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# A CASE OF "FRIENDLINESS IS NEXT TO STATELINESS"? THE MIGRATION OF CONSTITUTIONAL IDEAS ON EURO-CONFORM INTERPRETATION OF NATIONAL LAW

## 1. Introduction

The German Federal Constitutional Court ("FCC") in its decision in the *Lisbon Treaty* case[1] expressly highlighted, for the first time in its case-law, the constitutional principle of "friendliness" or "openness towards European law". Such development was, however, already heralded several years previously by the Polish Constitutional Tribunal ("CT") in the lead up to and beyond EU accession in 2004. It is clearly arguable, then, that the German Court[2] had been inspired by its Polish counterpart[3] in this respect, one of the

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[1] FCC, *Lisbon Treaty*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 *CMLR* 712.

[2] On the FCC's abundant constitutional and legal impact in the region, see generally A.F. Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of*

first examples of a constitutional principle migrating from the newer constitutional courts to older established ones.[4] Since then the PCT has itself taken on board the FCC's subsequent application of this principle in *Honeywell*.[5]

Such openness towards European law is directly linked to the requirements found in the case-law of the Court of Justice[6] according to which national courts are under a duty to interpret national law in conformity with European law.[7] This article will thus deal with the overarching European judicial context first, briefly looking at the need for effective remedies for breach of European law (section 2) before proceeding to examine in detail the Court of Justice's rulings in the field of indirect effect, the duty on national courts (in certain circumstances) to provide a Euro-conform interpretation of national law (section 3). Having looked at the requirements of European law, the focus of the work turns to address the respective positions, vis-à-vis this Court of Justice duty, of the constitutional courts in Germany and Poland (sections 4-5) before arriving at a few concluding observations (section 6).

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*the German Model of Integration in Hungary and Poland*, Martinus Nijhoff, Leiden (2013).

[3] This idea certainly runs counter to the point made by Bogdandy & Schill when they state that "the German Federal Constitutional Court invented [this principle] in its *Lisbon* decision": A. von Bogdandy & S. Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty" (2011) 48 *CML Rev*. 1417, at 1450.

[4] See generally S. Choudhry (ed.), *The Migration of Constitutional Ideas*, CUP, Cambridge (2007).

[5] FCC, *Honeywell*, 6 Juli 2010, 2 BvR 2661/06: BVerfGE 126, 286; [2011] 1 *CMLR* 33.

[6] Following the entry into force of the Lisbon Treaty, the Court of Justice forms part of the "Court of Justice of the European Union" that also includes the General Court (the previously named Court of First Instance) and the specialised courts: Art. 19 TEU ("Treaty on European Union"): 2010 OJ C83/13.

[7] For the purposes of this work and in order to avoid complications between the usage at different times of "EEC law," "EC law" and "EU law," the present author will use the generic term of "European law" to cover them all.

## 2. Requirements for remedies for breach of European law

The European law principles of direct effect and supremacy[8] combine to ensure that the role of national authorities, including courts, is of great significance in the practical application of the Union legal order. Much European law is applied at national level. The absence of any Union police force or army means that the support of national bodies for European law is indispensable. Put simply, the Union legal order would be instantly deprived of its *sui generis* characteristics were support from national institutions, including, and perhaps especially, courts, to be withdrawn.

In those cases where rights are conferred upon individuals by directly effective European provisions, it follows from the combined effect of the doctrines of direct effect and supremacy of European law that national courts are bound to protect and enforce those rights against any adverse measure or practice of the Member States which tends to prevent their free exercise. The national courts are obliged to afford direct and immediate protection.[9] Article 4(3) TEU[10] provides a basic statement of the obligations undertaken by Member States towards the Union[11] and provides:

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[8] A.F. Tatham, *EC Law in Practice: A Case-Study Approach*, HVG-ORAC, Budapest (2006), chap. 2, 44-95. See also S. Weatherill, *Law and Integration in the European Union*, Clarendon Press, Oxford (1995), chapter 6; T. Winter, "Direct Applicability and Direct Effects" (1972) 9 *CML Rev*. 425; P. Pescatore, "The doctrine of 'Direct Effect': An Infant Disease of Community Law" (1983) 8 *EL Rev*. 155; P. Eleftheriadis, "The direct effect of Community law: conceptual conceptual issues" (1996) 16 *YBEL* 205; and B. de Witte, "Direct Effect, Primacy and the Nature of the Legal Order," in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, 2nd ed., OUP, Oxford (2011), chap. 12, 323-362.

[9] On the need for national remedies for breach of European law, as developed by the Court of Justice, see Tatham (2006), chap. 3, 96-147; and M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, Oxford (2005).

[10] The new numberings of the Treaty on European Union and the Treaty on the Functioning of the European Union (i.e., the post-Lisbon numbering) are used throughout the text and quotations to ensure consistency.

[11] Formerly Art. 5 EEC and Art. 10 EC: see J. Temple Lang, "Community constitutional law: Article 5 EEC Treaty" (1990) 27 *CML Rev*. 645; and J. Temple Lang, "The Duties of National Courts under Community Constitutional Law" (1997) 22 *EL Rev*. 3.

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

The Court of Justice has inferred for many years that the notion that the principle of Union solidarity laid down in Article 4(3) TEU (and its predecessors) imposes a duty on the national courts to ensure the legal protection of the rights which citizens derive from directly effective European provisions.[12]

Rights conferred upon individuals must be exercised before national courts in accordance with the system of remedies and procedures available under domestic law,[13] where European law does not provide otherwise. European law requires that adequate protection be afforded: it leaves to each Member State the task of lying down, *inter alia*, the rules of procedure and evidence.[14] This matter is subject to the principles of (1) non-discrimination or equivalence in the provision of remedies;[15] and (2) the remedy must be

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[12] For example, Case 265/78 *H. Ferwerda B.V. v. Produktschap voor Vee en Vlees* [1980] ECR 617.

[13] Case 33/76 *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989. See also M. Ruffert, "Rights and Remedies in European Community Law" (1997) 34 *CML Rev.* 307.

[14] National law also normally governs questions of evidence and procedure. These include such matters as the appropriate court or tribunal to hear the case, time-limits for commencing proceedings, and the burden of proof: Case 45/76 *Comet BV v. Produktshap voor Siergewassen* [1976] ECR 2043; Cases 205-215/82 *Deutsche Milchkontor v. Germany* [1983] ECR 2633. On the question of time-limits, however, see Case C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I-4269; and generally, A. Biondi, "The European Court of Justice and certain national procedural limitations: not such a tough relationship" (1999) 36 *CML Rev*. 1271.

[15] Case 33/76 Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland [1976] ECR 1989; and Case 45/76 Comet BV v. Produktschap voor Siergewassen [1976] ECR 2043.

effective in protecting the infringed European Union right.[16] This latter appears to have been subsumed by Art. 19(1) TEU, second sentence, which reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

The Court of Justice case-law on the effectiveness in the provision of national remedies to protect European rights has been greatly affected, in its development, by the tension such principle enjoys with that of non-discrimination or equivalence. In certain cases, the strict application of the equivalence principle will have the result of denying effective protection of a European right. At times, it has seemed that the effectiveness principle has predominated over equivalence.[17]

In application of the principle of effectiveness and in the absence of a directly effective provision of European law, the Court of Justice has developed a series of devices to ensure that rights derived from European law are still properly protected before national courts. In the pursuit of such aim, the Court of Justice has evolved the principle of state liability for breach of EU law,[18] as well as the principle of "indirect effect," which forms the focus of the present work.

## 3. Indirect effect of European law: the duty of Euro-conform interpretation of national law

Interpretation of national law in accordance with obligations arising under European law[19] became an important issue after the Court of Justice decided

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[16] Case 79/83 *Harz v. Deutsche Tradax GmbH* [1984] ECR 1921.

[17] For an interesting analysis of the present situation, see M. Bobek, "Why There is no Principle of 'Procedural Autonomy' of the Member States," in B. de Witte & H. Micklitz (eds.), *The European Court of Justice and Autonomy of the Member States*, Intersentia, Antwerp (2011), 305-322.

[18] Tatham (2006), chap. 2, 44, at 89-93 and chap. 3, 96, at 132-145. See also J. Steiner, "The limits of State Liability for Breach of European Community Law" (1998) 4 *EPL* 69; R. Caranta, "Government Liability after *Francovich*" (1993) 52 *CLJ* 272; G. Anagnostaras, "The Principle of State Liability for Judicial Breaches: The Impact of EC Law" (2001) 7 *EPL* 2; W. Van Gerven, "Bridging the Unbridgeable: Community and National Tort Laws After *Francovich* and *Brasserie*" (1996) 45 *ICLQ* 507; and M. Breuer, "State liability for judicial wrongs and Community law: the case of Gerhard Köbler v. Austria" (2004) 29 *EL Rev.* 243.

[19] Tatham (2006), chap. 2, 44, at 81-86; and S. Prechal, *Directives in EC Law*, 2nd ed., OUP, Oxford

in *Marshall*[20] that directives could not be horizontally directly effective.[21] Litigants seeking to rely on directives against private sector parties could thus not invoke the directives as of right. Instead, attempts were made by the Court of Justice to require national courts to take into account European law provisions[22] when interpreting the relevant domestic legislation.

However, the foundations of the duty of consistent[23] or harmonious[24] interpretation[25] were laid down in a case which predates *Marshall* and which was decided while the question of horizontal direct effect was still open. *Von Colson*[26] and the related case of *Harz*[27] exemplified the problem of the

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(2006), chap. 10. See also: M. Amstutz, "In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning" (2005) 11 *ELJ* 766; G. Betlem, "The Principle of Indirect Effect of Community Law" (1995) 3 *ERPL* 1; P.P. Craig, "Directives: Direct Effect, Indirect Effect and the Construction of National Legislation" (1997) 22 *EL Rev*. 519; S. Drake, "Twenty years after Von Colson: the impact of 'indirect effect' on the protection of the individual's Community rights" (2005) 30 *EL Rev*. 329; and M. Klamert, "Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots" (2006) 43 *CML Rev*. 1251.

[20] Case 152/84 Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) ("Marshall No. 1") [1986] ECR 723.

[21] Confirmed again in Case C-91/92 *Faccini Dori v. Recreb srl* [1994] ECR I-3325. In 1993 and 1994, three Advocates General had delivered Opinions in favour of overruling *Marshall* and acknowledging the horizontal direct effect of Directives: van Gerven AG in Case C-271/91 *Marshall v. Southampton and South-West Hampshire Area Health Authority ("Marshall No. 2")* [1993] ECR I-4367; Jacobs AG in Case C-316/93 *Vaneetveld v. SA Le Foyer* [1994] ECR I-763; and Lenz AG in *Faccini Dori v. Recreb* itself.

[22] Although, as this article will discuss, such requirement is applied mainly to directives, other forms of European law may be involved. Thus, in *Grimaldi* (Case C-322/88 *Grimaldi v. Fonds des maladies professionnelles* [1989] ECR 4407), the Court of Justice held that Recommendations – which have no binding force according to Art. 288 TFEU – must be taken into account by national courts when interpreting domestic or European law.

[23] T.C. Hartley, *The Foundations of European Union Law*, 7th ed., OUP, Oxford (2010), at 234-238.

[24] P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, 5th ed., OUP, Oxford (2011), at 200-207.

[25] There are a number of designations used by commentators and are listed in S. Prechal, *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts*, Clarendon Press, Oxford (1995), at 200.

[26] Case 14/83 Von Colson v. Land Nordrhein Westfalen [1984] ECR 1891.

[27] Case 79/83 *Harz v. Deutsche Tradax GmbH* [1984] ECR 1921.

anomalies created by lack of horizontal direct effect, since in the former case the defendant was a regional authority of a State and in the latter, a private company.

The plaintiffs in *Von Colson* had both initiated proceedings under German sex discrimination law, arguing the defendants had refused to engage them because of their sex. The problem arose because the German legislation, as interpreted by the German courts, only allowed for damages based on out-of-pocket expenses. The plaintiffs argued that this limitation on remedies infringed the obligations put on Member States by the Equal Treatment Directive, Directive 76/207/EEC.[28] Direct effect, it was agreed by the parties, could not be applied because the provision of the Directive did not fulfil the criteria.

The Court of Justice held that although Member States had to be free to choose the ways and means of implementing the Directive, the obligation to adopt "all the measures necessary to ensure that the Directive is fully effective, in accordance with the objective which it pursues" places limits on Member State discretion. The Court of Justice emphasised the necessity of sanctions which would act as a deterrent to behaviour in contravention of the Directive. The Court, using (now numbered) Article 4(3) TEU, then established this obligation of effectiveness of national implementing measures as a duty of interpretation:[29]

> "However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article [4(3) TEU] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law

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[28] Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: 1976 OJ L39/40. Repealed and replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast): 2006 OJ L204/23.

[29] These principles were specifically applied in Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; and in Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen* [1987] ECR 3639.

> and in particular the provisions of a national law specifically introduced in order to implement Directive 76/207, national courts are required to interpret their national law in the light of the wording and purpose of the Directive in order to achieve the result referred to in Article [288(3) TFEU].
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> .... It is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given the discretion to do so by national law. [Emphasis supplied.]"

The duty of interpretation in *Von Colson* was limited, as set out above, in two ways. It was restricted to legislation specifically designed to implement European law, and therefore previous legislation would be excluded. Further, national courts might only act within the discretion given to them within their domestic legal systems. At this stage, the Court of Justice did not appear to consider it necessary to create European rules of interpretation for national courts to use in comparing national law with European obligations.

However it was several more years before the Court of Justice took the final step in establishing the duty of interpretation as a key aspect of the legal effect of European law in national systems in *Marleasing*.[30] In that case, the plaintiff argued that the formation of the defendant company was illegal because of the lack of cause. The defendant argued that this ground of nullity could not be raised against it as the causes of nullity of companies were exhaustively determined by the First Company Law Directive, Directive 68/151/EEC.[31]

Here there could be no argument that the national legislation in question was an implementation of Directive 68/151/EEC. The Spanish Civil Code provisions on the validity and nullity of contracts, which had in the past been applied to the formation of companies, predated Spain's accession to the Community. Relying on the direct effect of the First Company Law Directive appeared to be out of the question, since the defendant was a private sector company.

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[30] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. See N. Maltby, "*Marleasing*: what is all the fuss about?" (1993) 109 *LQR* 301.

[31] 1968 JO L68/8; OJ English Spec. Ed. Series I, Chapter 1968(I), 4.

The Court of Justice confirmed its *Marshall* ruling in *Marleasing*, rejecting the possibility of horizontal direct effect of directives. The Court went on to build on the foundations of *Von Colson*. The requirement that the Spanish law should be intended as an implementation of European law was discarded. Since (now numbered) Article 4(3) TEU was the basis for the duty, and that Article placed a duty on all national authorities to do everything in their power to achieve the goals of European law, a restrictive approach could not be justified. The language used by the Court of Justice was broadly inclusive:

> "[In] applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article [288 TFEU]."

Although the latter part of the paragraph quoted above is similar to the language used in *Von Colson*, it is more explicit that the national court is required to construct an interpretation of national law which achieves the goals of the directive. Courts are required to do everything possible to achieve the conformity of national law with European law. This "everything possible" formulation could undermine legal certainty, which in *Kolpinghuis Nijmegen*[32] was identified as a limitation on the duty of interpretation.

In *Kolpinghuis*, criminal proceedings were brought against the defendant café owner for stocking mineral water when, in fact, it was merely sparkling tap water. The Dutch prosecutor sought to supplement the basis of the prosecution by relying on definitions of mineral water detrimental to the defendant which were contained in a directive that the Netherlands had not yet implemented. On a reference, the Court of Justice ruled that a national authority could not rely, as against an individual, upon a provision of an unimplemented directive. Having been asked, *inter alia*, how far a national court might or had to take account of a directive as an aid to the interpretation of a rule of national law, it repeated its wording in *Von Colson* and added:

[32] Case 80/86 Criminal proceedings against Kolpinghuis Nijmegen [1987] ECR 3639.

> "It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article [288 TFEU].
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> However, that obligation on the national court to refer to the content of the directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus the Court ruled ... in Case 14/86 *Pretore de Salò v. X* [1987] ECR 2545 that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive."

The *Kolpinghuis* view on limitations on the duty of interpretation[33] was confirmed in *Wagner Miret*[34] in which the Court of Justice took a more restrictive approach to indirect effect. The applicant was a senior manager in a company that became insolvent. Directive 80/987/EEC[35] required Member States to set up a fund to recompense employees whose employers had become insolvent. Spain had established the necessary Fund but it did not cover payments to higher managerial staff. The applicant brought an action against the defendant Fund, seeking payment on the ground that the Spanish law setting up the Fund should be interpreted according to the directive. On a reference the Court of Justice ruled:

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[33] See also on this point Case C-168/95 *Criminal proceedings against Arcaro* [1996] ECR I-4705. The ruling out by the Court of Justice of interpretation of non-implementing national law in such a way as to aggravate or determine an individual's *criminal* liability does not exclude an obligation on national courts to interpret non-implementing national law in such a way as to aggravate or determine an individual's *civil* liability: Case C-456/98 *Centrosteel v. Adipol* [2000] ECR I-6007.

[34] Case C-334/92 Wagner Miret v. Fondo de Garantía Salarial [1993] ECR I-6911.

[35] 1980 OJ L283/23, as amended by Directive 2002/74/EC: 2002 OJ L270/10.

> "… [It] should be borne in mind that when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. As the Court held in its judgment in Case 106/89 *Marleasing v. La Comercial Internacional de Alimentación* [1990] ECR I-4135 … in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article [288 TFEU].
>
> The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned."

The Court of Justice accordingly held that the national provisions in question could not be interpreted in a way which conformed to the directive on the insolvency of employers and therefore did not permit higher management staff to obtain the benefit of the guarantees for which it provided. The only possible remedy for the applicant was that the State should compensate him for his losses since its failure to transpose the directive correctly had caused his loss.[36] *Wagner Miret* thus adds a rider to *Marleasing*: while national courts should act on the presumption that relevant domestic legislation (passed before or after the directive) was intended to implement it, whether that is in fact possible – in the light of the wording of the national provision – is essentially a matter of interpretation by those national courts.

Yet this point is apparently subject to the rider that where an interpretation of domestic law in conformity with European law is possible then the national court is bound to use that interpretation.[37] Such has been confirmed in *Pfeiffer*[38] which case also confirmed that the principle of consistent

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[36] Joined Cases C-6 and C-9/90 *Francovich v. Italian State* [1991] ECR I-5357.

[37] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, at paras. 47-49; and also Case C-185/97 *Coote v. Granada Hospitality Ltd.* [1998] ECR I-5199.

[38] Cases C-397-403/01 *Pfeiffer v. Deutsches Rotes Kreuz* [2004] ECR I-8835. See also Case C-12/08 *Mono Car Styling SA, in liquidation v. Dervis Odemis* [2009] ECR I-6653, at para. 64; Case C-

interpretation applies not only to the national law implementing a directive but also in fact to the national legal system as a whole:[39]

> "Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive....
>
> In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive."

Nevertheless – as seen from *Wagner Miret* – while the principle of consistent interpretation is strong it does not require the national court to give an interpretation to domestic law which it cannot bear. In fact, the Court of Justice has accepted the limits of interpretation as expounded by national courts or as could be clearly seen from the terms of domestic legislation.[40]

Moreover, temporal limitations may also be imposed on this interpretative obligation: in *Adeneler*,[41] the Court of Justice ruled that national courts were

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98/09 *Sorge v. Poste Italiane SpA* [2010] ECR I-5837, at para. 51; and Case C-239/09 *Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v. BVVG Bodenverwerungs- und – verwaltungs Gmbh* [2010] ECR I-13083, at para. 50.

[39] Cases C-397-403/01 *Pfeiffer v. Deutsches Rotes Kreuz* [2004] ECR I-8835, at paras. 115-116.

[40] Case C-91/92 *Faccini Dori v. Recreb srl* [1994] ECR I-3325, at para. 27; Case C-192/94 *El Corte Inglés v. Blázques Rivero* [1996] ECR I-1281, at para. 22; Case 111/97 *Evobus Austria v. Niederösterreichischer Verkehrsorganisations* [1998] ECR I-5411, at paras. 18-21; Case 131/97 *Carbonari v. Università degli Studi di Bologna* [1999] ECR I-1103, at paras. 48-50; and Case C-81/98 *Alcatel Austria v. Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671, at paras. 49-50.

[41] Case C-212/04 *Adeneler v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, at para. 115.

only required to interpret national law in conformity with a directive once its period of transposition had expired. Nevertheless, it did add that national courts were bound to follow its previous ruling in *Inter-Environnement Wallonie*[42] in which the Court of Justice had held that Member States were under a duty – in the implementation period prescribed for the directive – to refrain from taking measures liable seriously to compromise the result prescribed by that directive. Applied in *Adeneler*, the Court of Justice stated:[43] "It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive."

In conclusion, the main long-term achievement of *Marleasing* may be seen as having substantially reduced the impact of the lack of horizontal direct effect of directives. Although interpretation of European obligations transformed into national law is a less certain method than the direct reliance on rights as drafted in EU legislation and is subject to an array of limitations (the most potent of which is a national court override where such interpretation would distort the meaning of the national law[44]), it does provide an opportunity for national courts to avoid the discrimination against individuals suing private-sector defendants. The next sections look at how German and Polish constitutional practice have taken on board the Court of Justice's interpretative obligations in their domestic context.[45]

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[42] C-129/96 Inter-Environnement Wallonie ASBL v. Région Wallonne [1997] ECR I-7411.

[43] Case C-212/04 *Adeneler v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, at para. 123.

[44] In a pre-*Marleasing* case which came before the UK House of Lords (now the UK Supreme Court), Lord Templeman refused to "distort the meaning of a domestic statute so as to conform with Community law which is not directly applicable": *Duke v. GEC Reliance Systems Ltd.* [1988] AC 618, at 641.

[45] For an earlier discussion of the general area of this topic, see G. Betlem & A. Nollkaemper, "Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation" (2003) 14(3) *EJIL* 569.

## 4. Germany

### *4.1. Introduction*

It has already been seen that the German courts were involved with the principle of indirect effect from its very inception by the Court of Justice in the Von Colson case. A requirement on German courts to interpret national law to conform to European law is actually derived from basic constitutional principles. The Preamble to the *Grundgesetz* ("Basic Law", hereinafter referred to as the "Constitution") underlines the will "to serve the peace of the world as an equal partner in a united Europe". In addition, Articles 23-26 of the Constitution underline this willingness to co-operate internationally: Article 23 concerns Germany's participation in the European Union, the transfer of sovereign powers, its procedures and limits as well as participation of federal and *Land* authorities; Article 24 allows for the transfer of sovereign powers to international organisations together with allowing German membership in a system of mutual collective security and the peaceful resolution of international problems; Article 25 gives primacy to the general rules of international law; and Article 26 secures international peace.

### *4.2. Friendliness or Openness towards International Law*

Taken together, these provisions express the basic principle of co-operation with other States, organisations or the international community as a whole, and underlines Germany's openness towards international co-operation and integration. The Constitution thus enshrines "the principle of openness towards international law" ("*das Grundsatz der Völkerrechtsfreundlichkeit*")[46] which[47] "combines the exercise of state sovereignty with the idea of international cooperation". It is arguable that this principle[48] is as important as other basic structural principles laid down in the Constitution that

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[46] *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 34; and *Eurocontrol II*, 10 November 1981, 2 BvR 1058/79: BVerfGE 59, 63, at 89. See also R. Geiger, *Grundgesetz und Völkerrecht*, 3rd ed., Beck, München (2002), para. 34 II.

[47] A. Vosskuhle, "Multilevel cooperation of the European constitutional courts: der Europaische Verfassungsgerichtsverbund" (2010) 6(2) *EuConst* 175, at 185.

[48] M. Payandeh, "Völkerrechtsfreundlichkeit als Vefassungsprinzip" (2009) 57 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 465.

establish a democratic, federal and social State governed by the rule of law.[49] From this concept, the Federal Constitutional Court ("FCC") has derived a general rule of interpretation: in case of doubt, the Constitution as well as all ordinary statutes must be interpreted as much as possible in conformity with German obligations under public international law.[50]

In several cases, e.g., the FCC has ruled[51] that the principle of openness towards international law obliges it to ensure, within its own competences, that administrative and judicial bodies respect the provisions of international treaties and to take into consideration the relevant case-law of international courts.[52]

The FCC is also required, again within its competences, to ensure that rules of national law are interpreted generally in a way that would avoid international liability.[53] The duty to take international judgments into consideration ("*Berücksichtigungspflicht*")[54] only follows directly from the Constitution, if the constitutional "concept" as provided for in Constitution Articles 23-26 (discussed previously), Article 1(2) on human rights or Article 16(2) on extradition to an international court would so command. Thus only if an administrative authority or national court had failed to consider a judgment of an international or European court in respect of one of the said

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[49] Cf. especially K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, Mohr (Siebeck), Tübingen (1964), at 62ff; and C. Tomuschat, "Der Verfassungsstaat im Geflecht der internationalen Beziehungen" (1978) 36 *VVDStRL* 7, at 16ff.

[50] *Ostverträge*, 7 Juli 1975, 1 BvR 274/72: BVerfGE 40, 141, at 178; and *Grundlagenvertrag*, 31 Juli 1973, 2 BvF 1/73: BVerfGE 36, 1, at 14.

[51] *Fair Trial*, 26 März 1987, 2 BvR 589/79: BVerfGE 74, 358, at 370; *Görgülü I*, 14 Oktober 2004, 2 BvR 1481/04: BVerfGE 111, 307, at 315ff.

[52] U. Di Fabio, "Das Bundesverfassungsgericht und die internationale Gerichtsbarkeit", in A. Zimmermann & U. Heinz (eds.), *Deutschland und die internationale Gerichtsbarkeit* (2004), 107, at 111.

[53] *Konkordat*, 26 März 1957, 2 BvG 1/55: BVerfGE 6, 309; *Spanier-Entscheidung*, 4 Mai 1971, 1 BvR 636/68: BVerfGE 31, 58, at 75; *Todesstrafe*, 30 Juni 1964, 1 BvR 93/64: BVerfGE 18, 112, at 121; and *Vienna Convention on Consular Relations*, 19 September 2006, 2 BvR 2115/01: BVerfGK 9, 174, at para. 60.

[54] D. Richter, "Does International Jurisprudence Matter in Germany? – The Federal Constitutional Court's New Doctrine of 'Factual Precedent'" (2006) 49 *GYIL* 51, at 64-67.

Articles of the Constitution, could an individual successfully bring a complaint before the FCC.[55] Nevertheless, such a complaint could not be based on a violation of international law but rather on one or other of the fundamental rights protected by the Constitution in Articles 1-19.

Clearly there are limits to this principle of international law openness: it cannot be used to infringe "the identity of the constitutional order" ("*die Identität der Verfassungsordnung*").[56] The commitment to international law, the FCC has held, takes effect only within the democratic and constitutional system of the Constitution.[57] The Constitution:[58]

> "aims [at integrating] Germany into the legal community of peaceful and free States, but does not waive the sovereignty contained in the last instance in the German Constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with [international treaty law], provided this is the only way in which a violation of fundamental principles of the Constitution can be averted."

Thus[59] international treaties and the case-law of international courts set up by them (e.g., the European Convention and Court of Human Rights) serve as a guiding source in determining the content and scope of fundamental rights and principles of the Constitution but only to the extent that such interpretation or taking into account does not restrict or reduce a person's fundamental rights under that Constitution.[60]

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[55] *Vienna Convention on Consular Relations*, 19 September 2006, 2 BvR 2115/01: BVerfGK 9, 174, at para. 43.

[56] Di Fabio (2004), at 111, argues that the Constitution wants Germany to abide by her international legal obligations but not at the cost of giving up its own identity. This final reserve of an open Constitution which is, however, resolved to safeguard its own identity is the reason underlying the prevalence of constitutional law over general principles of international law and international treaty law as expressed in Constitution, Arts. 25 and 59(2).

[57] *Görgülü I*, 14 Oktober 2004, 2 BvR 1481/04: BVerfGE 111, 307, at 318.

[58] *Ibid*., at 319.

[59] R. Hoffmann, "The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches?" (2004) 47 *GYIL* 9, at 18-19.

[60] *Görgülü*, 14 Oktober 2004, 2 BvR 1481/04: BVerfGE 111, 307, at 317, which also refers to, e.g.,

*4.3. Constitutional requirement of interpretation*

In addition to this principle of openness towards international law, it is necessary to mention another basic idea which has been developed by German constitutional doctrine,[61] viz., the principle of "*verfassungskonforme Auslegung*" or "construction in the light of the Constitution". This principle aims at ensuring as much effectiveness as possible to constitutional rights and values while also respecting the democratic will of the legislator if the constitutionality of its decision is at stake. Any legal rule must therefore be interpreted in accordance with the relevant constitutional values and can be declared null and void only if such an interpretation is excluded by the wording or rationale of the legislation in question.[62] The obligation to construe and interpret national law or statutes in conformity with the Constitution is founded on the principle of the "*Einheit der Rechtsordnung*" or the "unity of the legal order".[63]

*4.4. Application of principles to European law*

Taking the principles of openness to international law, of a constitutional conform interpretation of national law and of the unity of the legal order as its context, German academia evolved an approach to the requirements of the Court of Justice's principle of indirect effect – viz., the so-called "*richtlinienkonforme Auslegung*" or "construction in the light of a directive"[64]

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*Fair Trial*, 26 März 1987, 2 BvR 589/79: BVerfGE 74, 358, at 370; and *Prohibition on Forced Labour*, 14 November 1990, 2 BvR 1462/87: BVerfGE 83, 119, at 128.

[61] I. Pernice, "Constitutional Law Implications for a State Participating in a Process of Regional Integration: German Constitution and 'Multilevel Constitutionalism'", in E. Riedel (ed.), *German Reports on Public Law*, Vol. 12 *Beiträge zum ausländischen und vergleichenden öffentlichen Recht*, Nomos Verlag, Baden-Baden (1998), 40, at 46.

[62] K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 19th ed., Müller, Karlsruhe (1993), at para. 79ff.

[63] Hesse (1993), at para. 81.

[64] W. Brechmann, *Die richtlinienkonforme Auslegung*, C.H. Beck, München (1994); and C. Hermann, *Richtlinienumsetzung durch die Rechtsprechung*, Duncker & Humblot, Berlin (2004). See also H. Jarass, "Richtlinienkonforme bzw. EG-rechtskonforme Auslegung nationalen Rechts" (1991) 26 *EuR* 211; G. Ress, "Die richtlinienkonforme 'Interpretation' innerstaatlichen Rechts" 1994 *DÖV* 489; and M. Nettesheim, "Ausbildung und Fortbildung nationalen Rechts im Lichte des Gemeinschaftsrechts" (1994) 119 *AöR* 261. There has, however, been criticism of this point by U. di Fabio, "Richtlinienkonformität als

principle. Pernice[65] has even contended that the doctrine of indirect effect implies that European law and national law are considered to be (parts of) one legal system the unity of which is to be ensured by the German courts.

However, the evolution of such principle – limited as it is to directives – was a logical consequence of the express recognition of the *von Colson*[66] ruling by the FCC in *Kloppenburg*.[67] In that case, the Federal Constitutional Court found that the Federal Fiscal Court (*Bundesfinanzhof*) was bound by the interpretation of the Sixth VAT Directive,[68] given by the Court of Justice in a preliminary ruling[69] in answer to a reference from a German lower fiscal court.[70] If the Federal Fiscal Court had not wanted to follow the view of the law stated by the Court of Justice, the FCC said, then it should have requested another preliminary ruling from the Court of Justice – since the interpretation of the Sixth VAT Directive was a question on which the Federal Fiscal Court had to give judgment. In its ruling, the FCC observed:

> "At the same time the directive is important for interpretation of the member-States' implementing regulations in so far as the courts, in accordance with the obligation of loyalty to the Treaty arising from [Article 4(3) TEU], must choose the interpretation national law which corresponds to the tenor of the directive in the interpretation of it given by the Court of Justice pursuant to [Article 267 TFEU]."

*Kloppenburg*, however, was decided by the FCC before the Court of Justice's ruling in *Marleasing*.[71] In the latter case, as will be recalled, the Court of Justice decided that "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to

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ranghöchstes Normauslegungsprinzip?" (1990) 43 *NJW* 947.

[65] Pernice (1998), at 46.

[66] Case 14/83 von Colson v. Land Nordrhein-Westfalen [1984] ECR 1891.

[67] *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223, at 237; [1988] 3 CMLR 1, at 15.

[68] Directive 77/388/EEC: 1977 OJ L145/1

[69] Case 70/83 *Kloppenburg v. Finanzamt Leer* [1984] ECR 1075.

[70] The Federal Fiscal Court had overruled the lower court: *In re Kloppenburg*, 25 April 1985, VR 123/84: BFHE 143, 383.

[71] Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

interpret it is required to do so, so far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter" and thereby comply with (now numbered) Article 288(3) TFEU. In *Marleasing*, then, the Court of Justice emphasised that the national court was required to construct an interpretation of national law which achieved the goals of the directive. Courts were required to do everything possible to achieve the conformity of national law with European law.

The extension of the interpretation requirements occasioned by Marleasing has not led, in the main, to problems for the FCC. This is based on the FCC's acceptance of the effect of such Court of Justice rulings. In *Steinike & Weinlig*[72] the FCC ruled that domestic rules,[73] allowing a ruling on constitutionality to be sought before it, did not confer jurisdiction on it to declare EEC Treaty provisions to be applicable in Germany contrary to the effect which the Court of Justice had already attributed to such Treaty provisions in a preliminary ruling in the same (original) proceedings. It is clear that German courts remain – where necessary – under a duty to give indirect effect to European law (following the guidelines given in *Marleasing*). However, as the FCC affirmed[74] in *Maastricht*[75] its ultimate jurisdiction "to see whether (the European institutions) remain within the limits of sovereign rights conferred on them or transgress them," in *Lisbon*[76] it expressly extended its *ultra vires* review to include as its object any European legal act, including interpretation of EU law by the Court of Justice.

*4.5. Openness to European law: a new principle of German constitutional law*

In its *Lisbon Treaty* ruling the FCC recognised the fact that the constitutional mandate to realise a united Europe flowed from the Preamble[77] to the

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[72] *Steinike & Weinlig*, 25 Juli 1979, 2 BvL 6/77: BVerfGE 52, 187; [1980] 2 CMLR 531.

[73] Constitution Art. 100(1) and Constitutional Court Act, ss. 80ff.

[74] Thym (2009), at 1806.

[75] *Maastricht*, 12 Oktober 1993, 2 BvR 2134 und 2159/92: BVerfGE 89, 155; [1994] 1 CMLR 57, at para. 49.

[76] *Lisbon Treaty*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712, at para. 240.

[77] The Preamble to the Constitution states, in part: "Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of

Constitution as well as Constitution Article 23(1),[78] with the FCC referring to the principle of openness towards European law ("*Grundsatz der Europarechtsfreundlichkeit*").[79]

Yet such openness to European integration generally was circumscribed by the limits imposed by Germany's inalienable "constitutional identity", outlined in Constitution Article 79(3) ("*unverfügbare Verfassungsidentität*").[80] Consequently, the FCC could review whether the inviolable core content of the constitutional identity of the Constitution, pursuant to Constitution Article 23(1), sentence 3 in conjunction with Article 79(3), was respected,[81] stating:[82]

> "The exercise of this competence of review, which is rooted in constitutional law, follows the principle of the [Constitution's] openness towards European law ("*Europarechtsfreundlichkeit*"), and it therefore also does not contradict the principle of loyal co-operation (Article 4(3) TEU); with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4(2), sentence 1 TEU cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and the one under Union law go hand in hand in the European legal area."

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their constituent power, have adopted this Basic Law."

[78] *Lisbon Treaty*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 CMLR 712, at para. 225.

[79] *Ibid*., at para. 225. For further reading, see J. Ziller, "Zur Europarechtsfreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon" (2010) 65/1 *ZÖR* 157-176 ; and J. Ziller, "The German Constitutional Courts Friendliness towards European Law" (2010) 16 *EPL* 53.

[80] *Lisbon Treaty*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 *CMLR* 712, at para. 219.

[81] See *European Arrest Warrant*, 18 Juli 2005, 2 BvR 2236/04: BVerfGE 113, 273, at 296; [2006] 1 CMLR 378, at 401.

[82] *Lisbon Treaty*, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 *CMLR* 712, at para. 240.

The identity review, the FCC stressed, made it possible for it to examine whether (due to the action of European institutions) the principles under Constitution Articles 1 and 20, which were declared inviolable in Article 79(3) and as such represented the essential core of German sovereignty, had been violated.

The other jurisdiction proposed by the FCC in Lisbon as a partner proceeding to constitutional identity review, although first enunciated in *Maastricht*, is the *ultra vires review*. According to this jurisdiction, if primary European law amended or was interpreted in an extending sense by EU institutions (e.g., the Court of Justice), it would conflict with the principle of conferral and Member States' own constitutional responsibility for integration as such institutions risked transgressing the predetermined integration programme and acting beyond the powers which they had been granted (i.e., *ultra vires*).[83] *Ultra vires* review applied where European institutions had infringed the boundaries of their competences and where protection could not be obtained at the Union level. In such cases the FCC reviewed whether European legal instruments – adhering to the principle of subsidiarity[84] – kept within the boundaries of the sovereign powers accorded to them by way of conferral by the Member States.[85]

The first litmus test for the exercise of the FCC's *ultra vires* review power came in *Honeywell*[86] which concerned the attempt of a complainant company

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[83] *Ibid*., at 352; and *ibid*., at 336-337.

[84] Art. 5(1) TEU, sentence 2, and Art. 5(3) TEU together with TEU and TFEU, Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

[85] See *Eurocontrol I*, 23 Juni 1981, 2 BvR 1107, 1124/77 und 195/79: BVerfGE 58, 1, at 30-31; *Kloppenburg*, 8 April 1987, 2 BvR 687/85: BVerfGE 75, 223, at 235 and 242; [1988] 3 *CMLR* 1, at 13 and 18; *Maastricht*, BVerfG 12 Oktober 1993: BVerfGE 89, 155, at 188; [1994] 1 *CMLR* 57, at 89. See the latter case concerning legal instruments transgressing the limits ("*ausbrechende Rechtsakte*").

[86] *Honeywell*, 6 Juli 2010, 2 BvR 2661/06: BVerfGE 126, 286; [2011] 1 CMLR 33, 1067. A. Proelß, "Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der 'ausbrechende Rechtsakt' in der Praxis des BVerfG – Annmerkung zum Honeywell-Beschluss des BVerfG vom 6. Juli 2010" (2011) 45 *EuR* 241, at 244-251; M. Payandeh, "Constitutional review of EU law after *Honeywell*: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice" (2011) 48 *CML Rev*. 9, at 21-32; D. Hanf, "Vers une précision de la Europarechtsfreundlichkeit de la Loi fondamentale – L'apport de l'arrêt 'rétention des

to have the Court of Justice ruling in *Mangold*[87] annulled on the grounds that it was an *ultra vires* act of the Court of Justice since it had transgressed its conferred competences through its expansive interpretation of EU law and principles. This interpretation by the Court of Justice, the complainant alleged, had infringed its contractual freedom as guaranteed under the German Constitution. If successful, this would have led to a decision of the Federal Labour Court, based on *Mangold*, being overturned to the benefit of the complainant vis-à-vis a former employee who had previously and successfully claimed before the labour courts that the complainant had discriminated against him on the grounds of age. In its decision, the FCC observed that its ultra vires review could only be exercised in a restrained manner and one of openness to European law:[88]

> "When exercising this competence to effect a review, the principle of openness of the Basic Law towards Europe is to be complied with as a correlate of the principle of sincere co-operation (art. 4.3 TEU ) and to be made fruitful (BVerfGE 123, 267, 354). The majority one-sidedly dissolves the tension occurring here between the principle of safeguarding democratic legitimation and the functioning of the Union (see Folz, Demokratie und Integration (1999), p. 395) in favour of functionality."

Moreover, in using its *ultra vires* review in respect of acts of European bodies and institutions:[89]

"[T]he FCC must in principle adhere to the rulings of the Court of Justice as providing a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act [by the FCC] of the European bodies and institutions, the Court of Justice should therefore be afforded the opportunity – in the framework of Art. 267 TEU – to interpret the Treaties as well as to rule on the validity and

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données' et de la décision Honeywell du BVerfG" (2010) 46 *CDE* 515, at 519-531; and J. Corti Varela, J. Porras Belarra & C. Román Vaca, "El control *ultra vires* del Tribunal constitucional alemán. Comentario de la decisión de 06.07.2010 (2 BvR 2661/06, *Honeywell*)" (2011) 40 *RDCE* 827.

87 Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.

88 *Honeywell*, 6 Juli 2010, 2 BvR 2661/06: BVerfGE 126, 286, at 303; [2011] 1 CMLR 33, 1067, at 1096.

89 *Ibid*., at 304; *ibid*., at 1085.

interpretation of the acts in question. As long as the Court of Justice has not yet had the opportunity to clarify the EU law questions which have arisen, the FCC should not determine for Germany the inapplicability of Union law (cf. [*Lisbon*:] BVerfGE 123, 267, at 353)."

Further such a review could only be considered if it were obvious that acts of the European bodies and institutions had been enacted beyond the competences conferred on them. A violation of the principle of conferral was only obvious then, the FCC stated:[90]

> "[I]f the European bodies and institutions have overstepped the limits of their competences and breached the principle of conferral in a specific offending manner (Constitution Art. 23(1)), i.e., the violation of competence is 'sufficiently serious' (cf. the formulation of 'sufficiently serious' as characteristics facts of the case in Union tortious liability, see C-472/00 P *Commission v. Fresh Marine Co. A/S* [2003] ECR I-7541, at para. 26ff). This means that the acts of the EU authority are manifestly in breach of competences and the impugned act leads to a structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union."

Measured against these standards, the Federal Labour Court had not ignored the scope of the complainant's constitutional guaranteed contractual freedom. In any event, the Court of Justice in *Mangold* had not violated its competences in a sufficiently serious manner. This particularly applied to the derivation of a general principle of non-discrimination in respect of age.[91] Such derivation would not however have introduced a new competence for the EU, neither would an existing competence have been expanded. In this sense, Anti-Discrimination Directive 2000/78/EC[92] had already made non-discrimination in respect of age binding for legal relationships based on employment contracts, and hence had opened it up for interpretation by the Court of Justice.

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[90] *Ibid*., at 304-305; *ibid*., at 1085-1086.

[91] *Ibid*., at 309-313; *ibid*., at 1089-1091.

[92] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: OJ 2000 L303/16.

What then are the contents of openness to European law? Looking at what the FCC observed in the *Lisbon Treaty* and *Honeywell* cases, it is clear that openness to European law is elevated to the level of a constitutional principle (although, notably, not as part of the essential core of German sovereignty) and consequently has a strong guiding influence. As a result, it would be possible to derive a general rule of interpretation: in case of doubt, the Constitution as well as all ordinary statutes have to be interpreted as much as possible in conformity with German obligations under European law.[93] Moreover, within its own competences,[94] the FCC must ensure that administrative and judicial bodies respect the provisions of European law (whether primary or secondary) and not only just take into consideration the relevant case-law of the Court of Justice but actually recognise its normative and binding nature. In fact, the FCC would require courts (even itself, where necessary) in cases of doubt to refer questions to the Court of Justice, as per *Honeywell*, before being the FCC is able to rule on whether or not the EU by enacting a law (or the Court of Justice through a broad interpretation) had transgressed the limits of the powers conferred on the Union by the Member States. In addition, the FCC is also required to ensure that rules of national law are interpreted generally in a way that would avoid liability under European law.[95]

Nevertheless, although arguably a constitutional obligation,[96] there are evidently clear limits to this principle of European law openness: e.g., the

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[93] Cf. *Ostverträge*, 7 Juli 1975, 1 BvR 274/72: BVerfGE 40, 141, at 178; and *Grundlagenvertrag*, 31 Juli 1973, 2 BvF 1/73: BVerfGE 36, 1, at 14.

[94] *Fair Trial*, 26 März 1987, 2 BvR 589/79: BVerfGE 74, 358, at 370; *Görgülü I*, 14 Oktober 2004, 2 BvR 1481/04: BVerfGE 111, 307, at 315ff.

[95] *Konkordat*, 26 März 1957, 2 BvG 1/55: BVerfGE 6, 309; *Spanier-Entscheidung*, 4 Mai 1971, 1 BvR 636/68: BVerfGE 31, 58, at 75; *Todesstrafe*, 30 Juni 1964, 1 BvR 93/64: BVerfGE 18, 112, at 121; and *Vienna Convention on Consular Relations*, 19 September 2006, 2 BvR 2115/01: BVerfGK 9, 174, at para. 60.

[96] Vosskuhle has stated that "the Basic Law's constitutional principle of openness towards international law ... is complemented by the principle of openness towards European law ... which not only permits Germany's participation in European integration but, as has been emphasised by the Federal Constitutional Court in its *Lisbon* decision, even requires it as a constitutional obligation": A. Vosskuhle, "Multilevel cooperation of the European constitutional courts: *der Europaische Verfassungsgerichtsverbund*" (2010) 6(2) *EuConst* 175, at 179-180.

FCC acknowledged in Lisbon that such principle cannot be used to infringe the identity of the German constitutional order neither, as indicated in *Honeywell*, could it justify the transgressing of conferred powers, e.g., through an unjustifiable expansive interpretation of EU law by the Court of Justice.

## 5. Poland

### *5.1. Introduction*

Before proceeding to look at the relevant cases from the Polish Constitutional Tribunal ("CT"), it would be worthwhile shortly restating the basic constitutional provisions which have been used as bases for the Polish principle of openness to European law.[97] In the Preamble to the 1997 Constitution, it provides in part: "Aware of the need for cooperation with all countries for the good of the Human Family." In addition Article 9 states: "The Republic of Poland shall respect international law binding upon it."

In addition, a number of provisions in the Constitution provide for the place of international and European law in the domestic system, among them Article 90(1): "The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters." Lastly, Article 91 provides as follows:

> "(1) After promulgation thereof in *the Journal of Laws of the Republic of Poland* (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
>
> (2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
>
> (3) If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall

[97] See K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne* [Openness of the Constitution of the Republic of Poland for International Law and Integration Processes], Warsaw Wydawnictwo Sejmowe, Warszawa (2006).

be applied directly and have precedence in the event of a conflict of laws."

In the lead up to and indeed, even beyond EU accession, the academic community has been clear in maintaining that where European law does not enjoy direct effect (the situation pre-membership in any event), Polish courts are under a duty to interpret domestic law in a manner as favourable as possible to European law.[98] Indeed, it is presumed that the court should choose the European meaning of a domestic provision from among the possible meanings available according to the relevant rules of interpretation:[99] such academic position was later confirmed by the case-law of the CT, as examined below.

*5.2. Pre-accession cases*

The above academic position, conforming to the *Marleasing* jurisprudence, is itself however no more than a reconfirmation of the CT's approach before accession using European law and Court of Justice rulings – by means of the 1991 Europe Agreement between the EEC and Poland ("EA")[100] – as a tool of interpretation of national norms. In *Dec. K 15/97*,[101] the Ombudsman petitioned the CT, seeking review of the constitutionality of section 44(2)(1) of the 1996 Civil Service Act[102] which referred the determination of retirement age of female civil servants to the general legal provisions concerning

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[98] On this issue, see generally K. Kowalik-Bańczyk, "Prowspólnotowa wykładnia prawa polskiego" *Europejski Przegląd Sądowy* grudzień 2005, 9-18; and E. Łętowska, "'Multicentryczność' systemu prawa i wykładnia jej przyjazna ['Multicentralism' of the Legal System and Interpretation in the light of this concept]", in L. Ogiegło, W. Popiołek & M. Szpunar (eds), *Rozprawy prwanicze* [*Juridical Tracts*], Zakamycze, Kraków (2005), 1136-1146.

[99] S. Biernat, "Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich [Interpretation of national law in compliance with EC law]", in C. Mik (ed.), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [*Implementation of European law in the internal legal systems*], TNOiK, Toruń (1998), at 123.

[100] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part: OJ 1993 L348/1.

[101] *Dec. K 15/97*, 29 September 1997: OTK ZU 1997/3-4, Item 37.

[102] Act of 5 July 1996, Dz. U. No. 89, Item 402.

retirement pensions. Thus, it was submitted, by implication the possibility of compulsory retirement of a female civil servant at 60, i.e., five years before a male one. In challenging this as an infringement on the right of equality between men and women laid down in Article 79 of the then (1952, amended) Constitution, the Ombudsman used in support a line of judgements of the Court of Justice.

The CT, ruling in favour of the Ombudsman's petition, held that in 1996 Civil Service Act, section 44(2)(1) the differentiation in compulsory retirement ages amounted to sex discrimination contrary to Constitution Articles 67(2) and 78(1) and (2). It noted that (now numbered) Article 157 TFEU had fundamental importance for the formulation of the principle of equality of men and women and had been further developed in several Community directives, the most important being Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The CT continued that, in the light of the Equal Treatment Directive, notice had to be taken of the ruling of the Court of Justice in *Marshall*[103] where it stated: "Article 5 of the Directive must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and women, constitutes discrimination on grounds of sex, contrary to that directive."

Then the CT further remarked that the Court of Justice had assumed a similar standpoint, in a ruling of the same date, *Beets*.[104] It thereafter proceeded to balance the clear lack of domestic effect of European law prior to accession with the requirements of the EA:

> "Of course, European [Community] law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [EA] …. Poland is thereby obliged to use 'its best endeavours to ensure that future legislation is compatible with Community legislation" and this

[103] Case 152/84 Marshall v. Southampton and South-West Hampshire Area Health Authority [1986] ECR 723.

[104] Case 262/84 Beets-Proper v. Van Lanschot Bankiers [1986] ECR 773.

> obligation is referred to, for example, provisions regulating "protection of workers at the workplace.' The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the Parliament and the Government) also results in the *obligation to interpret existing legislation in such a way as to ensure the greatest possible degree of such compatibility*. [Emphasis supplied.]"

It is evident that the CT considered it as incumbent on domestic law-applying authorities to interpret national law as far as possible in a Euro-conform manner. The CT would accordingly not countenance an interpretation that would be unconstitutional: such *contra legem* limits were re-emphasised post accession in cases as to be examined later in this section.[105] *Decision K 15/97* thus implied the duty to apply an interpretation *infra legem* (explanatory function) but did not impose (although permitted) an interpretation *praeter legem* (supplementary function) and prohibited an interpretation *contra legem* (specifically the Constitution and its principles):[106] this duty of consistent interpretation was followed in later judgments.[107]

In the lead up to accession – in respect of the particular case of Polish courts being bound to the interpretation of European law in rulings of the Court of Justice – the position of Polish legal thinking was divided between those who felt that an express rule ordering the courts to respect such Court of Justice interpretation was needed[108] and those who considered them as part of the

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[105] The need to interpret national law in a Euro-conform manner (within the field of sex discrimination) also arose in *Dec. K 27/99* (28 March 2000: OTK ZU 2000/2, Item 62); *Dec. K 15/99* (13 June 2000: OTK ZU 2000/5, Item 137) and *Dec. K. 35/99* (5 December 2000: OTK ZU 2000/8, Item 295). Moreover, the CT did not see itself limited to merely legal sources from the EU in support of its arguments: in *Dec. K. 15/98* (11 April 2000: OTK ZU 2000/3, Item 86) it even made reference to the 1997 Commission Opinion on Poland's application to the EU.

[106] C. Mik & M. Górka, "The Polish Courts as Courts of the European Union's Law", in B. Banaszkiewicz *et al.*, *1 Jahr EU Mitgliedschaft: Erste Bilanz aus der Sicht der polnischen Höchstgerichte*, *EIF Working Paper* No. 15, Institut für Europäische Integrationsforschung, Österreichische Akademie der Wissenschaften, Wien (2005), 33, at 41: <http://www.eif.oeaw.ac.at/downloads/workingpapers/wp15.pdf>. Visited 23 August 2010.

[107] For example, *Dec. K 12/00*, 24 October 2000: OTK 2000/7, Item 255.

[108] C. Mik, "Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny [Principles underlying EC law and the Polish constitutional system]" (1998)

*acquis*[109] and thus introduction of such an express requirement into Polish law was unnecessary.[110] The absence of any legal changes confirmed the latter assumption and this was affirmed in CT case-law in the year before accession.

The CT gradually transformed the duty of consistent interpretation into the principle of a friendly approach to European law. In *Dec. K 2/02*,[111] the CT was seised of a case concerning the advertisement and promotion of alcoholic drinks. In the judgment, the CT invoked the Court of Justice rulings in *von Colson*[112] and *Marleasing*[113] and observed that, although in the pre-accession period, Poland did not have the legal obligation to apply the principles of interpretation derived from the acquis, it nevertheless stressed that the duty of consistent interpretation could be considered as a practical and the least expensive instrument for law harmonisation. Such a duty was, however, subject to two preconditions: (1) the Polish law in question could not expressly contradict the EC rule as a result of political and legislative choices made in the pre-accession period; and (2) some gap existed to allow for interpretative flexibility.[114]

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*PiP* 1/1998, 27, at 37.

[109] The whole body of European law (primary and secondary legislation) as well as the rulings of the European courts: A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009), chap. 12, 327, at 327-353.

[110] N. Półtorak, "Zmiany w postępowaniu przed sądami polskimi jako konsekwencja Polski do Unii Europejskiej [Changes in Polish court procedures as a consequence of Polish EU accession]", in C. Mik (ed.), *Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia* [*Poland in the EU: Perspectives, conditions, chances and dangers*], TNOiK, Toruń (1997), 270; J. Skrzydło, "Sędzia polski wobec perspektywy członkostwa Polski w Unii Europejskiej [Polish judge considering the perspective of Poland's EU membership]" (1996) PiP 11/1996, 35ff.

[111] *Dec. K 2/02*, 28 January 2003: OTK ZU 2003/1A, Item 4. See also *Dec. K 33/03*, 21 April 2004: OTK ZU 2004/4A, Item 31.

[112] Case 14/83 Von Colson v. Land Nordrhein Westfalen [1984] ECR 1891.

[113] Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

[114] Despite its apparent convenience and attractiveness, consistent interpretation was counselled only as a supplementary method of European law implementation and not as a substitute form other legislative activities aimed at European law harmonisation in Poland: P. Biernat, " 'Europejskie' orzecznictwo sądów polskich przed przystąpieniem do Unii Europejskiej" 2005 *Przegląd Sądowy*, No. 2, 7.

The evolution of this approach into a constitutional principle occurred several months later in *Dec. K 11/03*[115] on the constitutionality of the Act on National Referenda. In its reasoning, the CT stated that the interpretation of binding law – whether constitutional provisions or any domestic norms – should take account of the constitutional principle of a friendly approach to European integration and co-operation between States. According to the CT, the basis for this principle was the Preamble (e.g., "Aware of the need for co-operation with all countries for the good of the Human Family") as well as Article 9 of the Constitution: "The Republic of Poland shall respect international law binding upon it." The CT therefore posited the position that it would be constitutionally correct and preferable to interpret the law in such a way that it would contribute to the realisation of this principle.

On the eve of membership, the CT revised its understanding of the constitutional basis for this principle. *Decision K 33/03*[116] concerned certain provisions of the 2003 Biofuels Act which aimed at inducing producers and distributors of liquid fuels to manufacture and offer petrol and diesel containing additives of biological origin (biofuels). The Ombudsman challenged three particular provisions of the Act[117] which, he considered, amounted to substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection. In applying the challenged provisions to all manufacturers (or sellers) – not just to national but also to foreign (EU) ones – the national legislator would be imposing a

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[115] *Dec. K 11/03*, 27 May 2003: OTK ZU 2003/5A, Item 43.

[116] *Dec. K 33/03*, 21 April 2004: OTK ZU 2004/4A, Item 31.

[117] The three provisions in question were: (a) s. 12(1) which made it obligatory for manufacturers to market in any given year the amount of biocomponents specified in a Council of Ministers' Decree issued annually under s. 12(6). Biocomponents could be introduced in three different forms: as a component of "normal" liquid fuels; as a component of liquid bio-fuels; or as pure engine fuel (pure bio-ethanol, pure VOME bio-diesel); (b) s. 14(1) which stated that "normal" liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense (s. 14(2) which was not challenged in the present proceedings) and (c) s. 17(1)(3) which prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Decree. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

measure having equivalent effect to a quantitative restriction, prohibited by (now numbered) Article 34 TFEU, and would be unable to justify it under (now numbered) Article 36 TFEU, in the light of cited Court of Justice case-law on the subject.[118]

In making its ruling, the CT observed that the principle of interpreting national law in a manner favourable to European law, based on Constitution Article 91(1), related in particular to interpretation of the constitutional basis of review performed by the CT – which in this case were the principles of economic freedom and consumer protection.

*5.3. Post-accession cases*

This principle carried on its application into the post-accession CT's case-law. In *Dec. K 15/04*[119] on the constitutionality of the 2003 Accession Treaty, the CT noted that whilst interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and co-operation between States: The CT[120] observed the "constitutional assumption, that on the territory of the Republic of Poland, next to provisions enacted by the national legislature, the regulations created outside the system of national (Polish) legislative bodies are binding". In accepting the multi-component nature of the domestic legal order, the CT added that European law was not totally external law since national bodies also participated in the process of its creation (i.e., through the making of secondary legislation in the Council of Ministers) and concluded:[121] "Therefore in the territory of Poland there are both in force [binding] 'sub-systems' of legal regulations that originate from various legislative centres. They should co-exist on the basis of 'mutual friendly' interpretation and co-operative co-application. Those circumstances, from another perspective, could give rise to a potential conflict of norms and the ultimate supremacy of one of the distinct sub-systems."

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[118] Referring basically to *Cassis de Dijon* (Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) and Keck (Joined Cases C-267 and C-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097).

[119] *Dec. K 15/04*, 31 May 2004: OTK ZU 2004/5A, Item 47.

[120] *Ibid.*, at para. III.2.1.

[121] *Ibid.*, at para. III.2.2.

Further in *Dec. K 34/03*,[122] having already cited to *Marleasing*,[123] the CT stated that as a result of the principle of interpretation requiring domestic law to be construed in such a manner as to enable the efficient functioning of the economy within the framework of European integration, an expectation arose that any interpretation of domestic law would ensure conformity with European law: such an obligation stemmed from (now numbered) Article 4(3) TEU. This meant that it was not possible to interpret domestic legal rules which led to a conflict with obligations deriving from European law.

Clear guidance that constitutional norms must be interpreted in a manner favourable to European integration was further emphasised in *Dec. K 24/04*[124] (on the inequality in competences of Sejm and Senate committees in respect of EU legislative proposals) and *Dec. K 38/04*[125] (on contracts in foreign languages). In this latter case, the constitutionality of certain sections of the 1999 Polish Language Act – relating to the provision of contracts in Poland in foreign languages – was challenged as being contrary, *inter alia*, to Constitution Article 76 which provides: "Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute." In its Decision, the CT noted that the realisation of the protection mentioned in Article 76 could not be divorced from the principles and demands of European law:[126]

> "Normative acts intended to facilitate consumer protection are subject to review from the perspective of the legislator's use of adequate legal means to achieve the intended protective goal, concomitantly, realisation of the protection mentioned in Article 76 of the Constitution … may not be divorced from the principles and demands of European law…. The European model of consumer protection is based on broadening the knowledge and scope of accessible

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[122] *Dec. K 34/03*, 21 September 2004: OTK ZU 2004/8A, Item 84.

[123] Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

[124] *Dec. K 24/04*, 12 January 2005: OTK ZU 2005/1A, at Item 3.

[125] *Dec. K 38/04*, 13 September 2005: OTK ZU 2005/8A, Item 92.

[126] OTK ZU 2005/8A, Item 92, at Part IV. 2.

> information, so as to enable consumers to fulfil their perceived needs autonomously and in accordance with their own interests…. The principles of transparency and genuine public access to clear, comprehensive and comprehensible commercial information are therefore assumptions of modern consumer protection…. Article 54(1) of the Constitution, in turn, is considered by the Constitutional Tribunal as a constitutional guarantee of a consumer's right to be informed. In this aforementioned provision, the right finds its confirmation and guarantees the realisation of Article 76 of the Constitution."

It might appear then that the CT is enjoined to interpret the Constitution by using European law and principles to provide more depth or content to a domestic constitutional provision.[127] However, there are limits to such interpretation. In *Dec. K 18/04*[128] on the 2003 Accession Treaty, the CT stated that such an interpretation could not conflict with the express wording of a constitutional norm nor prove irreconcilable with the minimum guarantee functions of the Constitution. Moreover, this limitation was amply displayed in the *European Arrest Warrant case*, *Dec. P 1/05*,[129] when the CT clearly avoided using EU law to interpret the Constitution.

More recently, in *Dec. SK 45/09*,[130] the CT reviewed the constitutionality of a provision of an EU Regulation. It first considered[131] its self-created principle of a Euro-friendly interpretation of national law through which the CT would approach EU law "with the utmost respect" and "on the basis of mutually acceptable interpretation and co-operative application" so that "any contradictions should be eliminated by applying an interpretation that respects the relative autonomy of EU law and national law".

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[127] The Austrian Constitutional Court (*Verfassungsgerichtshof*) actually ruled that the priority of EU law had the effect of overruling a provision of the Constitution in the field of application of a directive (although, it must be added, this provision was not regarded as part of its constitutional identity): VfGH B 1625/98, 24 Februar 1999, VfSlg. 15427.

[128] *Dec. K 18/04*, 11 May 2005: OTK ZU 2005/5A, Item 49.

[129] *Dec. P 1/05*, 27 April 2005: OTK ZU 2005/4A, Item 42; [2006] 1 CMLR 965.

[130] *Dec. SK 45/09*, 16 November 2011: OTK ZU 2011/9A, Item 97.

[131] *Dec. SK 45/09*, 16 November 2011: OTK ZU 2011/9A, Item 97, at para. III.2.6.

Moreover, constitutional review of EU Regulations was to be regarded as independent and subsidiary vis-à-vis the jurisdiction of the ECJ, leading the CT expressly to adopt the FCC's approach in *Honeywell*.[132] Here, the CT clearly acknowledged its duty to make a reference and justified this action on two grounds: (a) as a result of the ECJ ruling, the content of the challenged EU law might be consistent with the Constitution; or (b) the ECJ ruled that EU norm to be inconsistent with EU primary legislation. In either case, the CT need not decide further. However were it to prove impossible to avoid constitutional review then the CT ruling declaring the non-conformity of provisions of EU secondary law to the Constitution "should have the character of *ultima ratio*" and was therefore to be carried out only in exceptional instances like the present case. Again, this reinforces the notion that an interpretation of national law in conformity with European law will be pursued unless – exceptionally – that would lead to an unconstitutional interpretation.

## 6. Conclusion

Both national constitutional courts in this short study have opened up their constitutional systems to European integration through their use of the principle of openness to European law. Although initially developed within the context of openness to international law as a constitutional principle in Germany, it was the CT which transformed this concept into one of openness to European law as a way of coping with the demands of the Europe Agreement before EU accession. Its further refinement of the principle and evident limits to its application in the interpretation of national constitutional and ordinary laws, based on the essential core of sovereignty, have been followed by the FCC in the *Lisbon* case. With the FCC's ruling in Honeywell being received by the CT in *EU Regulation*, the migration of this concept back and forth between systems evinces the continuing existence of a judicial dialogue[133] between domestic constitutional courts in the face of ever deepening European integration. No doubt other concepts, originated and

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[132] *Honeywell*, 6 Juli 2010, 2 BvR 2661/06: BVerfGE 126, 286; [2011] 1 CMLR 33, 1067.

[133] On this concept, see generally G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Law*, Edward Elgar, Cheltenham and Northampton (MA) (2012).

developed by the constitutional judiciaries in the new EU Member States, will also migrate in time to form part of the principles in older Member States.