and this is the key for the success of the Community legal order. Furthermore, he calls for a "*balance of power*" between the ECJ and the courts in the Member States. Kirchof rejects that the relationship is hierarchical in nature since such a relationship would cut off the ability of having a co-operative legal system. Thereby, Kirchof calls for a culture of balance of power and co-operation and staunchly rejects "*dominance and, subordination and rejection*".<sup>190</sup> Interestingly enough Professor Kirchof sat as a judge in the German *Maastricht* ruling.

#### 4.4.5.1 Stop Asking the "*Decisive Question*"?

Kumm argues that one should stop attempting to answer the "*Decisive Question*" since there is no need to define who has the right to be the ultimate umpire in a pluralistic framework.<sup>191</sup> Kumm conceives the ECJ to be the final arbiter of constitutionality in Community law whereas the constitutional courts in the Member States are the final arbiters on the national level, each being the ultimate umpire in their own sphere.

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<sup>186</sup> Somewhat refreshingly MacCormick also acknowledges that legal reasoning cannot be the solution to all problems.

<sup>187</sup> Bernitz and Kjellgren, p. 86.

<sup>188</sup> Craig and De Búrca, p. 313.

<sup>189</sup> Kirchof, *The Balance of Powers between National and European Institutions* (1999), 5 ELJ 225, 227-8, 241. Extract in Paul Craig and Grainne De Búrca, *EU Law: Text, Cases and Materials*, 3<sup>rd</sup> rev. ed., Oxford, Oxford University Press (2003) p. 314. Craig and De Búrca, p. 314.

<sup>190</sup> Ibid.

<sup>191</sup> Kumm, Part V.

Respectively, the ECJ and the national courts must determine the limits of their own spheres. Thus, the question of which court should decide is no longer necessary. Kumm acknowledges that this viewpoint is accepted by national courts but has no recognition with the ECJ. Thus, this interrelated relationship corresponds more to the reality in the Member States and signifies the multidimensional mechanism of the Community legal system. Kumm recognises that there is no panacea to the *Kompetenz-Kompetenz* question and problems will still continue to arise. However, the ultimate goal must be to secure the coherence of the Community legal order while, at the same time, respecting national constitutions. The ECJ and the national courts must therefore attempt to have an ongoing conversation.

## 4.5 Conclusion

This chapter has tried to shed light on the question of *Kompetenz-Kompetenz* of the Community. The power to have the ultimate say in matters regarding the constitutionality of Community provisions is of monumental importance and essentially touches on the very core of the Community legal order. On the one hand, the ECJ considers that it has the authority to determine the legal limits of the Community whereas the German and Danish Constitutional Courts are profoundly opposed. This dichotomy is also illustrated in the legal debate and there have been numerous answers to the “*Decisive Question*” posed by Theodor Schilling. Weiler and Haltern, considers that the ECJ has *judicial Kompetenz-Kompetenz* whereas Schilling considers this right to lay with the national courts in the Member States. MacCormick, on the other hand, argues that the relationship between national courts and the ECJ must be one of mutual respect and interaction rather than hierarchical.

The European Union is not a European state nor is it a federation of states. It is a hybrid animal. The position of a Supreme Court in a federal system is different to the position of the ECJ in the Community legal order. The question remains whether the ECJ is really fit to have the power of *judicial Kompetenz-Kompetenz* and can the ECJ really be trusted to have this authority? Ultimately, it is up to the Member States when revising the Treaties to settle this matter. The aim of the following chapter is to examine what the Convention on the Future of Europe has done to remedy this situation.

# 5 The Work of the Convention on the Future of Europe

The name given to this thesis is “*From Costa to Constitution*”. As the title indicates, the thesis has attempted to illustrate the evolutionary process of the doctrine of supremacy and the closely related question of competences. This chapter will examine the effects of the proposed Draft Constitution as established by the Convention on the Future of Europe.

## 5.1 The Convention and Revision of the Treaties.

At the Nice European Council the European leaders paved the way for the biggest enlargement in the history of the Community, enabling ten former Communist countries to join the Union. The enlargement will mark the biggest (peaceful) political landmark in Europe since the fall of the Berlin Wall and will be a further leap toward a perpetual peace in Europe. However, it became evident that an enlarged Community would make decision-making, among many other things, more difficult. Leaders agreed that institutional reforms were necessary and there were calls for a deeper and wider debate on the Future of Europe. Accordingly, the Nice European Council set up Declaration 23 on the Future of the European Union that was appended to the Nice Treaty. The Declaration envisaged a three-stage process. First, an open debate with civil society would take place under 2001 followed by a more concentrated preparation of the next phase of reform that was decided upon under the Laeken European Council in December 2001. Finally, an Inter-governmental conference (IGC) would take place under 2004. On 15 December 2001 the European Council agreed on the Laeken Declaration that gave guidelines to Declaration 23. The Laeken Declaration set up the Convention on the Future of Europe. One of its aims was to create a draft constitutional treaty for Europe through consensus. The Convention on the Future of Europe finally agreed on a Draft Constitution that was handed over to the European Council in Thessaloniki on 20 June 2003 and later, in a finalised version, to the Italian Presidency of the European Council on 18 July 2003.<sup>192</sup>

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<sup>192</sup> Draft Treaty Establishing a Constitution for Europe CONV 850/03. *Official Journal C* 169,18/07/2003 p.0001-0105.

Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>. Last visited 9 January 2004, 3.45pm. The Convention on the Future of Europe was a “*strange new hybrid political animal* “. John Fitzmaurice, Lecture 12, *Politics of the European Union*, Université Libre de Bruxelles (2002). The Convention consisted of 105 representatives originating from diverse political backgrounds. Representatives included members of the European Commission and European Parliament, government representatives from the Member States as well as the candidate countries, including Turkey, and members of national parliaments. One must bear in mind that the ECJ was not represented in the Convention. The representatives had to agree on the Draft Constitution by consensus. The

Adopting a constitution for the European Union means rewriting the Treaties. One must bear in mind that this is an intergovernmental process and cannot be substituted by the work of the Convention. Modifications of the Treaties require a unanimous decision during the IGC by the Member States followed by ratification by the national parliaments and referenda if the national constitutions so require. Hence, the Convention was merely a preparatory process ahead of the IGC that started 4 October 2003. However, the Convention had to agree on the Draft Constitution by consensus. This meant that the representatives, including many anti-Europeanists, had to agree on a draft without giving dissenting opinions. Accordingly, the Draft Constitution was the result of the consent reached by all representatives. This gives the Draft Constitution considerable weight. Therefore, one may anticipate that the Draft Constitution will be the natural reference point during the IGC.

The purpose of this chapter is to give an account and analysis of the Draft Constitution. It may be contentious and hazardous to evaluate the importance of articles of a Draft Constitution that has not yet been ratified nor even fully debated, especially at a time like this when negotiations have broken down and the revision process has been put on ice. However, the most contentious questions have regarded, among others, the allocation and votes in an enlarged Union and the views on a political union. The question of primacy of EU law and the delimitation of powers of the Union has not been the primary focus of the negotiating parties which, somewhat have been left in the shadows of the limelight of more populist debates on issues such as Christianity and votes. The aim here is to examine the impact of the proposed articles on primacy and the conferral of powers to the Union. The guess of the author is that these issues will be passed without much dispute once the revision process is reopened since other more politically contentious issues may be the focus of debates. Thus, it is of interest to try to analyse the effects of the articles.

Naturally the wording of the articles may well change and be revised several times before a final version of the Constitution is agreed upon. But, even then, it is far from clear that the article or even the Constitution itself will be accepted by the Member States since it may be subjected to intense parliamentary debate and/or referenda in the Member States. This is a heavy process. However, the author believes that despite this flaw it is still meaningful to examine the implications of these articles since it may shed light on the essence of the supremacy doctrine and the problem of *Kompetenz-Kompetenz*.

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work of the Convention was lead by the Presidium and its outspoken and ambitious chairman, former French President Valéry Giscard d'Estaing.

## 5.2 Primacy of EU Law<sup>193</sup>

### 5.2.1 From Supremacy *de facto* to Supremacy *de jure*

The Treaties have so far been silent on supremacy and it is the ECJ that has gradually established the doctrine of supremacy in Community law since the early days of *Costa*. The ECJ has held that Community law has supremacy even over conflicting constitutional provisions in the Member States. We have seen that the courts in the Member States have somewhat partially accepted supremacy even though there are stark exceptions such as the German Constitutional Court that still have not unconditionally accepted supremacy. Nonetheless, the doctrine of supremacy must be said to be a well-established reality. The Member States have had many occasions at the Intergovernmental conferences to settle the issue of supremacy if they considered it to be unwarranted. This has not been done and one may arguably draw the conclusion that by doing so the Member State have somewhat reluctantly accepted supremacy.

The Convention on the Future of Europe agreed to include the primacy of Union law in the Draft Constitution. Article I-10 of the Draft Constitution states:

- “1. *The Constitution, and law adopted by the Union’s Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.*<sup>194</sup>
2. *Member States shall take appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions’ acts.”*

First of all it is important to examine the text of the proposed article. It seems evident that the Convention delicately preferred the weaker word “primacy” to the stronger “supremacy”. However, the implications of the Article would probably not change if the Convention had used “supremacy”. What is more important is that the wording of the Article is ambiguous and

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<sup>193</sup> The Draft Constitution has proposed an abolishment of the old pillar structure. The Union will have one legal personality. Today, the primary jurisdiction of the ECJ lies in the supranational first pillar that concerns the European Community. See Craig and De Búrca, p. 31. It is the first pillar that gives legislative power to the Community. The ECJ lacks jurisdiction in the second and third pillar. The second (CFSP) and third pillars (PJCC) are founded on intergovernmental co-operation. Consequently, the law of Community is generally referred to as Community or EC law rather than EU law and the Court is called the Court of Justice of the European Communities and not the Court of the European Union. See Jörgen Hettne and Ulf Öberg, *Domstolarna i Europeiska unionens konstitution*, (2003), p. 80. This will partly change if the Constitution is ratified. Hence, the Draft Constitution speaks of EU law.

<sup>194</sup> Added emphasis.

can lead to different interpretations.<sup>195</sup> Should one consider that *all* EU law is supreme to *all* national law, including national constitutions? The wording does not give a precise answer. Paradoxically, the Article can also be interpreted as not granting supremacy over national constitutional provisions but mere basic national law.

On the other hand, Hettne and Öberg argue that a textual interpretation of the Article would give the “*Constitution*” as well as “*the law adopted by the Union’s Institutions in exercising competences conferred on it*” supremacy over the law in the Member States. They believe it will be very difficult, if not impossible, for a Member State to claim that its national constitutional provisions should take precedence over the Constitution or EU law even in exceptional cases.<sup>196</sup> If so, there would be no room for national courts, authorities or parliaments to persevere in questioning supremacy. Thus, Hettne and Öberg believe that if this wording of Article I-10.1 is accepted by the IGC, the fundamental question of supremacy will be finally settled.<sup>197</sup>

Article I-28.1 of the Draft Constitution states that the ECJ shall “*ensure respect for the law in the interpretation and application of the Constitution*”. The Article gives the ECJ the jurisdiction to safeguard the respect of EU law in the interpretation and application of the Constitution. Hettne and Öberg argue that the Article grants the ECJ authority to interpret the Constitution as a whole unless it expressly states otherwise.<sup>198</sup> The authors call this a “*general jurisdiction*” for the ECJ to interpret EU law.<sup>199</sup> Consequently, under Article I-28.1 the ECJ has the authority to interpret Article I-10.1 on the primacy of EU law. It would not be a bold assumption to state that the ECJ will interpret Article I-10.1 as providing textual evidence for the Constitution and EU law to take precedence over national constitutional provisions if the Article stands. This would be a natural evolution following the earlier case law of the ECJ. Arguably, this was also the intention of the Convention when establishing Articles I-10.1 and I-28.1. Furthermore, Article I-10.2 states that the Member States must take appropriate measures to ensure fulfilment of obligations flowing from the Constitution or resulting from the Union Institutions’ acts. This would mean that Member States have an obligation to respect the primacy of EU law. Craig believes that Article I-10.2 reinforces Article I-10.1.<sup>200</sup> The question is whether Article I-10, in fact, will make a substantial difference. The ECJ has hardly refrained from ruling on supremacy in the past.

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<sup>195</sup> See Craig, *supra* note no. 109, section II of the article.

<sup>196</sup> Hettne and Öberg, pp. 70 and 15

<sup>197</sup> *Ibid.* p. 70. However, Hettne and Öberg acknowledge that the conclusion that EU law shall take precedence over national constitutions has not had a breakthrough in the political debate and the matter is still highly controversial.

<sup>198</sup> *Ibid.* p. 83.

<sup>199</sup> The author’s translation.

<sup>200</sup> Craig, *supra* note no. 109, section II of the article.

Moreover, Article I-5.1 states that the “*Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional (...)*”. Under Article I-28.1 the ECJ has jurisdiction to define what the exact meaning of “*national identities*” is.<sup>201</sup>

### **5.2.2 Codification or Enlargement?**

It is clear that Article I-10.1 is an attempt to codify the jurisprudence of the ECJ on supremacy. However, one may question whether the Article is a *de facto* enlargement of the supremacy doctrine or merely a codification? The Member States will most likely regard the primacy of EU law to exist as a result of their ratification of the Constitution. But the standpoint of the Court may well differ. Since the ECJ has the power, according to Article I-28.1, to interpret and apply Article I-10.1, the Court may argue that supremacy is inherent in the Union. In order to remedy this uncertainty, one among others, the article on primacy should be rephrased. If the Article stands ambiguity still exists. Furthermore, one could also argue whether the Article in fact is counterproductive since it does not unveil the many questions concerning the relationship between EU law and the law in the Member States. Furthermore, it is questionably that such a fundamental principle of Community law such as the doctrine of supremacy should be codified in the Constitution. One must bear in mind that the doctrine of supremacy is a well-established principle of Community law. Some may say that the attempt to codify the doctrine of supremacy will bring up an unnecessary discussion on a principle that is deep rooted in the Community. On the other hand, this discussion will make the general public more aware of the nature of the Community. Wouldn't it be absurd to have a Constitution that would not mention the Primacy of EU law only to avoid political controversy? The point of the Constitution must be to make the European legal order more comprehensible and that would not be achieved if one would brush supremacy under the carpet.

It is somewhat peculiar that the ECJ was not represented at the Convention. Why exclude the ECJ? The judges of the ECJ could provide insight to complex legal problems and give expert opinions to the Convention representatives and give their view on supremacy and the question of legal limits of the Union. However, in the end it remains to be seen whether the national parliaments and Constitutional Courts in the Member States will accept Article I-10.

## **5.3 A Better Delimitation of Powers?**

The delimitations of the powers of the Community have frequently been the focus of debate. An example of this is the ECJ report ahead of Amsterdam. The ECJ stated, “[I]t may be necessary to determine the limits of the

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<sup>201</sup> See Hettne and Öberg, p.84.



*powers of the Union vis-à-vis the Member States, and of those of each of the institutions of the Union.*”<sup>202</sup>

Article I-1.1 of the Draft Constitution states that the Member States have conferred competences to the European Union in order to attain common objectives. The aim was to better describe the limitations and powers of the Union. Ahead of the work of the Convention the Nice and Laeken European Councils called for a better delimitation of powers between the Member States and the Community. One must bear in mind that Article I-10 only grants primacy to the Constitution and EU law adopted by the Union’s institutions “*in exercising competences conferred on it*”.<sup>203</sup> It is therefore called for to examine the competences conferred on the Union.

Article I-9.1 states that “*the limits of Union competences shall be governed by the principle of conferral*”. The implications of the principle of conferral (or attribution) are spelt out in Article I-9.2 that states “*the Union shall act within the limits of the competences conferred on it by the Member States in the Constitution to attain the objectives set out in the Constitution.*” Naturally, competences that are not conferred on the Union remain with the Member States.<sup>204</sup>

Moreover, the Member States shall “*take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions’ acts*”, according to Article I-10.2. Hettne and Öberg argue that, by intently putting this obligation on the Member States to loyally ensure the fulfilment of Union law in the “primacy Article”, the obligation to follow Union law is strengthened.<sup>205</sup> They reach this conclusion by examining the difference between Article I-10.2 and Article 10 EC.

### **5.3.1 The Proposed Fields of Competences in the Union**

Articles I-11 to I-13 states that there are three kinds of competences. Firstly, according to Article I-11.1, the Union has an exclusive legislative authority in areas where the Union has exclusive competence. The Member States may then only legislate and adopt legally binding acts if they are empowered to do so by the Union or for the implementation of acts adopted by the Union. These specific fields are laid out in Article I-12 and include the common commercial policy and monetary policy (for those countries who have adopted the Euro). Craig acknowledges that the implications of the areas of exclusive competences are severe in the way that the Member

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<sup>202</sup> Report of the Court of Justice on Certain Aspects of the Application of the Treaty of the European Union, May 1995, 2. [http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj\\_rep.html](http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html). Last visited 8 January 2004, 5.27 pm.

<sup>203</sup> Craig, *supra* note no. 109, section II of the article.

<sup>204</sup> For example, the EU would not have the competence to change the constitutional structure in Sweden from a constitutional monarchy to a republic.

<sup>205</sup> Hettne and Öberg, p. 73.

States completely relinquish their autonomous legislative powers in those fields.

Secondly, some competences are shared between the Union and the Member States. If competence is shared in a specific area between the Union and the Member States both shall have the power to legislate and adopt legally binding acts in that area, according to Article I-11.2.<sup>206</sup> The areas of shared competences are stated in Article I-13. Shared competence essentially signifies that both the Union and the Member States may legislate and adopt legally binding acts within that specific field. Hence, a Member State can exercise competences in an area where the Union lacks competence or where the Union has decided not to exercise its competence.<sup>207</sup> The shared competences are listed in Article I-13 and include, among others, the internal market, agriculture and fisheries, environment and freedom, security and justice. The specific details of concerning these areas are given in Part III of the Constitution. Hence, extent of these individual fields varies considerably.

Lastly, the third competence category is found in Article I-11.5 that states that the Union shall have competence in some areas to “*carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas*”. These fields are expressed in Article I-16 and examples of which are industry, education and culture. Hettne and Öberg state that one must bear in mind the areas of shared competences can be defined negatively or subsidiary. Negatively, shared competences relate to areas where the Union lacks exclusive competence (Article I-12) and subsidiary, in areas where the Union can carry out supporting, coordinating or complementary actions (Article I-16).<sup>208</sup> However, there are no limits for the Union to initiate legislation in new areas, which the Union believes to be within areas of shared competence. But, the Union cannot legislate in areas where harmonisation of Member State laws is excluded according to Article I-16.3. These areas are specified in Part III of the Constitution. Furthermore, according to Article I-11.6 the provisions in each specific area determine the scope of and arrangements of Union competences. These areas are defined in Part III of the Constitution. Craig argues that although the list of areas is clear there is an imminent risk of potential overlaps with areas of shared competences.<sup>209</sup> The example given by Craig relates to the problem of distinction in an area such as regulation of the media that may well fall under the internal market, which is a shared competence or culture that is listed among the areas of supporting, coordinating and supplementary actions.

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<sup>206</sup> The areas of exclusive and shared competences are defined in Article I-12 and I-13.

<sup>207</sup> Craig, *supra* note no. 109, section II of the article.

<sup>208</sup> Hettne and Öberg, p. 74.

<sup>209</sup> Craig, *supra* note no. 109, section II of the article.

The principle of conferral as expressed in Article I-9.1, governs the delimitation between Union and Member State competences. On the one hand, the Member States have conferred powers to the Union through the Constitution but on the other hand, it is the Constitution that gives the categories of competences to the Union. It is important to note that it is the Constitution itself that grants the Union these competences. Significantly, it is not the Member States that grant competences to the Union. Thus, these competences can be said to be inherent in the Constitution. Consequently, this leads us to the question of *Kompetenz-Kompetenz*. One may again pose Schilling's "*Decisive Question*"; who has the ultimate power to determine whether the Union has acted *ultra vires*; the Union or the Member States? Or, is such a question really necessary?

### 5.3.2 The Question of *Kompetenz-Kompetenz* in the Union

As we have seen earlier the question of the legal limits of the Union can both concern the legislative boundaries of the Union institutions and the judicial boundaries of the Court. Hence, the following section will examine whether the Constitution gives the Union *legislative Kompetenz-Kompetenz* and its court *judicial Kompetenz-Kompetenz*. On the whole, it would seem that the Convention on the Future of Europe has avoided settling these questions.

Article I-10 states the Constitution and law adopted by the institutions of the Union shall have primacy "*in exercising competences conferred on it*". The Article does not finally settle the issue of the legal limits of the Union. The primacy of EU law is conditional. EU law shall take precedence over the law in the Member States in matters where the Member States have conferred competences on the Union. Moreover, Article I-28.1 gives the ECJ the authority to ensure the application and interpretation of EU law. The Article does not seem to give the Court *judicial Kompetenz-Kompetenz* but merely the power to apply and interpret the Constitution and EU law. An assumption that these articles grant the ECJ *judicial Kompetenz-Kompetenz* would seemingly be too bold. Hettne and Öberg take an opposite standpoint. They consider that the Constitution gives the Court *judicial Kompetenz-Kompetenz*.<sup>210</sup> By giving the ECJ the authority to interpret the "*national identities*" of the Member States stated in Article I-5.1 and Articles I-9 to I-17 of the Constitution, they argue that this is textual evidence for *judicial Kompetenz-Kompetenz*. However, the authors do not further develop their arguments.

Moreover, one may pose the question whether the Constitution gives the Union *legislative Kompetenz-Kompetenz*. Article 308 EC is replaced by a flexibility clause in Article I-17. The article states, "*if action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set up by the Constitution, and the Constitution has not provided the necessary powers, the Council of*

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<sup>210</sup> Hettne and Öberg, pp. 15 and 78

*Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures*". Article 308 EC states that such an enlargement of competences of the Community must take place "*in the course of the operation of the internal market*". Hence, the reference to the common market in Article 308 EC is omitted in the Draft Constitution. Hettne and Öberg state that the Union objectives have been extended in Article I-3. Furthermore, the European Parliament is given authority to consent to a further attribution of powers according to Article I-17. They draw the conclusion that this would give the Union *legislative Kompetenz-Kompetenz*. Their conviction is further strengthened by Article I-33.2 which states that "*in specific areas provided for by the Constitution, European laws and European framework laws shall be adopted by the European Parliament with the participation of the Council of Ministers, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures*". Hettne and Öberg believe this to be a new form of decision-making. It is unclear what these "*special legislative procedures*" are and it seems uncertain whether the Convention wanted to provide *legislative Kompetenz-Kompetenz* to the Union.

However, if it would be the aspiration of the Convention to finally settle the question of competences why haven't they explicitly addressed the issue in the Constitution? The question of judicial competence of the Court and legislative competence of the Union has not been openly addressed in the Draft Constitution and the issue is seemingly still left wide open. Maduro argues that "*both national and European constitutional law in the internal logic of their respective legal systems the role of higher law. In this way there is no agreement as to the Kompetenz-Kompetenz between national legal orders and the EU legal order.*"<sup>211</sup> The European legal order will still be a multi level system that interact and provide a system of 'checks and balances'.<sup>212</sup> The Member States and their courts and Union institutions are all part of the European framework and should interact and assist one another in a spirit of co-operation rather than causing stalemate by head on confrontation. In a pluralistic framework there is no need for subordination and hierarchy.

The debate will undoubtedly continue even after an eventual ratification of the Constitution since there is no universal answer to the question of competences. Arguably, the European Union and its Member States are not ready at this point in time to bestow *legislative* and *judicial Kompetenz-Kompetenz* on the institutions of the Union. This has been mirrored in the national political debate on the future of the Union. All the same, it is up to

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<sup>211</sup> Miguel Poiars Maduro, *Europe and the Constitution: What if this is as good as it gets?* Forthcoming in Weiler and Winds (eds.), *Rethinking European Constitutionalism*, p. 5. Cambridge, Cambridge University Press (2000). Available at:

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<sup>212</sup> *Ibid.* p. 30.

the IGC to try to get over these hurdles and agree on a Constitution for Europe during the course of 2004.

## 6 Conclusion

This thesis has attempted to address the questions of supremacy of Community law and the intertwined issue of the legal boundaries of the Community. As stated by MacCormick, supremacy does not entail an all out subordination of Community law over national law nor does it imply that the national constitutions as a whole shall yield to Community law.<sup>213</sup> It is clear that Community law cannot take precedence over national law in a field where the Community lacks competence.

The development of the doctrine of supremacy has been evolutionary rather than revolutionary, but not without bumps on the way. Alter sees supremacy as “*largely an unquestioned truth.*”<sup>214</sup> However, one must bear in mind that the doctrine of supremacy was not received with unbridled enthusiasm in the Member States and it has only in part been accepted by the national Constitutional Courts. Today we stand at a crossroads. The Convention on the Future of Europe has included the primacy of EU law in its Draft Constitution thereby establishing supremacy *de jure*. Nonetheless, it remains to be seen whether the Member States will endorse the wording or the very existence of such an article. My guess is that once the smoke settles after discussions on more contentious issues such as CFSP and votes in the Union, the primacy of EU law will be enshrined in the Constitution without much controversy. Undoubtedly, the precise wording of a ‘primacy article’ will be of significant importance.

The debate on competences, stemming from that of supremacy, has been a lively one, with dichotomised views expressed both by the ECJ and national courts, and amongst legal scholars. The German Constitutional Court defied the ECJ by stating that it had certainly not relinquished the authority to declare the unconstitutionality of Community acts and thereby rejected the ECJ’s claim to *judicial Kompetenz-Kompetenz*. The legal debate was partly triggered by Schilling who somewhat rhetorically asked whether a Community that is based on limited attributed competences and, in his mind, lacking *legislative Kompetenz-Kompetenz*, can have a court that has *judicial Kompetenz-Kompetenz*? MacCormick who advocates legal pluralism and an interactive relationship between the Union and the Member States gives the most convincing response. The ultimate goal must be to secure the coherence and the effectiveness of the European legal framework. This should be undertaken by attempting to have an ongoing conversation rather advocating subordination and hierarchy that lead to a stalemate relationship between the Union and the Member States.

Seemingly, the Draft Constitution does not settle the competence issue as the Articles currently stand. Notwithstanding, the debate has taught us more

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<sup>213</sup> MacCormick, pp. 115-117.

<sup>214</sup> Alter, p 26.

about the European legal order and the relationship between the Union and the Member States. We have come a long way since the early days of *Van Gend en Loos* and *Costa* but many questions remain unanswered. Undeniably, the case continues...

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