Written evidence at the request of the Lords' Sub-Cee E on the EU
Published in:
House of Lords. European Union Committee. 6th Report of Session 2003-04.
The Future Role of the European Court of Justice. Report with Evidence. HL paper 47. Ordered to be printed 2 March and published 15 March 2004.
London: The Stationery Office Limited. p. 59-67

WRITTEN EVIDENCE
TO THE EUROPEAN UNION COMMITTEE
SUB-COMMITTEE E (LAW AND INSTITUTIONS)

Leonard F.M. Besselink[1]

The role of the European Court of Justice under the new Constitutional Treaty

In answer to your invitation of comments on the role of the ECJ under the draft Constitution of the European Union, I make a number of brief remarks regarding questions 1 and 6, and give a fuller comment on questions 2 and 3. On questions 4 and 5, concerning the CFSP and criminal law, I make no comments.

Question 1
The new formulation of the proposed Article I-28 (1) must be regarded as a matter of language only, which has no bearing on the meaning .
It seems to me that the changes made in the English version of what is at the moment Article 220 EC, are an adaptation to the language which Article 220 contains in other languages.
The proposed wording "to ensure respect for the law", bears more similarity to that of at least some of the language versions than the present English version. For instance the French language version has "assure le respect du droit"; the Italian language version has "assicura il rispetto del diritto", the Spanish language version "garantizará el respeto del Derecho"; the Dutch language version has "verzekerd de eerbiediging van het recht". All these language versions are more correctly translated by the proposed new version of the English text.
Only the German version is somewhat more like the present English translation:"sichert die Wahrung des Rechts", in as much as "Wahrung" may mean the observance (of the law), but it also means protection, preservation or safeguarding.
For lack of knowledge of the other languages, I cannot judge to what extent the proposed text or the old text better reflects their wording.
At any rate, the proposed change does not seem to have any substantive consequence.

Question 6
Since the present Article 230 (4) EC satisfies the requirements of the right to an effective remedy, as it is understood by Article 6 and 13 ECHR and the common constitutional traditions of the Member States, this is to my opinion a fortiori the case for the proposed Article III-270 (in the previous version of the draft Constitution III-266 (4)).

I base this view on the following grounds.
For determining the conformity of provisions on standing in relation to a particular remedy with a fundamental right to effective judicial protection, these provisions must be not be viewed in total isolation from other existing remedies. In the EU context they should, moreover, be viewed in the context of the totality of the system of protection of rights, which exists at both the European

[1]Dr. Leonard F.M. Besselink is Associate Professor of Constitutional Law, Institute for Constitutional and Administrative Law, Faculty of Law, University of Utrecht, Netherlands.

level and at the national level, and of the division of labour between courts in the EC system.
Although from relatively early days onwards, criticism has been mounted against the limitation of standing for private parties at the ECJ in cases of annulment under Article 230 (4) [and the identical older 173 (4)] EC, and such eminent authorities as Advocate General Jacobs have now come to criticize the requirement that a private party must be individually concerned by the provisions of a Community measure, I am of the opinion that it goes too far to say that the present Article 230 (4) conflicts with the fundamental right to effective judicial protection.
Article 13 of the ECHR does not require necessarily access to a court of justice, but other remedies may also satisfy the ECHR's requirements. Since Article 6 ECHR does not grant an unlimited right of access to any court, Article 13 when read in conjunction with Article 6 of the ECHR, does not grant a right to citizens of access to any court for any complaint they may have. This remains the case also under Article II-47 of the EU Charter of Fundamental Rights.
From a constitutional perspective, rules on standing concern the question in which public forum, before which institutions of the constitutional order, interests of citizens are to be represented: to what extent are they more appropriately to be represented and decided upon in the political fora and when and to what extent are they better to be represented and decided upon by a court of law.
In this context, it is important to underline that in essence the present Article 230 (4) and the proposed II-270 (4) restricts the bringing of complaints against *legislative* measures to courts, and does not concern the review of the legality of just any decision by a public authority. Judicial review of legislative measures raises issues of the balance of powers, in particular the relationship between courts and institutions exercising legislative power, which are different from those which arise in the context of the relationship between courts of law and administrative organs when it concerns the latter's executive powers in a strict sense. I venture to claim that it is part of the constitutional traditions common to the member states that judicial protection against legislative measures is subject to certain restrictions which generally do not exist for other forms of judicial protection. These restrictions may also find their expression in rules on access to courts and other procedural restrictions.
It is not always deemed appropriate to shift a conflict over interests from the politico-administrative fora to a court of law, given the fact that such conflicts are rarely of a merely legal nature. A court of law, whose business - as is reflected in the rules on judicial procedure - is to deal with individual cases as they are presented before it, is not always the right forum for the assertion and balancing of often conflicting and irreconcilable interests which are involved in taking measures of general application.
These considerations are most decisive when it concerns parliamentary legislation - which is also covered by the rules contained in the present Article 230 (4) EC, and will be covered the more so when the extension of involvement of the European Parliament of the draft Constitution takes effect. But the constitutional principle is not necessarily different when it concerns legislative measures which are not taken by parliamentary bodies, but by executive bodies like the Commission. It is true that precisely because it may concern non-parliamentary legislation, judicial protection may and does form an important protective counterweight against the growing dominance of the executive also in the legislative sphere - the phenomenon of executive dominance and the judicial counterbalancing is a development which can be observed throughout the countries of the European Union. Nevertheless, this does not change the constitutional principle that authorities with legislative powers should first of all act on the views and interests of the citizens and the public at large which they serve, views as expressed by the citizens themselves or through their representatives. Thus they should also first of all be held accountable

to non-judicial fora, and be exposed to the views of citizens and their representatives.
If there are shortcomings in their exposure to such views - and this may in the European context certainly be the case, *vide* the vexed discussions on "governance" - these should be remedied. It is not necessarily the only or the best solution to do so by extending the rules on standing in court.
As to the present state of the law, there may well be shortcomings in the ECJ case law on the criteria of individual concern, which limits the possibility for private parties to have the legality of a Community measure assessed. But widening the access to the European Court under Article 230 (4) is not the only manner in which to improve the position of private parties which allege that they are affected by legislative measures.
At the European level, the case law concerning Community liability might be developed less restrictively in order to compensate for damages which are incurred by certain private parties due to legislative measures.
Also the role of national courts is too easily dismissed by those who criticize the restrictions on standing under Article 230 (4) - as the Commission has rightly pointed out in Unión de Pequeños Agricultores: if a Community measure constitutes an infringement of a legal right of a private party, it is hard not to find a manner in which to bring that matter to a national court.
As regards the role of national courts, it is submitted that at least part of the problem is caused by the case law of the ECJ which has centralized the review of the legality of Community measures at the European level in the *Fotofrost* case law. Such a strictly centralized assessment of the legality of measures of general application, is different from the situation under national law in some member states. This centralized approach has served an important purpose and has some great advantages. But given the fact that the national experience shows that also a decentralized approach to judicial review of legality of measures of general application can exist without severe drawbacks, the moment may arrive in which national courts could be trusted to act as a European law court with regard to European measures as well.

Question 2
Question 2 is centred upon the issue of the relationship between the European Courts and the national courts with regard to the validity of European measures from the perspective of competence. It concerns the issue which court, the European or a national court, should have competence to decide whether a particular Union law or national law is valid, when viewed in the context of the question which of the courts is to decide on the division of competence between the Union and the Member States.

Competence is inherently a political concept. Hence deciding about competence is not only a pure exercise in law. The language of Article I-9 testifies to this. Discussions on the issue of judicial supremacy in the EU are served by acknowledging the extra-legal essence of legitimacy. This is not to say the ECJ does not have an important role to play in adjudicating EU competence. Although the ECJ will in the normal course of things be the highest umpire of EU competence, national courts might not refrain from their own assessment of vires, particularly when it concerns fundamental constitutional values of the national legal order. This safeguard is of importance for the acceptance of EU law within national legal orders. Hence it is best to retain the perspective of a dynamic relationship between the European and national courts on the issues of judicial supremacy with regard to vires, that is to say that it should be seen as a polycentric matter rather than a matter unilaterally decided in all instances by the ECJ.

I argue this as follows. First I make an observation on the wording of the proposed Article I-9, and two brief remarks concerning the role of law and courts and that of politics and decision-making institutions, before concentrating on the role of European versus national courts.

1. The derivative nature of EU competence

The question raised in the call for evidence, is intertwined with the broader question of the relationship between the Union's competence and Member States' competence.
A comparison of the language of Article I-9 of the draft Constitution with the present Article 5 EC reveals a certain emphasis on the parentage of the Union's competence, its derivative nature from the Member States' competence.

Article 5 (ex Article 3b) EC	Article 9: Fundamental principles
The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.	1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

As we can see in the first sentence of the second paragraph of Article 9 , it is no longer the Treaty (or Constitution) which confers powers, but powers are "conferred by the Member States in the Constitution". The more derivative language of the first sentence of paragraph 2 may seem to be offset by that of the second sentence, depending on which spectacles one puts on. Federalists would say about the second paragraph of Article 9 that "residual powers"are left to the Member States.[2] Others might say that given the derivative nature of the powers conferred (as expressed by paragraph 1 of Article 9) , the fullness of power remains with the Member States.
However one reads the new provision, it highlights the continuing bi- or perhaps pluri-polarity of powers.

2. The political nature of questions of competence

The question whether a certain competence is to be deemed an exclusive or a shared competence (i.e. who is to exercise a competence) cannot always easily be separated from the question if and how it should be exercised. This last question is fraught with political considerations. This means that in this area a court of law should tread with the necessary caution.
This is reinforced by the wording of Article 9 on subsidiarity.

Article 5 (ex 3b) EC	Article 9: Fundamental principles
[...]	[...]
In areas which do not fall within its exclusive competence, the Community shall take action, in	3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union

[2]This federalist term "residual powers" does not have quite the same meaning as the term used in the case law of the ECJ, where it refers to the powers which remain with the Member States on matters on which EC legislative measures have been passed; e.g. case 332/00, 18 April 2002, Belgium v. Commission.

accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.	shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.	4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3.

This wording makes plain that the question who is to exercise powers is in the first place a matter for the political organs to decide. In this field, the draft Constitution contains an innovation by attributing a more prominent role to national parliaments.
Article I- 17 of the draft Constitution refers to Article I-9 (3) as "the procedure for monitoring the subsidiarity principle", which is further developed in the new Protocol on the Application of the Principles of Subsidiarity and Proportionality, attached to the draft Constitution.
This may raise again the question whether this restricts the competence of the ECJ with regard to subsidiarity.
The present Protocol on the application of the principles of subsidiarity and proportionality clearly states in Article 3 that it does not call into question the powers conferred on the Court by the Treaty. The ECJ has therefore proceeded to review the legality of Community measures for their compatibility with the subsidiarity principle.[3]
The proposed Protocol, however, provides in paragraphs 5 and 6 for a new procedure which clearly allocates power to national parliaments. If a specified number of national parliaments or chambers thereof lodge objections as to the conformity of a legislative proposal with the principle of subsidiarity, the Commission will have to reconsider its proposal. In paragraph 7, the Protocol provides:

> "The Court of Justice shall have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article III-270 of the Constitution by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.
> In accordance with the same Article of the Constitution, the Committee of the Regions

[3]Thus explicitly in Case C-491/01, 10 December 2002, The Queen and Secretary of State for Health, ex parte: British American Tobacco (Investments) Ltd et al., paragraph 178; the validity of a directive for an alleged infringement of the principle of subsidiarity was reviewed for instance in Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079 paragraphs 30 to 34; see also case C-103/01, 22 May 2003, Commission v. FRG, paras. 46-47. The principle of subsidiarity is used as an interpretative rule e.g. in case C-114/01, 11 September 2003, 56-57.

may also bring such actions as regards legislative acts for the adoption of which the Constitution provides that it be consulted."

I do not think that the new procedure and the provision on the Court's competence change the powers of the ECJ to review the conformity of Community measures with the principle of subsidiarity. I submit that the provision on the Court's jurisdiction as to the principle of subsidiarity in particular does not affect the powers in preliminary proceedings and under Article III-270, except that it makes clear that Member States may bring such cases - or rather that they have to do so - on behalf of their parliaments or a chamber thereof.[4] The provisions on the procedure which involves national parliaments, however, indicate clearly that the matter of the division of powers between Union and Member States which is involved in issue of subsidiarity - and *a fortiori* beyond the narrower issue of this principle's application - is not merely a legal one.

3. The European and national courts on *vires*

The division of powers and the judicial control over this division of powers, touches on the issue of supremacy, which is raised in Question 3 and on which I submit some comments below.

The answers to the questions raised are narrowly related to the answers to be given to the question whether Member States, on becoming a party to the founding treaties (or accepting the new Constitution), have given up (or: give up) control over the conditions of their membership. Some would say that the answer determines the locus of sovereignty within the European Union and thus the true constitutional character of the European Union and its constitutive document(s). It is orthodoxy among Community law experts to answer the question in the sense that Member States have indeed relinquished all rights of an independent assessment of issues of competence under the EU constitutive instruments. With the transfer of sovereignty to the European Union/EC, combined with recognizing the role of the ECJ as it has itself understood it under the Treaties, Member States have also transferred the power of adjudicating whether a certain matter is a EC/EU competence. The reality of the co-existence of national constitutions alongside the EU constitution, and the behaviour of national courts with regard to their power to judge competence, seems to me to make this orthodoxy a too one-sided approach to this important matter. In the following remarks I try to show that the issue raised by the call for evidence, is and should be an essentially two-sided affair, between both the EU and the national courts.

Because the view from Luxembourg is presumably catered for by other evidence submitted to your Committee, and for reasons of brevity, I limit myself to the conduct of national courts, and as far as this is concerned only to the German and British cases (but which could easily be extended to other countries with similar approaches).

It is well known that for the German courts the act by which the Federal Republic consented to the constitutional instruments of the EU is and remains the determining framework of Germany's membership of the EU. In the famous *Maastricht* judgment (BverfGE 89/155), the Bundesverfassungsgericht held that an EU measure which is of such a nature and meaning as to exceed the express or implied limits of this act of consent, is (from the national perspective) *ultra vires*.

There are two aspects to this issue of *vires*, due to the complex nature of the act of consent. Firstly, there is the issue whether the act of consent to the relevant European instruments is in

[4] The words "in accordance with their legal order" - a quaint formulation - may raise doubts as to whether this provision creates an EU obligation for Member States to thus bring a case to the ECJ, if there is no obligation to do so under national law.

accordance with autonomous rules of the relevant national constitutional order. In the Federal Republic these rules concern criteria contained in Article 23 of the Grundgesetz, such as the federal and democratic character of the state, the respect for principles of subsidiarity and the protection of fundamental rights.

The second issue is whether the relevant exercise of powers under the instruments consented to (presumbably on the part of the EU institutions and authorities) remains within the bounds of the treaty text consented to. Of course this matter can be judged by the competent institutions under the text consented to. But in order not to make the act of consent frivolous, there should be on the part of an authority some possibility of control to see whether the power exercised on the basis of the instrument consented to, is still observed. Otherwise becoming a member to the EU is like climbing a ladder and kicking it away once one has reached the higher level. Judging this matter should be effected on the basis of by the text of the EU instruments involved (and their meaning at the relevant point in time).

In the form which it takes in Germany, the national act of consent necessarily refers to the European constitutive instruments as consented to. A national court can take this national act of consent to the constitutive EC/EU instruments as a framework for deciding whether the EU measure in dispute is *ultra vires* not only in terms of the national act within its own national constitutional context, but also in terms of the constitutive instruments consented to. This does indeed mean that the possibility remains open for the German national court, at any rate the Bundesverfassungsgericht, to review whether an EU measure is *ultra vires* in terms of the EU constitutive instruments, as the *Maastricht* judgment confirms. This constitutes a reservation to judicial supremacy of the ECJ. However, the precise contours of when and to which precise extent there is room for such review of *vires* by a national court, remain vague. Perhaps in the normal course of determination of Community competence, a German court would not interfere with the assessment of the ECJ, but in clear and fundamental cases affecting the constitutional fundamentals of the German legal order it probably will.

For the UK the matter presents itself in a slightly different form. Here it is an Act of Parliament which determines the manner in which European law - as defined by the Act - is to be applied in the national legal order, rather than an Act of consent to the Treaty which incorporates the treaty text itself by which it becomes part of the national legal order. This may explain why the issue is normally conceived in terms of what a British court is to do when an Act of Parliament is passed which intends to restrict the effect and validity of an EU measure or derogate therefrom, though this is in contravention of the EU constitutive instruments as interpreted by the ECJ. If national courts were to follow the latter Act of Parliament, they would judge by the national constitutional principle which is at stake. The constitutional condition under which membership of the EU has been accepted, would then prove to have remained that of the sovereignty of parliament. But this is not a question of *vires* under EU law.

Nevertheless, the question can still be posed: if the EU institutions act outside the bounds of the constitutive instruments, what is a British court to do under such circumstances?

I think that something of an answer can be found in the High Court's judgment in *Arsenal Football Club PLC v. Matthew Reed* of 12 December 2002.[5] In this case the High Court found that the ECJ in a preliminary judgment based itself essentially on its own finding of facts which was contrary to the findings of the referring national court. Because the ECJ is not competent to do so under Article 234 EC, the High Court found that the ECJ exceeded its juridiction under the EU constitutive instruments. It came to the uncomfortable conclusion that "the High Court has

[5] [2002] EWHC 295 (Ch). For a comment see A. Arnull, in CMLRev 40: 753-769, 2003.

no power to cede to the ECJ a jurisdiction which it does not have". Were a British court of highest instance to come to the same assessment of the ECJ (or another EU institution) clearly exceeding its powers, the conclusion might well be the same.

The German and British examples show the two aspects of the issue under discussion: one is that of the national constitutional conditions under which a Member State has acceded to the EU instruments (for the UK sovereignty of parliament, for FRG fundamental rights, federalism, subsidiarity etc.), and secondly there is the issue of vires under the EU constitutional instruments. With regard to the first, the present state of constitutional relationships within the EU is in my opinion such that national courts - if under their national constitutional rules competent to do so - can and will autonomously maintain those rules which they consider fundamental to the national legal and constitutional order.
With regard to the second, the development of the EU legal order so far has led to an architecture in which the ECJ is to be the guardian of competence in the normal course of events. However, also here national courts may feel constrained to act as guards of the guardians. This they may do not only on the basis of their perceived role within the national constitutional order (as is the first point we raised), but with reference to *vires* in terms of the EU constitutive instruments.
My submission on these two points is not a legal point of view, but an extra-legal assessment of fact. But it is this type of fact which in the end will determine the legal realities. These facts determine the ultimate recognition of EU law and its boundaries.

It is one of the great and positive dynamics of European integration that this "dialogue" between the national and European courts has not been fixed by a definite provision in the constitutive treaty instruments (assuming that a legal provision could at all settle this matter - which it cannot).[6] It is a balancing between often legitimate concerns of national courts and their member states' constitutional order on the one hand, and those of the ECJ and the EU institutions on the other. The fact that the dynamics of this relationship is not firmly fixed, has greatly contributed to the legitimacy of the process of European integration and the acceptance within the constitutional orders of the Member States. Without such dynamics the ECJ might for instance not have developed its case law on the protection of fundamental rights at the European level. And also there are other traces in the case law where the ECJ has responded to firm positions taken by national courts, for instance with regard to the horizontal direct effect of directives. Perhaps it may also provide a bar to a too extensive interpretation of EU competence in at least some regards.
In my view, the implication of this is that it is beneficial for the legitimacy of the EU not to insist too rigidly on the judicial supremacy of the ECJ in the field of adjudicating issues of competence.

Question 3
1. Does Article I-10 (1) extend the doctrine of primacy of Community law, and if so to what extent?
2. Does it include primacy over constitutional rules of a Member State?

[6]This is because the ultimate recognition of a legal regime is ultimately always factual and hence extra-legal in the sense that it cannot possibly be established by the legal text whose acceptation and recognition is at stake.

The simple answer to these questions when viewed exclusively from the EC-perspective is, that it merely codifies what is already positive law, and that indeed from the Simmenthal II judgment it is apparent that there is primacy also over all rules of national constitutional law.
On closer inspection of the EC law, and particularly when the EU constitutional order is understood as comprising both the EU constitution and national constitutions, the answers must be considerably more subtle. It can be argued that the codification of the principle as proposed in Article I-10 (1) goes, at least potentially, beyond the present state of EU law and adversely affects the rights of citizens. Also it may lead to a concept of the superiority of EU law over all national law (including constitutional values of the legal orders of the Member States) and thus undermine the acceptance of EU law rather than promote it. I therefore doubt the wisdom of casting this doctrine in the form of a legal norm, carved in stone for the centuries to come.

Ad 1.
The doctrine of primacy is extolled as one of the foundations of Community law. Doctrines are most useful and necessary for understanding the coherence of (certain parts of) a legal system and for describing and understanding principles by which a legal system functions. However, it is doubtful whether such doctrines lend themselves for codification. At any rate, formulated as a legal provision it may begin a life of its own, which may well be quite different. In particular, it may lose the flexibility of a mere doctrine.
In the present EC/ EU constitutive instruments there is no supremacy clause such as that of the Constitution of the United States of America. The idea of primacy, or as some of the literature has it: supremacy, of Community law is developed in the ECJ case law. This case law, although of an importance far exceeding the individual cases judged therein, is nevertheless a case-by-case approach. It is a doctrine which developed and unfolded as the cases progressed (and may still do so). This also has as a consequence that some important features of the doctrine remain unclear and subject to controversy.
In this respect, discussions concerning the primacy of Community law over Member State law have much in common with the theological doctrine of primacy in the Church. The primacy of the laws and decrees of Rome over the laws and decrees of the local churches, runs parallel to the primacy of the treaty of Rome and the laws and decrees based thereupon over the laws and decrees of the Member States. Such questions arise (as dealt with in part above under Question 2) as to what primacy entails for the respective jurisdiction: in what sense does primacy mean that the Lords and Masters of the Treaties of the EU (whether residing in Luxemburg or in Brussels/ Strasbourg) are supreme to the Lords and Masters of the Treaties in the Member States (whether these are the parliaments/ legislatures of the Member States or the highest courts in the Member States)? This has a neat parallel in the theological controversy over the meaning of the primacy of Rome in terms of the authority of the bishop of Rome over that of the bishops elsewhere.[7]

Primacy and direct effect
One issue which is not definitely dealt with in the ECJ case law, but which seems crucial to the scope of Community law supremacy, is the question to what extent primacy is dependent on the doctrine of direct effect. It must be noted that these two doctrines have developed hand in hand. Thus the reasoning in Costa/ENEL was geared to granting "precedence" of the relevant directly

[7]The legislative and judicial powers are not as neatly distinguished in the Church as in (most of) the Member States, but converge in a bishop's authority, notwithstanding the existence of separate ecclesiastical courts.

effective treaty provisions. In fact, in this case the Court specifically developed the idea of precedence in relation to directly effective provisions, but stated that this direct effect did not exist with regard to the Articles 103 and 93 (old) EC, and hence the issue of precedence did not arise. Similarly, the *Simmenthal II* judgment takes as its starting point the fact that it concerned the precedence of the directly effective Article 30 EC and the duty of national courts to protect the rights granted by EC law to private parties (paragraphs 15-16 of this judgment) against conflicting rules of national law.
Article I-10 (1) of the draft Constitution, however, knows of no such restrictions of the doctrine. This may lead to an assertion of primacy well beyond the present contexts. A rupture of the link between primacy and direct effect may greatly affect the rights of citizens. For if the precedence of Community law applies also to non-directly effective EC and EU measures, such a non-directly effective measure may set aside rights which citizens enjoy under national law, whether these are of a constitutional nature or not.[8]

Primacy of all EC law and EU law

The last observation becomes all the more important in the light of the fact that Article I-(1) speaks unreservedly about "The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it".
Firstly, this means that *all* EU law is given the primacy which so far was reserved to EC law. The doctrines of primacy and direct effect simply did not apply to EU law of the second and third pillars. This would have been difficult, because the UK has not in any manner incorporated these parts of the EU Treaty - unless the doctrine of supremacy is extended to imply also that Member States are bound to apply in their national legal orders European law which they consciously intended to keep outside their national legal orders.[9]
Secondly, it is to be noted that earlier drafts of the present Article I-10 (1) restricted EU primacy to the "Constitution, and law adopted by the Union Institutions in exercising competences conferred on it *by the Constitution*".[10] This seems to exclude the primacy of delegated measures. But the last three words have been omitted in the present text.
The unrestricted formulation of Article I-10 (1) in its present form, means that whatever the type of the EU law, subordinate or primary, it has primacy over national law. This means that also delegated executive measures of a legislative nature which may not have been subjected to any form of scrutiny by the Parliament nor by the Council, has primacy over national law. The same goes for purely executive measures of whatever subordinate rank. This is, as the European case law suggests, already so under present EC law. But still it must be considered a consequence of the regrettable absence of any clear hierarchy of norms at the EU level.

---

[8]See for an example in the Dutch case law of the *Raad van State*, and a discussion of this: Besselink, Curing a Childhood Sickness? On Direct Effect, Internal Effect, Primacy and Derogation from Civil Rights. In: The Maastricht Journal of European and Comparative Law, vol. 3 (1996), pp. 165-183.

[9]Something approaching that effect is the protection of fundamental rights as found in the ECHR; but here the boundaries have been carefully observed by the ECJ by holding that it is not the ECHR which is to be applied, and that the ECHR is itself not binding within EC law.

[10]See CONV 528/03, Article 9.

Primacy, priority, precedence or supremacy?

Article I-10 (1) uses the expression "primacy". The question arises whether this term is of an hierarchical nature or not. If it is hierarchical, it creates a relationship of superiority and inferiority between EU law and Member State law. There is a strand of literature on the EU, also in the legal literature, which has in recent times become more authoritative than was the case previously, which conceives of the relationship between the EU and the Member States in terms of pluralism or a non-hierarchical form of multi-level governance.[11]

In terms more acquainted to lawyers, one can see primacy in terms of the precedence in cases where a conflict between norms is apparent. Such a conflict between norms has be resolved by given precedence to one of the conflicting norms. This can be done in two different ways. It can be resolved on the basis of hierarchy, that is to say the norm which has a hierarchically higher rank prevails over the norm of subordinate rank. But it can also be resolved by giving precedence without such hierarchical notions of superiority and inferiority. This is like giving priority on a level-crossing. In the legal sphere such priority on level-crossings is not unknown, for instance in private international law. Also in European law it not necessary at all to use superiority and inferiority as the approach for deciding on priority. Thus the doctrine of *effet utile* is by no means hierarchical and provides a much better rationale for giving priority to Community law in a large number of cases and upholding the relevance of national provisions in other cases.

In reality the ECJ has often taken the strictly hierarchical approach. Thus in the *Simmenthal II* judgment, which concerned overruling an important rule of Italian constitutional law concerning the division of powers between the national legislature and national courts, the Court found it necessary not only to use the doctrine of *effet utile* but also - and first of all - a strictly hierarchical positing of the superior status of Community law and the inferior rank of national constitutional law.[12]

The consequences of Article I-10 (1) and (2) for the relationship of the EU constitution to the member state constitutions

When we take *Simmenthal II* as our frame of reference in reading Article I-10 (1), then the primacy of EU law is one of unreserved and hierarchical supremacy (much like the Supremacy Clause in the US Constitution is understood). This can be taken even further when we read Article I-10 (2) within this frame of reference:

> "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."

On the premiss of hierarchical supremacy of all EU law, the conclusion must be that national constitutions are not only subjected to EU law as an inferior is subjected to a superior, but also that national constitutions must unreservedly be amended in order that they shall be in accordance with EU law of whatever nature and rank. This might already be extrapolated on the basis of the

[11] Amongst the lawyers prominently Ingolf Pernice, Multilevel Constitutionalism in the European Union, in: European Law Review 2002; and ... CMLRev.; among the philosophers Neil MacCormick, Questioning Sovereignty, in particular chapter 7.

[12] Case 106/77, 9 March 1978, *Simmenthal (II)*, ECR 1978, 629 - 646, paragraphs 17-18.

ECJ case law in the field of implementing EC measures, a case law which finds it insufficient to adapt national law to the requirements of EU law on an ad hoc basis. The ECJ holds that when in fact there exists compliance with an EC measure which requires implementation, this can be no justification for not adopting the EC measures in the form of a generally applicable rule of national law.[13] Also the Court uses the argument that it is a requirement of legal certainty that citizens should know with precision and clarity what their rights and obligations are.[14]
The proposed Article I-10 (2) if read within the frame of reference indicated would thus render national constitutions for all intents and purposes subject to EU law of whatever nature, and in effect subordinates the entirety of the state's constitution.
It cannot be excluded at all that the ECJ will in its future case law on Article I-10 take the frame of reference indicated. There are too many indications in the extant case law to think this would be otherwise. This would also be the case if the Member States did not in fact intend such a wholesale subjection of national constitutions to EU law. The ECJ has in past and recent case law shown that it will not easily consider the intention of Member States as decisive for the meaning of a treaty provision.[15]
Once the Treaties have been changed into a Constitution with all the allusions to sovereign status with which constitutions have been associated in most Member States, and if the ECJ is to be its constitutional court, claiming judicial supremacy for itself over that of any national court, there is little chance that the ECJ will not take the frame of reference we sketched, if it thought it fit to do so.
However, the ECJ will probably be aware that doing so may jeopardize the whole project of European integration once national courts ceased to accept a total subjection of their national constitutions to the EU. This would be a stance which in various of the present Member States has already been taken, but is perhaps even more likely to be taken by the new Member States which have recently shed the yoke of total subjection in favour of freely consented constitutional principles of their own.
Again the legitimacy of the project of European integration in terms of the national constitutional values of Member States is crucial for its success. This legitimacy is ultimately dependent on factual acceptance and recognition of the importance of EU law. It can be achieved much better when the EU constitutional order is conceived of in terms of a legal and political order encompassing *both* the EU Constitution proper and the constitutions of the Member States and their institutions. Such a view is not achieved by unilaterally imposing the hierarchical supremacy of the EU Constitution and all EU decisions on the national constitutions subjected thereto.
Hence, I doubt the wisdom of casting a doctrine of primacy in the form of an overriding legal norm and carving it in stone.

---

[13]For instance ECJ case C-339/87, Commission/Netherlands, *ECR* 1990, I-851, para. 25.

[14]Case C-361/88, 30 May 1991, Commission/Germany, *ECR* 1991, p. I-2567

[15]Thus Articles 54, 55 and 58 of the Convention implementing the Schengen Agreement still exist as treaty provisions of the Agreement itself, and have not been given a legal status under title IV of the EC Treaty, but under the intergovernmental third pillar provisions of the EU Treaty. They have not been changed nor otherwise been given a new content or meaning. Yet, the Court deemed it sufficient to set aside the intention of the parties to the Convention by reference to the fact that this will dates from before the Schengen arrangement being given a place in the EU system; see Joined Cases C-187/01 and C-385/01, Gözütok and Brügge, paragraph 46.