NATIONAL COURTS ARE ALSO COURTS OF THE EUROPEAN UNION

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Abstract: *the Court of Justice of the European Union (CJEU) ensures the uniform interpretation and application of European Union law. Its position as the court of the EU is explicitly and indisputably determined. The principle of the primacy of EU law over the domestic law of a Member State is considered one of the essential if not the essential requirement for the relationship between the separate legal orders: EU law on the one hand and domestic law on the other. Despite its unquestionable importance and unlike other principles developed by the CJEU, this primacy has never been incorporated in the founding treaties. The mechanism of references for preliminary ruling remains the primary means of dialogue between national courts and the CJEU. It enables the courts to maintain a harmonised interpretation of EU law and the use of the references by national courts is a good indicator of their relationship with the CJEU. It is noteworthy that the national courts have quickly embraced this instrument, thus the importance of the references for preliminary ruling exceeded the expectations of the framers of the Treaties in that originally they were intended as a complementary mechanism in the system of actions between the Member States and the Union bodies.*

Keywords: *Court of Justice of the European Union (CJEU), primacy of the EU law, effet utile, preliminary ruling, ultra vires doctrine*

INTRODUCTION

It is beyond any doubt that the Court of Justice of the European Union (CJEU) ensures the uniform interpretation and application of European Union law. Its position as the court of the EU is explicitly and indisputably determined. National courts can, however, justifiably be counted as EU courts even if many people – national judges among them – would not necessarily think to do so. National courts, having general jurisdiction in the EU, are often on the front line when it comes to the difficulties of the practical and specific application of the EU law. Of course, the CJEU as the guardian of treaties creates its own interpretation of the EU law, but its activities would be void if the effectiveness was not ensured by national courts. The judges are responsible for the effectiveness under a kind of "judicial subsidiarity",[1] applying to specific cases before them and thus to everyday life the integration logic which is at the heart of the European construction. A vast majority of decisions issued by the CJEU are initiated by national courts when they decide to file a reference for preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). National courts of the Member States are not only performing

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[1] SIMON, D. La subsidiarité juridictionnelle: notion-gadget ou concept opératoire? *Revue des affaires européennes*. 1998, Vol. 9, No. 1-2, pp. 84–85.

rules imposed from above. They are also representatives of intrastate constitutional and legal order. Their authority and legitimacy permits them to ensure coordination among case-law of Member States and the CJEU.

Given the fact that the relationship between the CJEU and national constitutional courts is a specific matter, this paper focuses primarily on the relationship between the CJEU and national general courts. That being said, it was impossible to avoid the dimension of the CJEU – national constitutional court relationship in those cases where it was necessary in order to proceed with the explanation.[2]

I. NATIONAL COURTS ARE ALSO EU COURTS

While the Czech courts did not have to fight for their status as courts of the EU, in many longer-standing Member States the status was attained as a result of a complicated process. The reserved attitude of national courts clearly stemmed from the revolutionary concept of the principle of primacy, which in the eyes of many judges challenged the concept of their institutional status in the system of division of powers as well as the system of legal regulations including the national constitution at the apex of the system.[3] Bruno Lassere, vice-president of the French *Conseil d'État,* in this context mentions, that at the outset of European integration a minimalist concept of the role of general court judge prevailed in a majority of Member States: the judge is only a body of law and should not check anything. The external dimension of the judge's work lies in the hands of executive and legislative bodies.[4] Under such circumstances and coupled with a dualistic approach to international obligations it is understandable that for example the Belgian *Cour de cassation/ Hof van Cassatie* or the French *Conseil d'État* resorted to *"loi-écran"* theory, to be able to reject EU enforcement and the direct effect of European law.[5]

The *"loi-écran"* doctrine in French administrative law means that an administrative judge cannot consider the constitutionality of an ordinary law. If an administrative act is issued without any basis in law the administrative judge of the *Conseil d'État* may consider its constitutionality. However, if an administrative act is issued on the basis of a law, regulation, or other generally binding legal rule, such law or rule forms a "veil" between the administrative act and the constitution. In France the constitutionality of such administrative act may be considered only by the Constitutional Council – *Conseil constitutionnel.* By analogy an administrative judge should not consider the conformity of ordinary laws with international obligations which falls within the sole jurisdiction of the *Conseil constitutionnel.* But the Constitutional Council refused to consider such questions because they concerned a review of conformity with international treaty (*contrôle de convention-*

[2] TOMÁŠEK, M. Ke vztahům Soudního dvora EU a obecných vnitrostátních soudů [On Relations between the European Court of Justice and General Courts in Member States]. *Zpravodaj Jednoty českých právníků* 2023, No. 4, pp. 54–63.

[3] SAUVÉ, J.-M. *Le renouvellement du droit administratif sous l'influence du droit européen', Mélanges en l'honneur de Bernard Stirn.* Paris: Dalloz, 2019, p. 511.

[4] LASSERE, B. Les juges nationaux et la construction européenne: unis dans la diversité. *Revue européenne du Droit.* 2021, Vol. 3, No. 3/2.

[5] CE 1 Mars 1968, *Semolina Manufacturers Union*, Lebon 149.

alité) rather than a review of constitutionality (*contrôle de constitutionalité*).[6] The foundations of the principle of primacy definition in *Costa v. Enel*[7] were formed in such a dualistic system where initially the Italian Constitutional Court (*Corte costituzionale*) held that violation of Community law means that the state is liable on the international level, but this does not render the contradictory law ineffective.[8] This opinion was subsequently amended by the CJEU in the well-known judgment which gave rise to the principle of primacy.[9]

Bruno Lassere in this context describes the complicated route the French administrative judiciary undertook to acknowledge the primacy of European law over French law.[10] Several months after the *Conseil Constitutionnel* found itself incompetent to consider the conformity of domestic law with French international obligations as stated above, in 1975 the French *Cour de cassation* decided in the *Société des cafés Jacques Vabre* case that Community law takes primacy over French law and enabled the review (*contrôle de conventionalité*).[11] The *Conseil d'Etat* took a longer amount of time to take this step but did eventually take it with respect to the importance of European law in the domestic legal order, the requirement for the consistency of law, and analogous decisions of the constitutional and supreme courts in other Member States. In its judgment in *Compagnie Alitalia*[12] the *Conseil d'Etat* acknowledged the full primacy of the EU founding treaties,[13] EU regulations,[14] and EU directives[15] over all domestic legal regulations. The judgment in *S.A. Rothmans International France*, cited in Note No. 12, was issued several months after an amendment to the French Constitution of 25 June 1992 which acknowledges the *acquis communautaire* and places Community law under the "constitutional umbrella" (*couverture constitutionnelle*).[16]

Later the *Conseil d'Etat* went even further in its efforts to prevent inconformity and deepen the integration of European law into the French domestic legal order. In the *Association de patients* case of 1999, the *Conseil d'Etat* ordered the administrative bodies not to pass regulations to implement a domestic law if the law is not in conformity with EU law.[17] In its 1998 decision in the *Communauté de communes de Piémont-de-Barr* case the *Conseil d'Etat* ordered the administrative bodies to stop applying those written and

[6] Cons. const., décision n° 74-54 DC du 15 janvier 1975.
[7] Judgment of the Court of 15th July 1964. Flaminio Costa v E.N.E.L. Case 6-64.
[8] Corte costituzionale della Repubblica Italiana, 24 Febbraio 1964, *Costa c/ ENEL*.
[9] For more details see MALENOVSKÝ, J. Triptych zobrazování Soudního dvora ES: Arbitr, „motor integrace" nebo „velký manipulátor"? [A Triptych Portraying the Court of Justice of the European Communities: An Arbitrator, "driving force of integration", or a "great manipulator"?]. *Právník*. 2007, Vol. 146, No. 10, pp. 1065–1083.
[10] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité*.
[11] Cass. 24 mai 1975, *Société des cafés Jacques Vabre*, 73-13.556.
[12] CE, 3 février 1989, *Compagnie Alitalia*, n° 74052.
[13] CE, 20 octobre 1989, *Nicolo*, n° 108243.
[14] CE, 9 septembre 1990, *Boisdet*, n° 58567.
[15] CE, 28 février 1992, *S.A. Rothmans International France*, n° 56776.
[16] MAGNON, X. Le chemin communautaire du Conseil constitutionnel entre ombre et lumière, principe et coneéquence de la spécificité constitutionnelle et du droit communautaire. *Revue Europe*. 2004, p. 6 – cited based on MALENOVSKÝ, J. Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před právem vnitrostátním měřítky pramenů mezinárodního práva [Trust, but verify: A verification of the principle of primacy of Union law over domestic law on the standards of the sources of international law]. *Právník*. 2010, Vol. 149, No. 8, p. 791.
[17] CE, 24 février 1999, *Association de patients de la médecine d'orientation anthroposophique et autres*, n° 195354.

unwritten principles of domestic law that contravened the objectives of the relevant directives upon expiration of the transposition deadline.[18] It imposed a duty on the government to use Article 37 of the Constitution of the French Republic on "delegalisation" in those cases where a legal provision interferes with the powers delegated to the EU.[19] In the *Syndicat national de l'industrie pharmaceutique* case of 2001 the *Conseil d'Etat* also acknowledged the primacy of the general principles of European Union law[20] and the full effect of the judgments of the CJEU issued in response to the references for preliminary ruling; this was confirmed by the *Conseil d'Etat* five years later also for responses to references for preliminary ruling submitted by other Member States.[21]

According to Lassere, the *Conseil d'Etat* harmonised the administrative case law in France with CJEU case law.[22] A number of decisions were issued to fill existing gaps. The directives which were not transposed and caused disputes with the CJEU were given full normative effect by the *Conseil d'Etat* in the decision in the *Mme Perreux* case of 2009 by giving consent to the review of individual administrative acts in the light of the unconditional and unequivocal provisions of the directives.[23] In terms of the liability of the state on the grounds of lack of transposition or failure to transpose directives, CJEU case law drove the *Conseil d'Etat* to leave the old decisions which were deeply rooted in *"loi-écran"* doctrine and to acknowledge the possibility of finding the state liable if the written law of the EU[24] or CJEU judgments[25] were not followed. Like in France, the courts in all Member States took the same route, albeit at varying speeds, to become the first guardians of the effectiveness of EU law in their Member States.

II. NATIONAL COURTS TEND TO BE RELUCTANT TOWARDS THE PRIMACY OF EU LAW

The principle of the primacy of EU law over the domestic law of a Member State is considered one of the essential if not the essential requirement for the relationship between the separate legal orders: EU law on the one hand and domestic law on the other. Despite its unquestionable importance and unlike other principles developed by the CJEU, this primacy has never been incorporated in the founding treaties. True, there was an attempt to do so in the draft Treaty establishing a Constitution for Europe but it has never been ratified.[26] The reasons why the primacy principle was not incorporated in the amendment of the founding treaties by the Treaty of Lisbon can be perceived as rather political. The principle of primacy was strongly criticised during discussions on the Treaty establishing

[18] CE, 6 février 1998, *Tête*, n° 138777 et 20 mai 1998, *Communauté de communes de Piémont-de-Barr*, n° 188239.
[19] CE, 3 décembre 1999, *Association ornithologique et mammologique de Saône-et-Loire*, n° 164789.
[20] CE, 3 décembre 2001, *Syndicat national de l'industrie pharmaceutique*, n° 226514.
[21] CE, 11 décembre 2006, *Société De Groot en Slot Allium B.V.*, n° 234560.
[22] LASSERE, B. *Les juges nationaux et la construction européenne unis dans la diversité.*
[23] CE, 30 octobre 2009, *Mme Perreux*, n° 298348.
[24] CE, 8 février 2007, *Gardedieu*, n° 279522.
[25] CE, 18 juin 2008, *Gestas*, n° 295831.
[26] Article I-6 of the draft literally provided that: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."

a Constitution for Europe, therefore it fell among the more controversial passages of the rejected document which were not carried over to the new concept of the treaties.

As a result of the direct effect principle[27] and the primacy principle[28] the CJEU must be rightly considered, in relation to national courts, as a judicial body of the Union which has been entrusted with a specific mission without it having explicit support in the founding treaties. These two principles create the framework for the specific, autonomous, and integrated legal order of the European Union, whose relations with the Member States are governed by an original logic, different from the logic governing traditional relations within domestic legal orders.[29] Since the beginning of the millennium the CJEU has moved forward in its creative development of the Europe of rights and values through extensive interpretation of the Union's powers and the applicability of EU law thanks in particular to the interpretation of the concept of EU citizenship and the interpretation of the Charter of Fundamental Rights of the European Union whose influence currently extends substantially beyond the economic sphere which was the original focus the fathers of European integration had in mind at the outset of the European integration.

Despite the national courts taking the role of EU courts and becoming the guardians of the effectiveness of EU law in the Member States, it must be stated that they remain reluctant in their decisions towards the primacy of EU law. European integration brought to the fore a complicated constitutional and legal pluralism in which the superior norms of domestic legal orders and the EU legal order are in constant danger of collision. [30] On the one hand the CJEU legitimately aspires to being a supranational entity in terms of the primacy of all its production over the rules of the Member States including their constitutional laws, which theoretically forces national judges to ensure the full effect of EU law, if necessary by disapplying domestic provisions if they contradict an EU law provision.[31] On the other hand, the national judges logically give primacy to their national constitution in their own legal order. Such primacy will remain an indisputable fact[32] as long as state sovereignty exists in the international community. Such a situation may result in "normative aporia", a blind alley,[33] if a solution is not adopted as to who will have the final say in case of conflict. Under such circumstances the national courts have the special responsibility together with the CJEU to prevent European constitutional and legal pluralism from falling into "cacophony".[34]

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[27] Judgment of the Court of 5th February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Case 26-62.
[28] Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Case 6-64.
[29] DEHOUSSE, R. L'Europe par le droit: plaidoyer pour une approche contextuelle. *Politique européenne.* 2000, Vol. 1, No. 1, p. 63.
[30] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité.*
[31] Judgment of the Court of 9th March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA. Case 106/77.
[32] ABRAHAM, R. *Droit international, droit communautaire et droit français.* Paris: Hachette, 1989, p. 35.
[33] MALVERTI, C., BEAUFILS, C. L'instinct de conservation. *Actualité juridique Droit administratif (AJDA).* 2021, No. 21, p. 1194.
[34] BAQUERO CRUZ, J. The Legacy of the Maastricht-Urteil and the Pluralist Movement. *European Law Journal.* 2008, Vol. 14, No. 4, p. 414.

II.1 Constitutional conformity check

As written in the above context by Jiří Malenovský, a CJEU judge for many years, "to prevent escape by reference to the primacy of the constitution and possible revolt of constitutional courts, the CJEU[35] had to tighten up the defence circle with the explicit reservation that the primacy of Community law is to be applied also over constitutional principles."[36] National courts are trying to prevent conflict between EU law and domestic law as much as possible. However, if the conflict is inevitable, they theoretically reserve the right to give primacy to their own constitution over EU law. Such possibility of a "constitutional conformity" check is often perceived as a potential threat to the CJEU. The existence of such possibility may be justified by European pluralism. Activation of the relevant mechanisms is legitimate on the condition that national courts fully cooperate and use the mechanisms only in extreme and exceptional cases. However, not all judges share the desire for cooperation. That being said, the threat posed by this constitutional conformity check is declining steadily in direct proportion to the convergence of constitutional principles among the Member States, in particular in the area of human rights thanks to the existence and application of the European Convention on Human Rights (ECHR).

Expert literature indicates that throughout the history of the Union there has never been a case where a national court refused to apply a provision of EU law by referring to primacy, but the same is not true for the doctrine of *ultra vires*.[37] Nonetheless, several European courts formed the so-called equivalent protection theory to prevent a situation where a domestic legal act whose substance is a transposed standard would become contradictory to guarantees arising from the national constitution. The national court must first ascertain whether an equivalent guarantee exists in the European legal order, very often in the area of fundamental rights and freedoms.[38] In such case the court projects its constitutionality review into the European legal order, if needed through a reference for preliminary ruling. The European Court for Human Rights[39] and the CJEU[40] followed such mechanism and created the mutual presumption of equivalent guarantees on the protection of fundamental rights between EU law and the ECHR.[41] The cases of constitutional conformity check in connection with the presumption of equivalent guarantees for

[35] Judgment of the Court of 17th December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11-70.

[36] MALENOVSKÝ, J. *Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před právem vnitrostátním měřítky pramenů mezinárodního práva. [Trust, but verify: A verification of the principle of primacy of Union law over domestic law on the standards of the sources of international law]*. p. 783 and therein cited LENAERTS, K., VAN NUFFEL, P. *Constitutional Law of the European Union, Second Edition*. London: Thomson, Sweet and Maxwell, 2005, pp. 666–667.

[37] For example MANIN, P. *Droit constitutionnel de l'Union Européenne*. Paris: Pedone, 2004, pp. 481–422, or MALENOVSKÝ, J. *Důvěřuj, ale prověřuj: prověrka principu přednosti unijního práva před právem vnitrostátním měřítky pramenů mezinárodního práva. [Trust, but verify: A verification of the principle of primacy of Union law over domestic law on the standards of the sources of international law]*. p. 784.

[38] Solange-I-Beschluss BVerfGE 37, 271 ff.

[39] European Court for Human Rights of 30th June 2005. Case *Bosphorus* 45036/9.

[40] Judgment of the Court (Grand Chamber) of 3rd September 2008. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. Joined cases C-402/05 P and C-415/05 P.

[41] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité*.

the protection of fundamental rights have recently occurred in connection with the doubts whether the fundamental constitutional principles common to all Member States are respected in another Member State. The objection of a party to a case claiming a lack of constitutional guarantees was raised for example in surrender proceedings under a European arrest warrant. The doubts concerning constitutional guarantees in other Member States were raised in connection with the application environment in a Member State rather than in connection with implementation of the Union framework decision. As early as in 2013 the Belgian courts refused to surrender to Spain persons connected to the activities of Basque organisation ETA, which is known for its fight for the independence of the Basque Country from the Kingdom of Spain.[42] The Belgian *Cour de cassation/ Hof van Cassatie* as the court of last resort literally held that "the surrender to Spain of a Spanish citizen, affiliated to the Basque resistance and separatist movement ETA, would entail a risk of fundamental rights infringement as guaranteed in Article 6 of the Treaty on the European Union (TEU)." [43]

Refusal to surrender a prosecuted person to another Member State on the grounds of doubt that the person's fundamental rights may be infringed there would put in danger the whole mechanism of the European arrest warrant and in a broader context also the principle of mutual trust between Member States.[44] As any crisis of interpretation of an EU rule should be addressed by the CJEU, it was just a matter of time until it would begin considering the grounds for refusing to surrender a prosecuted person to another Member State due to doubts on compliance with human rights standards in that Member State. The CJEU rendered two important judgments in such cases. The first decision was issued in the joint cases of Aranyosi and Căldăraru,[45] the merits of the case involved the doubts of the German High Court of the Land in Bremen (*Hanseatisches Oberlandesgericht in Bremen*) whether it was possible to surrender the requested persons to Hungary and Romania due to concerns that they may be subjected to inhuman and degrading treatment in the prisons of these countries. The CJEU stated that the primacy of the application of EU law and its principles of mutual recognition and mutual trust among the Member States may be restricted only under exceptional circumstances. Where there are objective, reliable, specific, and properly updated doubts on the human rights situation in the Member State to which the person is to be surrendered the CJEU imposed an obligation on the issuing Member State to determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, would be exposed, due to the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treat-

[42] MEYSMAN, M. Belgium and the European arrest warrant: is European criminal cooperation under pressure? Refusal of European arrest warrant surrender in the case Jauregui Espina as proof of failing mutual trust. *European Criminal Law Review*. 2016, Vol. 6, No. 2, pp. 186–210.

[43] Hof van Cassatie, 19 November 2013, AR P.13.1765.N.

[44] TOMÁŠEK, M. European Arrest Warrant – Mutual Trust and Mistrust among EU Member States. *The Lawyer Quarterly*. 2023, Vol. 13, No. 2, pp. 131–142.

[45] Judgment of the Court (Grand Chamber) of 5th April 2016. Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen Joined Cases C-404/15 and C-659/15 PPU.

ment, in the event of his surrender to that Member State. Such procedure is called an Aranyosi test[46] in legal theory.

The relation of the Aranyosi test to Article 7 TEU was further specified by the CJEU in the ruling of the High Court of Ireland v. LM.[47] The requested person claimed that by being surrendered to Poland the person would be denied the right to a fair trial because in the issuing state the principle of the rule of law is being infringed and there are no guarantees of the independence and impartiality of Polish courts. The CJEU accepted the information contained in the reasoned proposal of the Commission requesting the activation of the mechanism under Article 7(1) TEU as objective evidence, but again requested that the Irish judicial bodies not be satisfied with evidence of *"real risk"* based solely on the grounds of systemic or generalised deficiencies in the judicial power in Poland. Until the mechanism under Article 7 TEU is activated, the court of the surrendering Member State may refuse to comply with the European arrest warrant only providing that the court determines, specifically and precisely, that there are substantial grounds to believe that the individual concerned by a European arrest warrant would be exposed upon his surrender to the issuing judicial body to a real risk of violation of his fundamental right to be tried before an independent court and thus the substance of the fundamental right to a fair trial would be violated. As the Irish judicial bodies were unable to find evidence proving the real risk to which the requested person would be exposed by being surrendered to Poland, the person was surrendered.[48]

Effet utile

In relation to the application of the European arrest warrant a question was raised as to what extent the national courts should strictly stick to the scope of the Union regulation, or whether in the name of *effet utile* of European Union law they should go beyond the prescribed framework. We can mention as an example the procedure of national courts in Belgium and Germany in considering the Spanish requests for the surrender of the Catalan politicians who organised a referendum on the independence of Catalonia on Spain in October 2017. The government in Madrid stated that the referendum was unconstitutional and accused Catalan politicians who organised the referendum of the crime of rebellion (*rebelión*) under Article 472 of the Spanish Criminal Code, and of the diversion of public funds (*malversación*) under Article 432 of the Code.[49]

The crime of embezzlement is listed in the European arrest warrant among the 32 crimes which are exempt from the dual criminality test, but the crime of rebellion does not fall under exempt crimes. The Belgian, or more precisely Flemish court (*Raadkamer*

[46] FRACKOWIAK-ADAMSKA, A. Court of Justice Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State. *Common Market Law Review*. 2022, Vol. 59, No. 1, pp. 113–150.

[47] Judgment of the Court (Grand Chamber) of 25th July 2018 Minister for Justice and Equality v. LM. Case C-216/18 PPU.

[48] FRACKOWIAK-ADAMSKA, A. *Court of Justice Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State.*

[49] Ley Orgánica 10/1995, de 23 de noviembre 1995, del Código Penal. Boletín Oficial del Estado, 24. 11. 1995, núm. 281.

van de Nederlandstalige rechtbank van eerste aanleg Brussel), rejected the European arrest warrants issued by Spain on formal grounds. The European arrest warrant issued by Spain was based on a formal accusation issued by the Supreme Court of the intentional obstruction of a public officer's tasks or the enforcement of an official decision, and the diversion of public funds.[50] However, according to the Belgian court the European arrest warrant must contain information on an enforceable judgment, arrest warrant, or other enforceable court decision with the same effect which must precede the issuing of the European arrest warrant. According to the Belgian court, the Spanish court had not adopted any such decision therefore the "mere" formal accusation cannot be deemed sufficient for issuing a European arrest warrant. While the Belgian courts have never reached the phase of reviewing dual criminality for the purposes of surrendering the Catalan politicians, the German courts have considered the concept. The prosecuted Catalan Prime Minister Carles Puidgemont was, upon the request of Spain, detained in the federal state of Schleswig-Holstein where he faced the Spanish arrest warrant for surrender for the crimes of rebellion and diversion of public funds. The High Court of the federal state of Schleswig-Holstein (*Oberlandesgericht Schleswig-Holstein*) affirmed the dual criminality of the diversion of public funds and admitted the possibility of surrendering Puidgemont to Spain, however solely for this crime.[51] The German court rejected the dual criminality of the crime of rebellion. It first considered whether section 81 of the German Criminal Code providing for the crime of high treason against the federation (*Hochverrat gegen den Bund*)[52] could be applicable to the act committed. According to the court in Schleswig-Holstein it is disputable whether Puigdemont committed such crime using violence. This is because the German body of the crime of high treason requires the use of force or threat of force. On the contrary, Puidgemont attempted to achieve separation of Catalonia from Spain by democratic means, by organising a referendum. Even though violence occurred during the demonstrations it cannot be attributed to the requested person and it is not possible to claim that he wanted to achieve independence in this way. The court compared the acts of Puigdemont with the judgment of the German Federal Court of Justice (*Bundesgerichtshof*) in the Startbahn-West case of 1983.[53] In that case an environmental activist wanted to force the Parliament of the Federal State of Hessen to allow a referendum on the planned expansion of an airport. Similarly to Catalonia, violence occurred in relation to the referendum. According to the relevant decision of the Federal Court of Justice, violence which forces a state to capitulate or an attempt to make a revolution which results in victims and leaves the state in chaos is criminal.[54] At first glance this seems identical to the acts of the Catalan politicians, but the German court did not

[50] Auto de procesamiento del Tribunal Supremo, nº 20907/2017, del 21. 3. 2018.
[51] KHNINOVÁ, G. Test oboustranné trestnosti podle evropského zatýkacího rozkazu v kontextu stíhání katalánských politiků a europoslanecká imunita [Dual criminality test under the European arrest warrant in the context of the prosecution of Catalan politicians and the immunity of MEPs]. *Právník*. 2020, Vol. 159, No. 8, pp. 601–617.
[52] Strafgesetzbuch. In der Fassung der Bekanntmachung vom 13.11.1998 (BGBl. I S. 3322).
[53] Bundesgerichtshof, 23.11.1983 – 3 StR 256/83 (S), Startbahn West.
[54] KÖNIG, J., MEICHELBECK, P., PUCHTA, M. The Curious Case of Carles Puigdemont-The European Arrest Warrant as an Inadequate Means with Regard to Political Offenses. *German law journal*. 2021, Vol. 22, No. 2, pp. 256–275.

allow the surrender mainly because the Catalan referendum was declared unconstitutional by the Constitutional Court after the vote took place. It rejected the reasoning of the formal accusation that the organisers could foresee unconstitutionality under the given circumstances.

The examples described *in concreto* represent evidence of the still imperfect functioning of the European arrest warrant when the courts of the Member States hesitate or refuse to surrender the persons requested. *In abstracto* the examples show a situation where national courts meticulously stick to the scope of a European regulation without considering its *effet utile*. Such situation can be overcome by issuing a reference for preliminary ruling to the CJEU, which adopts "pro-EU opinions" on the case. This was very accurately commented on by Michal Bobek, the Advocate General, in his opinion on the Grundza case,[55] even though the case concerned a framework decision on the application of the principle of mutual recognition of judgments in criminal cases rather than the European arrest warrant. According to the opinion of Advocate General Bobek with respect to the principles of mutual trust and mutual recognition, it is evident that the legal orders of individual Member States are mutually much more open, as proven by the substitution of a simplified surrender procedure for the traditional extradition procedure. If this mechanism is to be exploited fully within the meaning of the *effet utile* doctrine it is necessary to accept the fact that consideration of the dual criminality condition will require a considerable amount of abstraction. Bobek in point 52 of his opinion states: "In other words, the questions to be asked by the judicial authority of the executing State in the process of such a 'conversion' are: can the act(s) that have led to the judgment in the issuing State be subsumed under any criminal offence provided for by the criminal law of the executing State? Would such an act be considered criminally punishable per se if committed on the territory of the executing State?"[56]

The *ultra vires* doctrine, for example in the judgments of the constitutional courts of the Czech Republic,[57] Denmark,[58] and Germany,[59] is considered the most significant manifestation of resistance by the national courts to the principle of primacy. These decisions that an act of the European Union was issued beyond the legal power entrusted to the Union (*ultra vires*) remind us of the fact that the national courts can actually freely decide whether they will apply EU law or not. These courts have been and still are the key architects of European integration but in the future they may also destroy it.[60] The latter trend may be exemplified by the decision of the Polish Constitutional Court (*Trybunał Konstytucyjny*) of 2021, which disputed the very principle of primacy of EU law over domestic law.[61] In June 2021 the Polish Constitutional Court (*Trybunał Konstytucyjny*) declared that

[55] Judgment of the Court (Fifth Chamber) of 11 January 2017 Criminal proceedings against Jozef Grundza. Case C-289/15.

[56] Opinion of Advocate General Bobek delivered on 28th July 2016, Case Grundza, C-289/15, EU:C:2016:622.

[57] Judgment of the Constitutional Court of the CR Pl.ÚS 5/12 of 31. 1. 2012N 24/64 Sb. Slovak Pensions XVII – application of the Agreement between the CR and the SR on social security, obligations international and EU law.

[58] Højesteret, afsagt mandag den 22. september 2014, Sag 15/2014 *Dansk Industri* som mandatar for Ajos A/S mod Boet efter A.

[59] BverfG, 5 Mai 2020, 2 BvR 859/15, Abtrennung von Verfahren in Verfassungsbeschwerdeverfahren bezüglich Anleihekäufen durch die EZB.

[60] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité.*

the interim measures of the CJEU concerning the organisation of the national judicial system in Poland were declared *ultra vires* and therefore are not binding on Poland. In the judgment of October of the same year the Constitutional Court (*Trybunał Konstytucyjny*) went even further and declared the contradiction of certain provisions of the TEU, for example Articles 1, 2, 4 (3), or 19 (as they are interpreted by the CJEU) with the Constitution of the Polish Republic, affirmed the primacy of the Polish Constitution over EU law and thus denied the principle of primacy of EU law over Polish law.

In fact, the Polish Constitutional Court (*Trybunał Konstytucyjny*) has never acknowledged the primacy of EU law over the Polish Constitution. Shortly after the accession of Poland to the EU, it issued in 2005 a judgment affirming the primacy of the Polish Constitution, stating that any possible conflicts between the provisions of the Constitution with a Union rule may not under any circumstances be resolved by adopting the principle of the primacy of EU law.[62] The dispute between the CJEU and Poland escalated in March 2021 when the CJEU issued a decision concerning the mode of appointment of justices of the Supreme Court of Poland.[63] In its decision, the CJEU expressed doubts concerning the independence of the judiciary in Poland: "Notwithstanding the fact that a candidate for a position as judge at a court such as the Supreme Court (*Sąd Najwyższy*) lodges an appeal against the decision of a body such as the National Council of the Judiciary (*Krajowa Rada Sądownictwa*) not to accept his or her application, but to put forward that of other candidates to the President of the Republic of Poland, that decision is final inasmuch as it puts forward those other candidates, with the result that that appeal does not preclude the appointment of those other candidates by the President of the Republic of Poland and that any annulment of that decision inasmuch as it did not put forward the appellant for appointment may not lead to a fresh assessment of the appellant's situation for the purposes of any assignment of the position concerned … those provisions are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic of Poland, on the basis of the decisions of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law." The CJEU's opinion in this case was confirmed again by the CJEU in June 2023.[64]

In the 2005 judgment, the Constitutional Court (*Trybunał Konstytucyjny*) did not accept the primacy of EU law over the Polish Constitution, but it declared the founding treaties of the EU compatible with Polish law, including the Constitution. But in the judgment of June 2021 the Constitutional Court (*Trybunał Konstytucyjny*) decided that Articles 2 and

[61] Trybunał Konstytucyjny K 3/21, 7 października 2021 r. Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej.
[62] Trybunał Konstytucyjny K 18/04, 11 maja 2005 r. Traktat akcesyjny
[63] Judgment of the Court (Grand Chamber) of 2nd March 2021 A.B. and Others v Krajowa Rada Sądownictwa and Others. Case C-824/18.
[64] Judgment of the Court (Grand Chamber) of 5th June 2023 Commission v. Poland. Case C-204/21.

19 (1) TEU are incompatible with the Polish Constitution. It stated that the CJEU illegitimately appropriated the right to review the functioning of the judicial system in a Member State, which does not fall within its jurisdiction under the Union treaties. This was the strictest application of the *ultra vires* principle so far in the "gunfights" between the CJEU and the national constitutional courts. However, the question as to whether the CJEU really went too far in the criticism of the system of appointment of justices in Poland is not insignificant. It may have interfered with the principle of the independence of legal orders, which has been applicable to the relationship between EU law and domestic law for years.

As a result of the growing influence of EU law it is likely that the national courts will be more cooperative if they gain more flexibility to apply and interpret EU law. It is true that the uniform application of EU law is essential in some areas, in particular those related to economics. In other areas, mainly the former third pillar, a common Union framework may mitigate certain disparities without the need to call for uniformity. Bruno Lassere means that the above-mentioned can be achieved by accepting that the CJEU does not have an absolute monopoly on the interpretation of EU law. Such acceptance presupposes first an acceptance of the reality of the division of roles between national courts and the CJEU. Second, it would materialise Article 4 TEU, providing that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." [65] And finally the specific status of national courts would be accepted, where the national courts have been taking a defensive position towards the Union and simultaneously for obvious reasons have been trying to democratically legitimise the intent of the legislature of the given Member State.[66] In response to constitutional pluralism, an "interpretation pluralism" could be created around the shared logic where judges could deviate from the judgments of the CJEU only in properly reasoned cases.[67]

III. THE NATIONAL COURTS FILE REFERENCES FOR PRELIMINARY RULING

The mechanism of references for preliminary ruling remains the primary means of dialogue between national courts and the CJEU. It enables the courts to maintain a harmonised interpretation of EU law and the use of the references by national courts is a good indicator of their relationship with the CJEU. It is noteworthy that the national courts have quickly embraced this instrument, thus the importance of the references for preliminary ruling exceeded the expectations of the framers of the Treaties in that originally they were intended as a complementary mechanism in the system of actions between the Member States and the Union bodies.

National courts of Member State understand a partnership among EU courts as a horizontal rather than a vertical chain. This is evidenced by the discretion they maintain in

[65] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité.*
[66] GENEVOIS, B. Dialogue des juges ou confrontation sous-jacente? In: Clément Juglar (ed.). *La Concurrence des juges en Europe. Le dialogue des juges en question(s)*. Paris: Éditions Clément Juglar, 2018, p. 19.
[67] LASSERE, B. *Les juges nationaux et la construction européenne: unis dans la diversité.*

relation to submitting the references for preliminary ruling.. In its judgment in *CILFIT* of 1982, the CJEU took the stand that the correct application of EU law must be so obvious that it leaves no room for reasonable interpretative doubts on the manner of resolution of the question raised. The concept of "reasonable interpretative doubt" is defined by the CJEU in the context of the relationship with other national courts and itself as follows: "Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."[68]

Such a requirement was undoubtedly legitimate at the time when the courts in Member States were far from being aware of their responsibility for European integration, but now it is much less justified. It is understandable that the majority of national courts refuse to apply the "reasonable interpretative doubts" principle in the strict sense. It is difficult to understand that the Grand Chamber of the CJEU did not draw any conclusions on such situation when it had the opportunity to do so in 2021 while reviewing the criteria in *CILFIT* judgment. At the time the CJEU in the *Consorzio Italian* Management judgment basically affirmed the conclusions of the *CILFIT* judgment and expanded on them as follows: "It is only where a national court or tribunal of last instance concludes that there is no circumstance capable of giving rise to any reasonable doubt as to the correct interpretation of EU law that that national court or tribunal may refrain from referring to the Court a question concerning the interpretation of EU law and take upon itself the responsibility for resolving it. The mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision. Where the national court or tribunal of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between

[68] Judgment of the Court of 6th October 1982. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. Case 283/81.

the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law."[69] Let us add that according to the CJEU analysis there is no uniform definition of the concept of "reasonable doubt" *per se* either in the Member States or on the level of the CJEU.[70]

The additional autonomy which should be granted to the national courts seems to be more appropriate given that the time to make a decision on a reference for preliminary ruling is becoming more and more disproportionate to the increasingly shorter time given to grant a right. The CJEU usually takes one to two years to review a reference for preliminary ruling; this lengthy amount of time affects the national judges' consideration of whether or not to file a reference for preliminary ruling. In any case, the above-mentioned partnership is an insuperable attitude of national courts which take the role of diligent participants in the debate by submitting the references for preliminary ruling to maximise the direct effect and primacy principles and yet at the same time play the role of proactive participants in the debate helping to develop CJEU case law by filing the references for preliminary ruling.

[69] Judgment of the Court (Grand Chamber) of 6th October 2021. Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA. Case C-561/19.

[70] Note de recherche sur l'application de la jurisprudence Cilfit par les juridictions nationales dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne. In: *curia.europa.eu* [online]. [2023-11-23]. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit-fr.pdf>.