

Constitutional Challenges of EU Accession for South East European Applicant Countries: A Comparative Approach

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1. Preparing the Constitution for EU Membership. Purpose of this Study.

Comparison shows that membership in the European Union (EU) – but already preparation for accession – raises numerous and specific constitutional challenges due to the specific features of the EU legal system. Only in few cases such adaptation can be achieved by a wide interpretation of existing constitutional provisions; most often it will require amendments to legislation and even to the Constitution itself in order to clarify and regulate fundamental questions thus creating legal certainty. Thus, almost all EU Member States have amended their Constitutions, either on occasion of Treaty revisions or in view of their accession to the EU, in order to meet the requirements resulting from their integration into the EU legal system.

While some of the necessary constitutional adaptations derive from concrete requirements of the *acquis communautaire* (and are thus specifically addressed in the accession negotiations, in the single chapters), other constitutional implications result from the general impact of EU membership on the domestic constitutional and legal system. These include above all the constitutional basis for membership, but also its consequences, such as changes in the balances between domestic institutions (in particular between executive and Parliament), changes in the internal distribution of competences as well as the participation in the EU-decision making process and the implementation of EU law. By contrast with the *acquis*-related specific matters, for these fundamental questions no blueprint or model for the necessary changes is provided by the EU. Thus, each (future) Member State has to find its own answers and way to adapt.

Various studies have been carried out on this topic, some examining single countries,¹ others choosing a comparative approach, in particular analysing the enlargement rounds of 2004 and 2007.² All studies show the great variety of solutions arising from the respective constitutional traditions and the political situation in the single countries: Due to considerable differences a standard model for these constitutional adaptations does not (and cannot) exist. However, critical

¹ See, for instance on Croatia, the detailed analysis by Irena Andrassy, *Constitutional Implications of EU Membership: an Overview of Constitutional issues in the Negotiating Process – the Croatian Perspective*, in Croatian Yearbook of European Law and Policy, Vol.4. No.4. November 2008, pp. 223-245 [hrcak.srce.hr/file/44803]; but also for Macedonia (N.B. "Macedonia" is used here and hereafter instead of the official denomination FYROM – Former Yugoslav Republic of Macedonia): see in particular Matthias Hartwig, *The Constitutional Amendments in the EU Member States with a View to the Ratification of the Maastricht Treaty and the Treaty on the Constitution of the European Union*, in: Mircev, Shkarik Kambovski (eds.), *Evouciata na ustavniot sistem na Republika Makedonija vo presret na usvoljuvanjueto na ustavniot dogovor na Evropskata Unija*, Cobiss, Skopje 2008, 109-128.

² Anneli Albi, *'Europe' Articles in the Constitutions of the Central and Eastern European Countries*. Common Market Law Review, 42 (2) 2005, 399-423; Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, Cambridge 2005; Anneli Albi/ and A. Kellermann/ J. Czuczai et al. (eds.), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries: Hopes and Fears*, Asser Press, The Hague 2006; Anneli Albi and Jacques Ziller (eds.), *The European Constitution and National Constitutions: Ratification and Beyond*, Kluwer Law International, The Hague 2006; Monica Claes, *The Europeanisation of National Constitutions in the Constitutionalisation of Europe: Some Observations Against the Background of the Constitutional Experience of the EU-15*, Croatian Yearbook of European Law and Policy, Vol.3. No.3. November 2007, pp. 1 - 38; Frank Hoffmeister, *Constitutional Implications of EU Membership: a View from the Commission*, Croatian Yearbook of European Law and Policy, Vol.3. No.3. November 2007, pp. 59 – 97; Anneli Albi, *Constitutional Changes and Challenges in the New Member States*, in: A. Lazowski (ed.), *Brave New World: The Application of EU Law in the New Member States*, Asser Press, The Hague 2010.

evaluation of comparative experiences from “old” and “new” Member States can provide useful indications and inspiration for the own situation.

This comparative study will analyse constitutional “integration clauses” in “old”, “new” and future Member States.³ The clauses will be distinguished according to their approach (general, EU specific, comprehensive or specific) and purpose (transfer of sovereign powers, procedures, substantial requirements, specific matters). Further adaptations for improving the participation in the EU decision-making process and the implementation of EU law will also be addressed (in particular relating to the role of Parliaments). In a final part, the role of Constitutional Courts and their relationship with the European Court of Justice will be discussed.

The aim of this comparative analysis is to draw conclusions for the EU accession candidates in the Western Balkans. In 2003, at the Thessaloniki summit the EU opened the perspective of accession to all countries in South Eastern Europe. Since then, the countries in the region have made different progress; today they are at different stages in their preparations for EU integration. The study will focus on Croatia, the former Yugoslav Republic of Macedonia (hereafter: Macedonia), Montenegro, Albania and Serbia:⁴ Albania returned the answers to the European Commission’s questionnaire on 14 April 2010 and Serbia did so in the beginning of 2011. Macedonia is an official candidate since 2005, has received recommendation for opening negotiations (only) in 2009, but still waits for the date for opening negotiation talks to be assigned by the Council, while Montenegro received candidate status in December 2010, without accession talks being opened so far. Most advanced is Croatia which has completed its accession negotiations in 2011 and is now awaiting full membership. In 2010, Croatia has adopted a major constitutional amendment for the purpose of constitutional conformity with EU accession and integration;⁵ the analysis will also discuss whether this amendment might become a model for the other States in the region.

2. Adapting to a new, encompassing kind of international organisation

2.1. The EU legal system: an international organisation with “constitutional features”

Membership in the European Union (EU) raises various challenges for the Constitutions of Member States. What started as an international organisation, separated from the internal legal system (according to the dualistic approach), developed into an integrated legal system of a new kind and quality. Due to this transformation from a traditional international organization to a

³ An excellent documentation with the texts of the related constitutional provisions in EU Member States and candidate countries can be found on the website “*The Europeanisation of National Constitutions*” [<http://proyectos.cchs.csic.es/europeconstitution/>] (N.B. in some cases not updated to the Lisbon Treaty).

⁴ Facing specific problems, Bosnia and Herzegovina (BiH) as well as Kosovo are clearly lagging behind the other Western Balkan States in the accession process. While for BiH constitutional reform is widely considered necessary for overcoming international guarantees under the Dayton Peace Agreement and for making the State functional, but political agreement does not seem possible, after its unilateral declaration of independence in February 2008, Kosovo is still not generally recognised as an independent State; to date, it has been recognised by 81 UN Member States, including 22 EU Member State. For these reasons both remain excluded from the study.

⁵ The constitutional amendments of 16 June 2010 (Narodne Novine 76/2010) introduced a Chapter VIII with specific provisions on membership in the European Union in the Croatian Constitution (articles 143 – 146).

multilevel constitutional framework, EU law is commonly referred to as “supranational” in order to distinguish it from international law:

“While the European Union is obviously an international organisation, the [...] legal system introduced by the European treaties cannot be considered merely as a system of treaty-based international law. In its current stage of development, the European Union is a unique organisation for regional integration which, as well as pursuing economic and monetary cohesion, has other political and general aims. The European Union has a Parliament, directly elected by universal suffrage, a Court of Justice of established authority whose decisions are binding, and an independent Community legal system applying both to the member states and their nationals. In addition to their various nationalities, the latter also enjoy European citizenship - a new status that confers advantages both within and beyond the borders of the Community. In addition, the European Union possesses its own resources, levies taxes and has [introduced] a single currency, the Euro.”⁶

Besides the mentioned institutional and structural elements and the fact that decisions are in most cases taken by majority (and not unanimously), the most salient features of the process of transformation or “constitutionalisation” of the EU legal system include:

- (1) the principle of direct effect, i.e. the self-executing character of some Treaty provisions, EU regulations and, in some exceptional cases, EU directives (granting rights), even vis-à-vis individuals;
- (2) the principle of supremacy of EU Law in order to guarantee its uniformity and efficacy of its application in all Member States (with the consequence of non-application of contrasting national legislation);
- (3) the implicit powers doctrine (contrary to the principle of attributed, i.e. limited and predetermined powers of the EU, the teleological criterion allowed to do what is “necessary and proper” to reach the objectives stated in the Treaties);
- (4) the protection of fundamental rights;
- (5) the principle of State responsibility.

Most of these characteristic features were not expressly mentioned in the Founding Treaties, but gradually reached through the jurisprudence of the European Court of Justice (ECJ) stressing the functional needs (*effet utile*) and the teleological, objective-oriented character of EU Law as well as its distinct quality.⁷ However, subsequent Treaty revisions tended to confirm the case-law and incorporated it in positive law.

⁶ European Commission for Democracy through Law (Venice Commission), *Constitutional Law and European Integration*, CDL-INF (99) 7, Strasbourg, 21 April 1999, p. 4.

⁷ The ECJ itself repeatedly illustrated the specific features of the EU legal system, e.g. in Opinion 1/91 of 14 December 1991 (at 21): “The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only member states but also their nationals [...]. The essential characteristics of the Community legal order which has thus been established are in particular its

The degree of legal interrelation reached is best illustrated by the famous Francovich-judgment,⁸ in which the ECJ brought State responsibility from the international sphere to the reach of citizens deciding that failures to implement EU directives in time can be the foundation for a damage-claim by the citizens: in these cases, Member States are subject to decisions by their own judges which apply or interpret legislation (EU directives) although this not yet in force in the Member State – in order to guarantee the uniformity of application of EU law as well as the rights of citizens.

Structurally, this close interrelation is necessary, as the application of EU law depends primarily on the administrative and judicial authorities of the Member States. The instrument of the preliminary reference procedure to the ECJ which the national judge can use in cases of doubts regarding the interpretation or the validity of EU acts again illustrates the interrelation, but also the need for exchange and dialogue between the institutional actors in this multilevel governance-architecture which is generally based on voluntary adherence and persuasion rather than on hierarchical imposed decisions. However, membership is based on the acceptance of the whole body of EU legislation by the State who has applied for it.⁹

2.2. The constitutional view: potential conflict and the legitimacy issue

The expansion of competences of the European Union (especially in the Maastricht-Treaty) as well as the direct interaction with individuals are elements of potential conflict of EU legislation with Member State Constitutions. The supremacy of EU law might lead to the non-application of contrasting national legislation; it is still controversial whether this also includes constitutional law.

As EU law is still based on international Treaties these questions raise issues of legitimacy and, sometimes, concern and have thus been challenges for national Parliaments and Constitutional Courts. While the former have, in many Member States, created specific constitutional provisions related to EU membership (“integration clauses”) as well as specific procedures and institutions, the latter have engaged in a judicial dialogue with the European Court of Justice, in an attempt to (de)limit the respective spheres of influence.

The fundamental constitutional adaptation regards the overall preparation for accession and membership, i.e. a provision permitting the transfer of sovereign powers to an international

primacy over the law of the member states and the direct effect of a whole series of provisions which are applicable to their nationals and to the member states themselves.”

⁸ ECJ, C-6 e 9/90 (1991). See, e.g., Vladimir Pavlović, *Some Observations on the European Court of Justice’s Post-Francovich Jurisprudence*, in *Croatian Yearbook of European Law and Policy*, Vol.4. November 2008, pp.179 – 193.

⁹ This is clearly underlined by the EU Commission in its Opinion on the application for accession to the European Union of the Republic of Croatia, Brussels, 12.10.2011, COM(2011) 667 final, p. 3: “(8) In joining the European Union, [the State] accepts, without reserve, the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community including all their objectives and all decisions taken since their entry into force, as well as the options taken in respect of the development and strengthening of the European Union and that Community. – (9) It is an essential feature of the legal order introduced by these treaties that certain of their provisions and certain acts adopted by the institutions are directly applicable, that the law of the Union takes precedence over any national provisions which might conflict with it, and that procedures exist for ensuring the uniform interpretation of the law of the Union. *Accession to the European Union implies recognition of the binding nature of these rules*, observance of which is indispensable to guarantee the effectiveness and unity of the law of the Union.” (italics by author).

organisation or to the European Union. Each country has to decide for itself how to identify or create a constitutional basis for membership limiting its own sovereignty by authorizing the application of sources of EU law within the own legal system (3.1.). The procedures for the transfer have to be determined (3.2.) and there might be even some constitutional limits against integration (3.3.).

More punctual constitutional adjustments have become necessary after the entry into force of the Treaty revisions since the Maastricht Treaty, most recently after the Lisbon Treaty (see below, 4.). While these are more specific in character, the single Member States still have discretion in shaping the concrete solution. By contrast, for the accession countries, these specific issues of constitutional character, such as EU citizens' rights, the question of extradition and the EU Arrest Warrant, already arise during the screening process and the following accession negotiations related to single negotiation chapters.¹⁰ Thus, there will be less discretion and the solutions will have to be found bilaterally, together with the EU Commission.¹¹ Clarification of these issues by express constitutional provisions might be useful in any case.

3. Providing a constitutional basis for EU integration

3.1. Preliminary distinctions

According to the distinction between monistic and dualistic schools of thought regarding the relationship between international law and the domestic legal system, among the Member States of the EU the monistic approach prevails (at least after enlargement). Former Socialist countries often opted for this approach during their period of transition in order to strengthen the Rule of Law and Fundamental Rights by granting supremacy to International Conventions, such as the European Convention on Human Rights;¹² however, this decision is in contrast with a traditional dualist practice in the former Yugoslav Constitution.¹³

In order to guarantee uniformity of EU law application throughout the Union also the European Court of Justice has opted for the monist approach,¹⁴ thus creating difficulties for those Member States which apply a dualistic solution and require constitutional amendments specifically

¹⁰ The negotiations for accession follow a subdivision of the *acquis communautaire* into 35 single chapters which are screened, monitored and evaluated in the annual progress reports by the Commission.

¹¹ This three-staged distinction is proposed from the Croatian perspective in the analysis by Irena Andrassy, *Constitutional Implications...*, p. 225.

¹² Thus, the Romanian Constitution assigns superiority to Human Rights Treaties (art. 20 para.2) as well as to the jurisprudence of the European Court of Human Rights (art. 148 para. 2); the latter in relation with the Act on Romanian Accession.

¹³ Siniša Rodin, *Requirements of EU membership and legal reforms in Croatia*, in *Politička misao: Croatian Political Science Review*, vol. 38, 2011, p. 98. According to the author, the dualist principle served the Socialist States as a "practical device for isolating themselves from ... 'interference with internal affairs'".

¹⁴ As regulations and some Treaty provisions are directly applicable and, according to the ECJ's case law, even some directives might have direct effect; in addition primacy of EU law over contrasting national provisions leads to the non-application of the latter.

addressing the peculiar issues of EU legislation compared to international agreements under public international law.¹⁵

Another important distinction is the one between unitary States and federal systems. The respect of the internal distribution of powers in the latter makes the involvement of sub-national entities necessary: on one hand, in order to guarantee the timely and efficient implementation of EU law, on the other for including sub-national entities in the decision-making process at EU level regarding (at least) those decision which directly affect them or their sphere of competencies.¹⁶ The EU has reacted to these peculiar structural requirements of some members by creating the Committee of the Regions as well as the possibility for regional ministers to participate in the Council even representing the Member State (art. 16 para.2 TEU, former art 203 TEC), and by considering sub-national entities in the obligation to “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.” (art. 4 para.2 TUE).¹⁷ However, in South Eastern Europe there are currently no federal systems or regions with legislative powers, with the exception of the Autonomous Province of Vojvodina.

3.2. General provisions versus (EU-)specific integration clauses. The special case of accession

The transfer of sovereign rights and competences from a State to an international organisation means a loss of control over these powers and consequently needs to be expressly authorized, although not necessarily with a special procedure different from normal treaty-making power. Examples are articles 24 para.1 of the German Basic Law and 11 of the Italian Constitution inserted in the respective Constitutions for permitting the re-integration into the international community of States after WW II and long before the Foundation of the E(E)C.¹⁸ However, while in 1992 the German general provision has been substituted – for EU integration – by a specific constitutional provision on EU integration, the Italian membership is still based on the unchanged general authorisation which has subsequently been interpreted by the Italian Constitutional Court as also providing “constitutional cover” to those EU legal acts and national implementation acts not in conformity with the Constitution.¹⁹

Progress in EU integration had the effect that ordinary provisions for the incorporation of public international law into the domestic legal system were increasingly considered insufficient. Comparison shows that today most Member States have adopted specific constitutional

¹⁵ This has been the case of Germany (Art. 23 GG). By contrast, Italy first relied only on a judgment of its Constitutional Court which insisted on the dualistic approach in principle while at the same time opening to monism in practice (both legal systems “are separated but coordinated”, *Granital* judgment, 8 June 1984, no. 170); the Constitutional reform of 2001 expressly introduced “EU and international obligations” as limits for the national as well as the regional legislators (art. 117 para.1 ITConst) thus guaranteeing primacy of EU legislation.

¹⁶ See for examples, in particular Germany, Austria and Belgium, the chapters by Peter Bußjäger and Jens Woelk in Roberto Toniatti, Francesco Palermo, Marco Dani (eds.), *An Ever More Complex Union. The Regional Variable as the Missing Link in the EU Constitution?* Nomos, Baden-Baden, 2004.

¹⁷ The early warning-procedure for the subsidiarity control might also be opened – according to domestic procedures – to opinions expressed by sub-national entities, art. 7 Protocol no.2 on the principles of proportionality and subsidiarity to the Lisbon Treaty.

¹⁸ This is highlighted by Matthias Hartwig, *The Constitutional Amendments ...* (2007), p. 6.

¹⁹ Consolidated jurisprudence, since Italian Constitutional Court, judgment “*Frontini*” (1973).

“integration clauses”, although still some “old” Member States did not. In fact, in the latter States, **general clauses**, valid for different kinds of international organisations, are still providing the basis also for EU integration. This is still the case of Belgium, where art. 32 of the Constitution permits transfer of competences without any specific formal or substantial requirement.²⁰ But also among the 2004 enlargement countries there are examples for mere general references to international organisations, as demonstrated by the Constitutions of Poland (art. 90), Slovenia (art. 138 para.5) and the Czech Republic (art. 10a).

These general clauses can be distinguished from those specifically related to the EU.

The Maastricht Treaty, subsequent Treaty revisions or the accession to the EU have been catalysts for creating a **specific constitutional basis** (and providing legitimacy) for the consequences of European integration in the domestic legal system. The transfer of sovereign powers by the State permits the EU to exercise these powers instead of the State institutions; this has been described as opening “a window in sovereignty”. The Constitutions of Hungary (art. 2A), Latvia (art. 68 para.3), Slovakia (art. 7) and Slovenia (art. 3a) are among those which expressly mention the (transfer to the) European Union in their texts. By allowing for this transfer, the opening clauses also permit derogation from the exclusive (popular) sovereignty and independence of the State as emphasised in the first articles of the respective Constitutions.²¹

The above described **all-purpose clauses** can be distinguished from those addressing **specific issues**, such as primacy of EU law (see below, 4.), or those dedicated to special occasions, such as accession to the EU. Although the Czech Republic joined the European Union in 2004, its Constitution does not include particular reference to the EU, with the exception of certain provisions related to the country’s accession to the Union and providing for a referendum.²²

Due to the absence of specific constitutional requirements for the transfer of sovereign rights at the moment of its accession to the EU, Finland has adopted the Act of Implementation stating its membership and the applicability of EU law in Finland with a two-thirds majority in Parliament. By this qualified majority it is possible to adopt acts derogating from the Constitution without formally amending it (art. 73). Respecting this general procedural requirement, Finland has actually acknowledged the impact of EU accession on its constitutional structures.²³

In some “new” Member States, where the re-gained sovereignty has been particularly emphasised in the new Constitution, a **referendum on accession** was held and, instead of an amendment, a separate Constitutional Act was adopted for creating a constitutional basis for membership, the transfer of powers and exceptions from constitutional provisions.

²⁰ Art. 32 Belgian Constitution has been introduced in 1970 (as art. 25 a). Neither at that time nor after Belgium, a Founding Member of the E(E)C, amended its Constitution.

²¹ Matthias Hartwig, *The Constitutional Amendments ...*, p. 15-16.

²² Art. 62 l) Czech Constitution provides for a referendum to be held on accession, art. 87 l) and m) for the relative competences of the Constitutional Court in this regard.

²³ Matthias Hartwig, *The Constitutional Amendments ...* (2007), p. 5; A. Kellermann, *Hopes and Fears*, in: A. Kellermann et al. (eds.), *The impact of EU accession on the Legal Orders of the New EU Member States and (Pre-)Candidate Countries – Hopes and Fears*, The Hague, 2006, p. 21.

Implementing the result of the referendum in Lithuania (10-11 May 2003), Parliament adopted a specific “Constitutional Act on Membership of the Republic of Lithuania in the European Union”,²⁴ stating in its article 1 that “the Lithuanian Republic shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent that, together with the other Member States of the European Union, it would meet its membership commitments in those areas as well as enjoy the membership rights”. According to article 2 the norms of European Union law “shall be a constituent part of the legal system of the Republic of Lithuania” and “be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania”. The Constitution Act is itself is declared constituent part of the Lithuanian Constitution (art. 150 Constitution). Thus, a possible conflict with art. 7 of the Constitution stating the supremacy of the Constitution as expression of Lithuania’s sovereignty can be resolved through the “opening” of sovereignty to the EU by means of the specific basis for membership in the Constitutional Act on Membership.²⁵ A similar approach has been chosen by Estonia, where the “Third Constitutional Act” of 2002 adopted by referendum on Estonia’s accession to the EU provides for the application of the Constitution in accordance with the rights and obligations resulting from the Accession Treaty.²⁶

3.3. Procedural requirements: transfer of sovereign rights

Nearly all integration clauses introduce specific **procedural requirements** for the transfer of sovereign powers to the EU: Parliamentary approval, sometimes with special majorities (similar or equal to those required for constitutional amendment), derogations in the internal distribution of powers and, in some cases, referendum-requirements in case of ratification of major Treaty amendments or prior constitutional amendment (or both, as in the special case of Ireland).

According to the Dutch Constitution an ordinary law is sufficient for the transfer of powers to international organisations (art. 92); in case of contrast with the Constitution such a transfer is subject to a higher majority requirement, i.e. a 2/3 majority (art. 91 para.3).²⁷ The Maastricht Treaty was considered compatible with the Constitution, consequently, it had been ratified by ordinary law.²⁸

A 2/3 majority-requirement for Parliamentary approval of delegation of State powers to the EU is also foreseen in the Constitutions of Hungary (art. 2A), Slovenia (art. 3a), Latvia (art. 68 para.3, requiring also 2/3 of members of Parliament to be present for a valid vote). The Greek Constitution requires a 3/5 majority in Parliament (the same as required for constitutional amendments) for the transfer of State competences to international organizations (art. 28 para.2).

²⁴ Constitutional Act on Membership of the Republic of Lithuania in the European Union, 13 July 2004, No. IX-2343 [<http://www.issirfa.cnr.it/4279,949.html>].

²⁵ Matthias Hartwig, *The Constitutional Amendments ...*, p. 15.

²⁶ The Third Constitutional Act was adopted by referendum on 14 July 2003 following the same procedure required for a constitutional amendment; the referendum included the question on the adoption of the Act.

²⁷ This provision has been introduced in the Dutch Constitution, as a general integration clause, already in 1956.

²⁸ L. Besselink, *The Dutch Constitution, the European Constitution and the Referendum in the Netherlands*, in A. Albi and J. Ziller (eds.), *The European Constitution and National Constitutions. Ratification and Beyond*, Kluwer Law International, The Hague 2007.

In addition to Parliamentary approval, the requirement of holding a **referendum** for fundamental decisions has been introduced in some Constitutions.

A referendum has been held in a number of States for authorizing the accession to the EU, such as in the Czech Republic, Hungary, Slovakia and Austria (as seen above), but in some States a referendum is also necessary for subsequent substantial changes or Treaty revisions, e.g. in Latvia (art. 69 para. 3, if such referendum is requested by at least one-half of the members of the Saeima). In Portugal, where art. 8 para. 4 Constitution opens to the application of EU law within the Portuguese legal system, art. 295 of the Constitution allows for holding a referendum.

Some Constitutions offer a **choice** in case of Treaty revisions between the approval by a qualified majority in Parliament or a referendum.

Even before Denmark became a member of the EU, in 1953, an integration clause was added to its Constitution (art. 20). This clause, however, makes the transfer of State competences to international organisations dependent on prior Parliamentary approval, either by reaching the extraordinarily high threshold of a 5/6 majority in Parliament or by subsequent additional approval in a referendum if the majority is lower.²⁹ In Poland, art. 90 Constitution also offers two alternative procedures for reaching the authorisation of a transfer of State competences: the Polish Parliament, Sejm, can choose between Parliamentary approval with a 2/3 majority or a referendum (art. 44 para.3). In a similar way also Austria's accession to the EU has been authorized: lacking the Austrian Federal Constitution prior to accession a specific integration clause, its amendment was considered necessary. While any amendment has to be approved by a 2/3 majority in Parliament, a so-called "total revision" of the Constitution, i.e. amendments affecting fundamental constitutional principles, has to be approved in a referendum.³⁰ Due to doubts regarding the possibility of a direct constitutional amendment by means of an international treaty, a constitutional law on the ratification of the accession treaty was adopted, approved by a 2/3 majority in Parliament and subsequently confirmed also in a referendum.³¹

However, although not legally binding and prescribed as conditional for ratification, also **consultative referenda** have their political weight: despite their merely consultative character, the negative results in the French and the Dutch referendum brought the ratification process of the Constitutional Treaty to a halt.

Some Constitutions require **express constitutional amendments prior to the transfer** of competences.

²⁹ On the Maastricht Treaty, the Danish voted twice in a referendum: on 2 June 1992 a majority voted against ratification, stopping the whole ratification process; after additional negotiations and the agreement on some opt out-clauses for Denmark, on 18 May 1993, the necessary majority of voters could be reached.

³⁰ In particular the transfer of competencies to the EU, the direct effect of EU law, and the risk of compromising the neutrality of Austria were consequences of EU accession seen as interfering with fundamental constitutional principles as well as the principle of legality and the federal principle; *Christoph Grabenwarter, National Constitutional Law Relating to the European Union*, in Armin von Bogdandy/Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing, Oxford 2006, p. 110.

³¹ Federal Constitutional Law on the Accession of Austria to the European Union ("*Beitrittsbundesverfassungsgesetz*", Federal Law Gazette No.744/1994). In the referendum on this law, on 12 June 1994, 66.58% of the Austrian population voted in favour of EU accession.

This has been clarified for France by a judgment of the French Conseil Constitutionnel in 1992 which interpreted art. 55 ConstFR as requiring formal amendments, at least in case of the transfer of additional competences; this is consolidated case-law.³² Thus, in 1992, on occasion of the ratification of the Maastricht Treaty, a specific title has been inserted in the French Constitution for the purpose of authorising European integration. The XV title starts with art. 88-1 which, permitting the transfer of powers, highlights the will of Member States as basis for integration and the EU, thus putting implicit limits on the organisation (as it cannot, on this constitutional basis, develop into a State-like structure independent from that will);³³ the title has recently been amended for the ratification of the Lisbon Treaty.³⁴ Further articles of the new title on integration are dedicated to single constitutional implications of membership, such as the rules on the European Arrest Warrant (art. 88-2), the extension of voting rights in local elections to EU citizens (art. 88-3), and changes in institutional relations reacting to the innovations in the Lisbon Treaty, such as simplified revision procedure or subsidiarity control (articles 88-4, 88-6, 88-7). In addition, the ratification of future Treaties of accession with new Members will be subject to a referendum in France (art. 88-5).³⁵

The necessity of **prior constitutional amendment** can be also **combined with a referendum** (as part of the revision procedure). A judgment of the Supreme Court of Ireland led to the Tenth Amendment of the Constitution establishing that each significant change to European Union Treaties required an amendment to the Irish constitution (always by means of a referendum) before they could be ratified.³⁶ Ireland has held constitutional referenda for every new Treaty since and each time a separate paragraph is attached to art. 29 para.4 Constitution listing the constitutional changes due to the ratification of international treaties. In October 2009, the 28th Amendment of the Irish Constitution (Treaty of Lisbon) Bill 2009 was passed in Ireland's most recent referendum.³⁷

³² *Conseil Constitutionnel*, Decision, no. 92-308 DC of 9 APRIL 1992 - Treaty on European Union (Maastricht). See Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in v. Bogdandy/Bast, *Principles of European Constitutional Law*, Oxford 2006, p. 113 et seq.

³³ Hartwig, *The Constitutional Amendments...* (2007), p. 10/11, who also notes the opposite views between the French constitutional perspective (exercise of transferred powers by EU institutions) and the EU's understanding (exercise of *own* powers although originally transferred). – Art. 88-1. French Constitution read: "The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common."

³⁴ *Loi constitutionnelle no 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*. – Art. 88-1 (new version) reads: "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007."

³⁵ This has been established by Art. 88-7. ConstFR (now art. 88-5): "Any legislative proposal authorising the ratification of a Treaty pertaining to the accession of a State to the European Union shall be submitted to referendum by the President of the Republic." However, the current version allows for an alternative vote in Parliament, if a motion with such a request is supported with a 3/5 majority in each House (art. 88-5 para.2); in this case, a 3/5 majority of Parliament convened in Congress (i.e. both Houses) is needed for ratification of the accession Treaty (art. 89 para.3).

³⁶ The Supreme Court of Ireland held that Ireland could not ratify the Single European Act without a constitutional amendment as it would alter sovereignty regarding foreign affairs enshrined in Article 1 and 5 of the Irish Constitution; *Case Crotty v. An Taoiseach*, [1987] IESC 4; [1987] IR 713 (9th April, 1987). See also below 6.1.

³⁷ The Treaty of Nice could be ratified by Ireland in 2002 only after its approval in a second referendum, as the first vote on the relative constitutional amendment had been rejected by a narrow margin in 2001. On 12 June 2008, also the constitutional amendment necessary for ratifying the Treaty of Lisbon was rejected in a first referendum. However

2.4. Supremacy and substantive constitutional limits to integration: “reverse” conditionality?

Supremacy (or primacy) of EU law is now expressly mentioned in some Constitutions: an amendment to Article 29 of the Irish Constitution establishes primacy of EU law in Ireland. Article 29 endeavors to reconcile EU and Irish law by authorizing enactments of laws and adoption of measures which are necessitated by EU membership (in particular art. 29 para. 4 no. 10 Constitution).³⁸ Since 2001, the Italian Constitution recognizes “EU and international obligations” as limits to be respected by both, the State and regional legislators, thus clarifying the primacy of EU law in the Italian legal system (art. 117 para.1, as amended in 2001; it is left open, however, whether this primacy also extends to constitutional law).

By contrast, in some new Member States the emphasis on regained sovereignty (after 1989) has led to the declaration of constitutional primacy in the Constitution, such as art. 7 Lithuanian Constitution and art. 8 Polish Constitution. Although these clauses have not been amended during the process of accession and would thus only permit further transfer of powers to the EU in so far as compatible with the Constitution, the constitutional legislator might still amend the Constitution, if future transfer of powers is seen in contrast with constitutional provisions.³⁹

From the EU perspective, the primacy of EU law cannot be limited by the nature of contrasting national legislation; national “reservations” to the uniform application of EU law cannot case be accepted in any case, not even those regarding constitutional principles. This assumption contrasts, however, with the constitutional perspective, in particular in those Member States following a dualistic approach to international law. The idea of constitutional limits to integration is understandable: being “authorised” by the Constitution, the application of EU law in the domestic legal system is only possible within the constitutional frame. The situation reminds of a reversal of the conditionality, with the Member States determining what is their “essential core” of untouchable constitutional values the EU has to respect.

This conflict has clearly emerged since the 1970ies between the European Court of Justice and some Constitutional Courts who acted in their role as guardians of the relative Constitutions (see below, 6.). The Italian Constitutional Court coined the concept of “counter-limits” vis-à-vis

the ratification Lisbon Treaty was eventually approved by Irish voters in the second referendum of October 2009. See Gavin M. Barrett, *Is a Second Referendum Appropriate in Order to Allow Ireland to Ratify the Treaty of Lisbon?* (2008), available at SSRN [<http://ssrn.com/abstract=1263300>]; J. O’ Brennan, *Ireland and the Lisbon Treaty: Quo Vadis?*, CEPS Policy Briefs (2008) No. 176; L. Pech, *National Report for Ireland: Preparing the EU for the Future? Necessary Revisions of Primary Law after the Non-Ratification of the Treaty Establishing a Constitution for Europe* (2008). Available at SSRN: [<http://ssrn.com/abstract=1123935>]; M. Holmes, (ed.) *Ireland and the European Union*, Manchester University Press, Manchester 2005

³⁸ However, the possible conflict between art. 40 para.3 Irish Constitution guaranteeing the life of the unborn child and the economic freedom of providing “services” throughout the EU (including all kinds of medical treatment) had to be resolved: including abortion into the notion of “service”, in the *Grogan* case (C-) the ECJ did not have to decide as only information about abortion abroad was concerned. The dilemma has been resolved politically by a special Protocol (no. 17) to the EU Treaty declaring that EU Treaties do not affect art. 40 para.3 no. 3 of the Irish Constitution. While this guarantees the constitutional prohibition of abortion on Irish territory, it is controversial whether it also extends to travels abroad for the same purpose; Matthias Hartwig, *The Constitutional Amendments...*, p. 18.

³⁹ Matthias Hartwig, *The Constitutional Amendments...*, p. 14-15. The choice given for the constitutional legislator in these situations between constitutional amendment, Treaty amendment or withdrawal from the EU has been confirmed by the Polish Constitutional Court in its judgment of 11 May 2005 (K 18/04).

integration, if fundamental constitutional principles are concerned and have to be protected,⁴⁰ the German Federal Constitutional Court has always insisted on its right (and duty) of final control and has progressively identified an “essential core” of values and principles making up the German “constitutional identity” and thus not subject to change.⁴¹

While this judicial dialogue still continues (ending it would necessitate a clear political decision on the nature of the EU), it has gradually led to the adoption of positive rules on both sides.

On one hand, the EU has highlighted its “constitutional” values, and in particular the protection of fundamental rights, in positive Treaty law. It has also added specific Treaty provisions to the Member States’ general obligation of sincere cooperation (which has often been interpreted as being reciprocal; art. 4.3 TEU, former art. 10 TEC), such as express reference to the respect of the “national identities” of its Member States, art. 4.2 TEU, thus stressing the (objective) value of diversity in the Union and allowing for a (wider) margin of appreciation of single constitutional differences between Member States.⁴² However, the question of primacy has not been clarified in the Treaty.⁴³

On the other hand, especially after the Maastricht Treaty or in view of accession, many Member States have adopted specific “integration clauses” containing **substantive limits to integration** by setting both, procedural as well as substantial conditions for the domestic, constitutional legitimacy of EU integration.

The existence of constitutional provisions addressing the coordination of structural principles within a multi-layered constitutional system is a well known phenomenon in federal systems: so-called homogeneity clauses in the federal Constitution determine the form of government or the respect of fundamental principles also by the constituent units.⁴⁴ In fact, if the main ratio of federalism can be summarized as “United in Diversity” (chosen in the Constitutional Treaty as the motto of the European Union!), then the homogeneity clauses serve the function of marking a

⁴⁰ In the judgments *Frontini* (1973) and *Granital* (1984).

⁴¹ First introduced in the judgments *Solange I* of 29 May 1974 (BVerfGE 37, 271) and *Solange II* of 22 October 1986 (BVerfGE 73, 339) regarding the protection of fundamental rights, these concepts have later been elaborated and widened in the judgment on the ratification of the Maastricht Treaty, 12 October 1993 (BVerfGE 89, 155), and been confirmed in the judgment on ratification of the Lisbon Treaty, 30 June 2009 (BVerfGE 123, 267).

⁴² Art. 4.2 TEU (Lisbon Treaty): “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*. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” (italics by the author).

⁴³ An express codification had been inserted in Art. I-6 Constitutional Treaty (2005): “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”. However, also this supremacy clause left space for interpretation by the ECJ and national courts and therefore did not settle the conflict of legal orders in an absolute way. Cancelling all constitutional traces in the transformation from a “Constitutional Treaty” to a mere “Reform Treaty”, the supremacy-clause was dropped for the Lisbon Treaty and a mere declaration on the subject attached (17. Declaration concerning primacy). The declaration makes reference to the principle of primacy as elaborated by the ECJ in its jurisprudence.

⁴⁴ For instance art. IV section 4 of the US Constitution (guarantee of the “Republican form of government”), art. 51 Swiss federal Constitution (democratic form of government in the Cantons) and art. 28 German Basic Law (conformity of the constitutional order in the Länder with a set of fundamental structural principles, i.e. Rule of Law, Republican, democratic and Welfare State).

threshold of tolerance of diversity or, positively, as the common denominator in substance and structure. They are necessary, because federal systems are in large part based upon the voluntary respect and cooperation (the “federal compact” or *foedus*). The difference in the objectives, resulting from the different nature of the systems, should be noted: while in federal systems the clauses shall guarantee a minimum of homogeneity of the comprehensive system, in the Treaty of the European Union (which is the basic agreement among the Member States) they shall above all guarantee diversity.⁴⁵ In addition, the constitutional “integration clauses” introduced by some Member States for safe-guarding constitutional values and principles, set substantive conditions for the EU, bottom-up. Just like to the dialogue between some Constitutional Courts and the European Court of Justice, this can be seen as a dialogue in positive law for bilaterally defining the common denominator. Rather than being of concrete practical use, these clauses – in the Constitutions as well as in the Treaty – serve as a guideline, for instance in interpretation.

Until the Maastricht Treaty, Germany’s participation in the integration process was achieved by sub-constitutional legislation: the ratification act was an ordinary statute and the general clause of art. 24 GG provided constitutional cover. However, the incremental evolution of European integration in quantitative and qualitative terms has raised the problem of “silent constitutional revision”.⁴⁶ Thus, at the time of the ratification of the Maastricht Treaty a specific legal basis was created for EU integration: the new Art. 23 GG, known as the ‘European clause’.⁴⁷ In its first paragraph, this new article on European integration declares European unification to be an objective of the German State and explicitly permits the transfer of sovereignty rights to the European Union; but it also contains a so-called ‘structural guarantee’ by listing the fundamental principles of the Basic Law which the European Union has to comply with. Using a very similar formulation to the fundamental structural principles listed in articles 20, 28 and 79 par. 3 GG (including the federal principle) and adding the principle of subsidiarity,⁴⁸ the drafters’ intention is clear: Germany continues to participate actively in the European integration process, but – at least at this stage – cannot be merged into a fully-fledged European state. This purpose of the ‘structural guarantee’ clause, setting a constitutional limit, was confirmed by the much disputed Federal Constitutional Court’s decision on the ratification of the Maastricht Treaty.⁴⁹ Thus, the German Basic Law protects itself establishing absolute limits against the substantive change of an

⁴⁵ Such as art. 4 para.2 TEU, but also other provisions, e.g. art. 167 TFEU (former art. 151 TEC): “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”

⁴⁶ “*Stille Verfassungsänderung*”, H. Bethge, *Deutsche Bundesstaatlichkeit und Europäische Union*, Festschrift Friauf, Heidelberg 1996, p. 55 et seq. The necessity of a specific constitutional provision was considered necessary due to the expansion of competences of the EU, the requests of the German Länder regarding participatory rights in decisions affecting their constitutionally guaranteed spheres of competences as well as after the above mentioned decisions of the German Federal Constitutional Court on the protection of fundamental rights within the EU and, regarding the Maastricht Treaty, the democratic rights of German citizens as guaranteed by the federal Parliament.

⁴⁷ 38th amendment to the Basic Law, 21 December 1992 (*BGBI*, I, p. 2086). It took the place of the article on the accession of German territories considered obsolete after re-unification.

⁴⁸ The clause, addressed to the organs of the German State which participate and contribute to the European Union, demands that the EU should fulfil ‘democratic, social and federal requirements whilst operating under the rule of law, is governed by the principle of subsidiarity and guarantees the protection of human rights to a standard that is, in essence, equivalent to the standard of the Basic Law’.

⁴⁹ BVerfGE 55, 155 ff. In this decision the BVerfG explicitly reserved for itself the competence to decide whether Community acts were *ultra vires* or within the domain of Community competence.

“essential core” of constitutional values; no constitutional amendment can overcome this threshold, only a new Constitution could do so.⁵⁰

Further examples of Member States with absolute limits to the transfer of powers are Sweden (chapter 10 § 5 Constitution: only within the limits of the fundamental principles of the form of government) and Greece (art. 28 para. 3 Constitution: human rights and the democratic structure of the State). Also Portugal amended its Constitution together with the ratification of the Treaty on the European Union, and later in occasion of the Lisbon Treaty. Art. 7 para. 6 expressly allowed agreements on the exercise of powers necessary for the construction or the deepening of the European Union; conditions for these agreements are the respect of the principles of reciprocity, the democratic State of law as well as subsidiarity. Later additions regarding the “achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy” show a parallelism between progress in integration and textual adaptations of the Portuguese Constitution in order to keep up with the evolution.

4. Adapting to further specific matters

Some Constitutions also comprise regulations of more **detailed questions** arising either already during the accession negotiations, for instance regarding extradition and voting rights at local level for resident EU citizens, or as a general consequence from EU membership, such as the nomination of representatives to EU institutions. Provisions regarding specific matters can be found scattered over different parts of the Constitution according to the subject matter concerned,⁵¹ or concentrated in a separate title or article dedicated to the relations with the EU.⁵²

4.1. Monitoring general constitutional change

For the Western Balkan countries, emerging from constitutional transition, the annual Progress Reports by the EU Commission highlight the necessity of specific amendments of the Constitutions in various areas, closely *acquis*-related or of more general nature; very prominent among these are the independence of the judiciary and the strengthening of parliamentary oversight over the government.⁵³

⁵⁰ The idea of an essential core of fundamental principles protected against any amendment is a reaction to the historical experience of the substantive transformation of the Constitution of Weimar by formally legal means after the National Socialist Party came to power in 1933. Totally emptied of its substantive meaning by the “Enabling Act” (*Ermächtigungsgesetz*) adopted by the Reichstag on March 23, 1933, but never formally repealed the Weimar Constitution remained the formal constitutional basis during the period of the Third Reich.

⁵¹ Portugal is an example for this: detailed reference to the EU or EU law can be found in articles 7 para.6, 8 para.4, 15, 33, 112 para.8, 119 para.1 i), 133 b), 161 n), 163 f), 164 p), 197 i), 227 para.1 v) and x) and 295 of its Constitution.

⁵² Examples are the French Constitution (Title XV, articles 88-1 to 88-7), Austria’s Federal Constitution (articles 23 a – 23f) and the recent amendment to the Croatian Constitution (Chapter VIII, articles 143 to 146).

⁵³ The issues regarding the participation of Parliament and the organisation of the respective procedures are discussed below, in part 5. of this paper.

Concerns for the independence of the **judiciary** regard the neutrality and independence of these institutions, which are considered not fully guaranteed. While most of these concerns have to be addressed by ordinary legislation, some questions are constitutional in nature and thus need regulation at constitutional level. Examples for necessary constitutional changes regarding the judicial system are, for Albania, the process of appointing judges to the High Court and the Constitutional Court, or the obstruction of investigations into possible cases of corruption in the judiciary due to the full immunity enjoyed by judges: according to the EU Commission “it will be necessary to limit or abolish the immunity of judges, which requires changes to the [Albanian] Constitution”.⁵⁴ In 2010, constitutional amendments have been adopted in Croatia for strengthening the independence of the judiciary.⁵⁵

Also more general in nature and related to the Copenhagen criteria are the protection of Human Rights and minority rights. The new Member States had to ratify the relevant Treaty instruments of the Council of Europe, such as the Framework Convention on National Minorities and the European Charter of Regional and Minority Languages. They also had to implement these in their domestic systems which usually implies constitutional – or at least legislative recognition – of groups as well as the principles of protection and promotion and resulting special rights. For instance, in Croatia, the revised Constitution now explicitly lists all 22 national minorities, while provisions of the constitutional law on the rights of national minorities regarding minority representation in Parliament were strengthened.⁵⁶ The rigor in conditionality regarding minority rights has raised questions regarding the application of “double standards”, as some “old” Member States did not yet ratify the same international instruments.⁵⁷ But there are also concerns for the continuous respect of the standards after accession.⁵⁸

4.2. Fundamental Rights, and EU citizens’ voting and property rights

In the area of fundamental rights and general principles of law, the “ECJ’s case law seems entirely compatible with that of the Member States’ Supreme or Constitutional Courts”.⁵⁹ Despite some

⁵⁴ Albania 2011 Progress Report, Brussels, 12.10.2011, SEC(2011) 1200 final, p. 11. – Croatia has amended its Constitution in 10 June 2010 and further amended relevant legislation in order to strengthen the independence, accountability, impartiality and professionalism of the judiciary, Croatia 2011 Progress Report, Brussels, 12.10.2011, SEC(2011) 1200 final, p. 6. As a consequence, in February 2011, a new State Judicial Council (SJC) and a new State Prosecutorial Council (SPC) were constituted according to the new constitutional provisions (p. 45). The procedure for constitutional amendments concerning the judiciary has been started in Montenegro, see Montenegro Progress Report 2011, Brussels, 12.10.2011, SEC(2011) 1204 final, p. 11; the Commission also states that Montenegro’s “Constitution (Article 20) has not yet been aligned with Article 13 of the European Convention on Human Rights (ECHR) to safeguard the right to an effective remedy before national authorities for violations of rights under the Convention”, pp. 13 and 15.

⁵⁵ EU Commission, Croatia 2010 Progress Report, p. 45-46.

⁵⁶ The EU Commission, however, continues to monitor the situation of the Serb and Roma minorities as well as of refugees in Croatia, EU Commission, Croatia 2011 Progress Report, Brussels, 12.10.2011, SEC(2011) 1200 final, p. 13.

⁵⁷ France did not yet ratify the Framework Convention on National Minorities, while Belgium, Luxemburg and Greece have signed, but have yet to ratify.

⁵⁸ See for instance Gabriel N. Toggenburg (ed.), *Minority Protection and The enlarged European Union: The way forward, Local Government and Public Reform Initiative*, LGI Books, Budapest 2004 [download at: <http://lgi.osi.hu/publications/2004/261/Minority-Protection-and-the-Enlarged-EU.pdf>].

⁵⁹ This opinion of the Venice Commission, p. 9, had already been expressed by some Constitutional Courts, in particular in the “*Solange II*”- judgment of the German Federal Constitutional Court (1974) which, since then,

recent differences regarding the principle of non-discrimination related to age,⁶⁰ the common ground, as circumscribed by art. 6 TEU and the European Charter of Fundamental Rights, seems to be wide enough; constitutional amendments do not seem necessary,⁶¹ if not related to specific areas. For instance, the rules on the equality of sexes (recognition of direct effect of art. 119 TCE and subsequent directives) had a strong impact on national legal systems. This is illustrated, for instance, by the judgment of the European Court of Justice (ECJ) regarding equality between men and women at the workplace which opened the German Armed Forces to female volunteers despite an express constitutional prohibition;⁶² after the judgment, the German Basic Law has been amended accordingly.

Constitutional change might also be necessary for the guarantee of the rights resulting from EU citizenship introduced by the Maastricht Treaty, in particular residence rights and voting rights of EU citizens. As a political right related to the exercise of popular sovereignty, the right to vote is traditionally connected with the status of citizenship and thus reserved for own citizens. Opening this right to ensure EU citizens' rights to vote and stand as a candidate in municipal and European Parliament elections, requires the harmonisation of the provisions of the Constitution, laws and other regulations, which regulate the exercise of the right to vote, with the *acquis* and especially with Council Directives 94/80/EC and 93/109/EC.

In many Member States specific constitutional amendments were considered necessary, such as in Lithuania (art. 119 Constitution), in Romania (art. 16 para.4 Constitution), in Slovakia (art. 30 Constitution) and in Germany (art. 28 para.1 Basic Law). Still in 1990, the planned introduction of a right of foreigners to vote in elections at municipal level in two German *Länder* was expressly ruled out by the German Federal Constitutional Court as incompatible with the Basic Law.⁶³ However, in order to accommodate the new obligation stemming from primary Community Law to grant such a right to all EU citizens, the Basic Law was changed accordingly.⁶⁴

considers the guarantees of fundamental rights at EU level as "substantially equivalent" to the one guaranteed by German authorities. Differences in single cases (e.g. ECJ, joined cases 46/87 and 227/88, *Hoechst*) might occur, but did so far not affect this general evaluation. In more recent judgments, the ECJ has also respected differences between Member States (e.g. C-36/02, *Omega-Laserdrome*). The concept of "constitutional tolerance", elaborated by Joseph H. Weiler, seems to work well in the field of fundamental rights' protection; for the principle of constitutional tolerance see Joseph H. Weiler, *In defence of the status quo: Europe's □constitutional Sonderweg*, in J. H. Weiler and M. Wind, *European Constitutionalism Beyond the State* (CUP, Cambridge 2003), 7-23 (hereafter "Sonderweg") at 18-23..

⁶⁰ In 2006, the ECJ had decided that German labour market-legislation had been discriminatory on grounds of age making reference to a general principle of (EU) law, C- C-144/04, *Mangold*. This has been very much contested by legal doctrine, but the German Federal Constitutional Court did not take the case as an opportunity for contesting the legitimacy of the EU powers in this field, BVerfG of 6 July 2010 (2 BvR 2661/06), Honeywell.

⁶¹ Apart from the specific matters discussed above.

⁶² ECJ, 11.1.2000 – C-285/98 ("*Tanja Kreil*"). As the constitutional prohibition – "[Women] may on no account render service involving the use of arms." (art. 12a al.4 last period) – could not any longer be applied due to the supremacy of EC Law, it was cancelled by the constitutional amendment of 19.12.2000 (BGBl. I, p. 1755).

⁶³ BVerfGE 83, 37 ff. (*Schleswig-Holstein*) and 60 ff. (*Hamburg*), considering already an exception for EC nationals (after a relevant constitutional change; obiter dictum at 59), as a right to vote for EU citizens in municipal elections to be introduced in the Maastricht Treaty had already been discussed. It was the first judgment in which express reference was made to the limits of constitutional amendments in art. 79 al.3 GG (although with regard to the *Länder* Constitutions)

⁶⁴ Article 19 par. 1 TCE (now: art. 22 TFEU) and art. 28 par. 1 s. 2 GG; the 38th constitutional amendment was adopted before the Maastricht Treaty was actually ratified (21.12.1992).

Other Member States consider this right included in the general constitutional authorization of the transfer of sovereign powers, thus only amending their electoral legislation. The Italian Constitution, for instance, has not been amended, although its art. 48 grants voting rights to Italian citizens only. The general clause permitting the transfer of sovereign rights (art. 11 Constitution) has been interpreted by the Italian Constitutional Court as a kind of “constitutional cover” allowing also those – national and EU – legal acts which are in contrast with other constitutional principles. In a similar way, some Member States like Poland interpret their constitutional guarantees on voting rights for citizens as to include also EU citizens. The Czech Republic and Hungary did not amend their constitutional provisions on voting rights for citizens (only), either;⁶⁵ however, in the new Hungarian Constitution (2010) a clarification on voting rights for EU citizens has been added (art. 70 para.2).

While the Dutch Constitution did already foresee voting rights for foreigners even in national elections,⁶⁶ an amendment to art. 16 para.1 (no. 2) of the Irish Constitution also opened participation in national elections to foreigners; the same is true for the Belgian Constitution (art. 8) and the Portuguese Constitution (art. 15 para.4 and 5, stressing reciprocity as precondition).

Regarding the guarantee of rights for EU citizens, the Croatian Constitution (after its amendment in 2010) has chosen an interesting holistic approach based on reciprocity: art. 146 lists the rights deriving from EU citizenship – including voting rights at local level and to the European Parliament – and declaring them applicable to Croatian citizens before stating that “all rights guaranteed by the European Union *acquis communautaire* shall be enjoyed by all citizens of the European Union.”⁶⁷

The EU Commission observes that Serbia will need to harmonise the provisions of its Constitution, laws and other regulations, which regulate the exercise of the right to vote, with the *acquis*.⁶⁸

Other changes at constitutional level, or at least in ordinary legislation, might affect the *acquis* on the free movement of persons, including the formalities and conditions for entry and stay for EU citizens on the territory. Foreigners are excluded in some legal systems from buying and owning land property in order to guarantee the full control over the territory. However, if applied vis-à-vis EU citizens, this is not compatible with the fundamental economic freedoms guaranteed by the EU Treaties.

Art. 47 Lithuanian Constitution was therefore amended by clarifying that both, foreign individuals and corporations, may acquire ownership of land, internal waters and forests according to a

⁶⁵ Art. 21 of the Charter of Fundamental Rights and Freedoms of the Czech Republic grants electoral rights to citizens; art. 42 of the same Charter restricts the concept of citizenship to Czech citizens.

⁶⁶ Article 130 Constitution of The Netherlands states: “The right to elect members of a municipal council and the right to be a member of a municipal council may be granted by Act of Parliament to residents who are not Dutch nationals provided they fulfil at least the requirements applicable to residents who are Dutch nationals.”

⁶⁷ Constitutional amendments of 16 June 2010. Consequently, also the Law on Foreigners was amended introducing specific provisions or exceptions for EU citizens and their family members compared to other foreign nationals.

⁶⁸ Commission Staff Working Paper Analytical Report, Brussels, 12.10.2011, SEC(2011) 1208, p. 105. It is also stated that “the Serbian system of temporary residence permits is not in line with the *acquis* regarding residence rights for EU citizens and will need to be amended. In order to comply with the *acquis*, Serbia will have to implement the Decision on diplomatic and consular protection for EU citizens and the Decision on the establishment of an emergency travel document”.

constitutional law.⁶⁹ Art. 41 para.2 Romanian Constitution, guarantees property to foreigners only in conditions of reciprocity, except from EU citizens who always have this right “under the terms resulting from Romania’s accession to the EU”.

4.3. Extradition and the EU Arrest Warrant

As expression of their sovereignty and guarantee for their citizens, a number of countries used to prohibit the extradition of citizens in their Constitutions. As a consequence of the implementation of the Framework Decision on the EU Arrest Warrant (EAW),⁷⁰ creating a facilitated possibility of extradition (“surrender”) to other EU Member States has become an obligation and is already addressed during the accession negotiations (chapter 24). Although national legislation in contrast with EU legislation cannot be applied due to the supremacy of EU law, controversies might arise from the fact that the contrasting national prohibition is of constitutional rank.⁷¹ Leaving this question unresolved will inevitably result in challenges to courts and constitutional conflict.⁷² Despite the clear wording, existing prohibitions might be interpreted in conformity with the EU arrest warrant system,⁷³ otherwise they have to be changed.

The Constitutional Court of Poland, for instance, rejected the opinion that the prohibition of extradition of Polish citizens (art. 55 Polish Constitution) would not be applicable to surrenders based upon EU arrest warrants – due to the different definitions. After the implementation of the EU arrest warrant in the Polish criminal procedure code had been declared unconstitutional (art. 607t § 1), the Constitution was amended in order to permit the surrender.⁷⁴ Also the Supreme

⁶⁹ Matthias Hartwig, *The Constitutional Amendments ...*, p. 18. Article 47 Lithuanian Constitution (25 October 1992) read: “(1) Land, internal waters, forests, and parks may only belong to the citizens and the State of the Republic of Lithuania by the right of ownership.”

⁷⁰ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1, as amended by Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L 81 of 27.3.2009.

⁷¹ Although the supremacy of EU legislation is not, according to the ECJ, limited by the nature and rank of contrasting national provisions, some Constitutional Courts have stated that (certain) constitutional principles are not “negotiable” and thus exempt from the application of the supremacy-doctrine. See Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems*, German Law Journal, Vol. 09 No. 10 (2008), 1313-1355.

⁷² None of the constitutional courts dealt directly with the position of legal documents in the third pillar in the system of sources of the domestic law, because subject of the constitutional adjudication were internal domestic regulations and not the regulations of the European law. See for a comparative analysis of the case law of Constitutional Courts on this matter: Zdeněk Kühn, *The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance / Acceptance. The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, in Croatian Yearbook of European Law and Policy, Vol.3. No.3. November 2007, pp. 99 – 133. – The Czech Constitutional Court stated the conformity of articles on EAW with the Czech Constitution, decree of 3 May 2006 (ref. Pl. US 66/04).

⁷³ Art. 69 para.1 Hungarian Constitution still contains a prohibition of extradition of Hungarian citizens (2011); see Jenő Czuczai, *Report on Hungary*, in Kellermann et al. (eds.), *The impact of EU accession on the legal orders of new EU Member States and (Pre-)Candidate Countries*, The Hague 2006, p. 348.

⁷⁴ Polish Constitutional Court, Judgment of 27 April 2005 (P 1/05) [www.trybunal.gov.pl/eng]. Matthias Hartwig, *The Constitutional Amendments ...*, p. 17-18. See the comment by Angelika Nußberger, Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant, *International Journal of Constitutional Law* (2008) 6 (1), 162-170. Art. 55 Polish Constitution was amended within the deadline provided for in the Constitutional Court’s decision (7 November 2006). However, Poland’s agreement to the execution of EAWs against its citizens, is subject to two conditions, which do not appear to be in line with the EU regulation: the fact that the crime has been committed outside Polish territory and that it is recognised under and also capable of being prosecuted under Polish criminal law; Oreste Pollicino, *European Arrest Warrant ...*, (2008), p. 1335.

Court of Cyprus decided that the act implementing EAW is inconsistent with the Constitution because of the unconditional ban on the extradition of Cyprus citizens included in Art. 11 section 2 of the Cyprus Constitution.⁷⁵ The ruling of the German Federal Constitutional Court was taken as a consequence of independent controversies related to the act implementing the EAW into the German legislative system.⁷⁶

A pragmatic approach and a specific constitutional amendment will create the necessary clarity for avoiding potential conflict.⁷⁷ Again, there is not only one specific model to follow: while some States generally allow the extradition of their citizens, such as Slovakia which eliminated the former prohibition (formerly in art. 23 Constitution), others do so only for the purpose of implementing international and/or EU obligations, e.g. Art. 16 German Basic Law, which guaranteed German citizens a full protection against extradition. After its amendment in 2000 the provision still generally bans, in the first sentence, the extradition of German citizens, while it now expressly allows, in the second sentence, the surrender to an EU Member State and International Criminal Courts if the principles of the Rule of Law are respected (imposing, again, a substantive constitutional limit).

Preparing for accession, the Macedonian Constitution was amended in order to enable extradition agreements to be concluded in further alignment with international agreements; also Croatia has amended its Constitution allowing extradition of its nationals.⁷⁸

4.4. Independence of the National or Central Bank and of Financial Control

Generally, the independence of the national or central Bank is enshrined in the Constitution, e.g. art. 95 Constitution of Serbia. Thus, Chapter 17 dedicated to “Economic and Monetary Policy” might require constitutional change (e.g. article 125 Constitution Lithuania concerning the exclusive right of the Bank of Lithuania to issue bank notes was repealed), but not necessarily so. For instance, article 106 of the Dutch Constitution states that “The monetary system shall be regulated by Act of Parliament”, which allowed for a regulation of the autonomy in currency issues by ordinary law, i.e. without constitutional change.

Germany is again an example for constitutional change: Art. 88 German Basic Law provides for the establishment of “a note-issuing and currency bank as the Federal Bank”. However, in the second sentence, the constitutional provision is “updated” to membership in the Economic and Monetary Union: “Within the framework of the European Union, its [i.e. the Federal Bank’s] responsibilities and powers may be transferred to the European Central Bank that is independent and committed

⁷⁵ Supreme Court of Cyprus, judgment of 7th November 2005 (ref. 294/2005).

⁷⁶ Christian Tomuschat, *Inconsistencies – the German Federal Constitutional Court on the Arrest Warrant*, 2 European Constitutional Law Review 2006, 209, 212.

⁷⁷ Irena Andrassy, *Constitutional Implications...*, p. 229-230.

⁷⁸ EU Commission, *The former Yugoslav Republic of Macedonia 2011 Progress Report*, p. 66. See art. Art. 33 para.2 Croatian Constitution. Following these amendments, in July 2010 Croatia has also amended the Act on judicial cooperation in criminal matters. The European Arrest Warrant and the European Enforcement Order can therefore be implemented from the date of accession. Extradition Agreements with neighbouring countries have been concluded or are under negotiation, see EU Commission, *Croatia 2010 Progress Report*, p. 56.

to the overriding goal of assuring price stability.” The substantive limits set by this constitutional clause should be noted.

The Economic and Monetary Policy is an area under particular observation by the EU Commission: In Macedonia the EU Commission reported “significant progress in the field of monetary policy, as a new Law on the Central Bank was enacted, outlining the organisation and the operations of the central bank, its legal status, independence and its relations with the parliament and the government, as well as its tasks and responsibilities after accession to the EU and after accession to the Eurozone.” The Commission also evaluated the institutional and administrative capacity of the central bank considering it as adequate and judging the country as in compliance with the requirements in the area of monetary policy.⁷⁹ By contrast, limited progress in aligning the legal framework with the *acquis* on monetary policy has been stated for Albania, where a “new Law on the National Bank, including provisions covering procedures for dismissal of the Governor, the personal independence of Council members and the accountability of the National Bank, has not yet been adopted”.⁸⁰

As regards external audit, requested by Chapter 32 (Financial Control), the establishment and functioning of a State Audit Office plays an important role.⁸¹ It is therefore mentioned expressly in some Progress Reports. Although external audit is considered to be still at an early stage of development in Serbia, the independence of the State Audit Institution operative since 2009 is anchored in the Constitution.⁸² Also the independence of the Croatian State Audit Office’s (SAO) is considered consolidated, after Parliament adopted amendments to the Constitution in June 2010.⁸³ According to the EU Commission, in Macedonia, “the State Audit Office’s (SAO) administrative capacity has been further strengthened; however, the independence of the SAO has yet to be anchored in the Constitution. Cooperation with the Parliament remains a concern.”⁸⁴ In Albania amendments to the Law on the State Audit Institution are under preparation to bring it fully in line with INTOSAI standards.

4.5. Country-specific constitutional issues

The Common Foreign and Security Policy might also require specific adaptations: in many Member States decisions on missions of the armed forces need Parliamentary approval and there are two Member States which are neutral, Austria and Ireland. Further problems might regard territorial claims or even conflict which have to be resolved before accession.

A detailed provision of the Austrian Federal Constitutional Law (art. 23f) introduces specific safeguards, such as a Parliamentary reservation, binding opinions by Parliament and the

⁷⁹ EU Commission, The former Yugoslav Republic of Macedonia 2011 Progress Report, p. 51 et seq.

⁸⁰ See the website of the European Organisation of Supreme Audit Institutions (EUROSAI) [<http://www.eurosai.org/ger/links-ger.asp>].

⁸¹ EU Commission, Albania 2011 Progress Report, p. 45.

⁸² EU Commission, Serbia 2011 Progress Report, p. 130. Article 96 Serbian Constitution (2006).

⁸³ EU Commission, Croatia 2011 Progress Report, p. 64.

⁸⁴ EU Commission, The former Yugoslav Republic of Macedonia 2011 Progress Report, p. 78-79. A procedure for the amendment of the Constitution has been launched which shall ensure the functional and financial independence of the SAO.

requirement of respecting the procedure of constitutional amendments (with the consequence of a 2/3 majority), for decisions of the European Council related to a common defence of the European Union and to the integration of the West European Union into the European Union, for voting within the framework of the Common Foreign and Security Policy and of police and judicial cooperation in criminal matters as well as for voting on decisions concerning peace-keeping tasks and the tasks of combat forces in crisis management, including peace-making. This specific and particularly detailed regulation is the reaction to concerns for Austria's neutrality status.

Besides Austria, also Ireland is a neutral Member State. In view of the second referendum on ratification of the Lisbon Treaty, Ireland has been reassured with specific guarantees by the European Council in 2008 regarding the continuation of the present arrangements for its military neutrality;⁸⁵ however, the problem remains that the "Irish clause" would not necessarily affect the mutual defence clause in the Lisbon Treaty (art. 42 para. 7 TEU).⁸⁶

The development of bilateral relations with other enlargement countries and neighbouring EU Member States as well as the settlement of border disputes are key priorities for the EU; only States which have resolved conflict with their neighbours can become Members of the EU.⁸⁷

Thus, a specific problem refers to Serbia and its relation to Kosovo. Under its Constitution of 2006, Serbia can only conclude international treaties that are compatible with the same Constitution. According to Article 182 "Kosovo and Metohija" is an Autonomous Province (as is Vojvodina) and is referred to as a constituent part of Serbia's territory in Article 114 (as part of the presidential oath).⁸⁸ The unilateral declaration of independence of Kosovo in 2008 has not been recognized by Serbia and the constitutional obligations are not only an obstacle to full cooperation with the EU, but also to future accession.⁸⁹

⁸⁵ The Lisbon Treaty affects Ireland in a number of areas identified as having caused concerns to Irish voters in the first referendum. Besides military neutrality these are taxation policy, right to life; education and family. Some of these concerns have been addressed by the European Council (on 11 December 2008) before the second Irish referendum on ratification of the Lisbon Treaty. On 2 October 2009, Irish voters approved ratification of the Lisbon Treaty by a margin of two to one. While in future certain decisions in the area of Freedom, Security and Justice are subject to the approval of its Parliament, if Ireland shall adopt these, its military is largely based on political guarantees.

⁸⁶ The European Council Decision (11 December 2008) states that Treaty provisions "shall not prejudice the specific character of the security and defence policy of certain Member States" (so-called Irish clause); however, according to legal scholars, "there remains no doubt that the neutral and non-aligned Member states are under the obligation to mutual (military) assistance in the case of armed attack" which is clearly against the law of neutrality, Waldemar Hummer, *The New EU – A "Military Pact"? Solidarity – Neutrality – Irish Clause*, in Gunther Hauser and Franz Kernic (eds.) *European Security in Transition*, Aldershot, Ashgate 2006, p. 63-72 (p. 67 and 69).

⁸⁷ Arguably, the one exception to the process of "EU peace-building" is Cyprus, which entered the EU in 2004 as a divided island, with the division now having the potential of blocking Turkish accession. However, the EU is continuing significant efforts to resolve the conflict. The prospect of accession has been successfully used for ending the maritime border-dispute between Slovenia and Croatia which risked blocking the latter's accession to the EU. Relations have improved significantly, in particular following the signing of the Arbitration Agreement on the border in November 2009, which both Parliaments have since then ratified. On 25 May 2011 Croatia and Slovenia finally submitted their agreement to the UN; after registration, the procedures for arbitration will begin after Croatia signs its accession into the EU.

⁸⁸ Commission Opinion on Serbia's application for membership of the European Union, Brussels, 12.10.2011 COM(2011) 668 final, p. 8.

⁸⁹ However, despite the EU's direct engagement in Kosovo with the EULEX mission, there are also still some EU Member States which did not recognize Kosovo's independence (Spain, XXX).

In a similar way, the unresolved name issue continues to adversely affect Macedonia's political relations with Greece (contrary to the economic relations, which remained close). In its 2011 Progress Report, the EU Commission reminds that "maintaining good neighbourly relations, including a negotiated and mutually acceptable solution to the name issue, under the auspices of the UN, remains essential".⁹⁰

5. Guaranteeing institutional balances: information and participation of Parliament, Regions and others

Necessary change might also affect **internal institutional balances** and thus extend to other parts of the Constitution or to sub-constitutional legislation. The specific features of EU Law, in particular the binding and directly applicable nature of EU regulations as well as some Treaty provisions, but also the need to timely implement EU directives, require detailed preparation and a continuous flow of information in order to permit a structured dialogue on two levels: first, within the country, where institutional and non-institutional actors might contribute to the preparation of the country's position within the Council of Ministers, and afterwards between the country in question and the EU institutions.

Comparative experience demonstrates that this might lead to the establishment of new, specialized institutions (e.g. Parliamentary Committees or Ministry for European Affairs), to the involvement of authorities beyond the central level of government (e.g. autonomous, decentralised implementation by sub-national territorial entities) and to procedural adaptations (e.g. streamlining the legislative procedure by concentration and coordination as in the case of the annual Italian "Community law", see below). The common purpose of these changes and adaptations is to guarantee timely and effective implementation of EU obligations by the Member State as well as the participation of Parliament (and sub-national entities) in a decision-making process dominated by governments at European level (in the Council).

5.1. Role of Parliaments

From a structural analysis of the EU's institutional system as well as from comparative experience a clear common tendency towards a dominant role of the executive bodies emerges. The natural (and, in the past, only decisive) forum for national participation in EU decision- and law-making is the Council of Ministers.⁹¹ The fact that representatives from Member States' executive bodies

⁹⁰ While the Commission observes that the "country remains engaged in talks, under the auspices of the UN, as well as through direct meetings of the prime ministers, in order to resolve it", it also notes that the Macedonian "government erected a statue in the centre of Skopje which was seen by Greece as a provocation because of its resemblance to Alexander the Great. Actions and statements which could adversely affect good neighbourly relations should be avoided. The hearings started on the legal proceedings initiated by the country against Greece before the International Court of Justice in The Hague regarding the bilateral interim accord of 1995." EU Commission, 2011 Progress Report on the former Yugoslav Republic of Macedonia, p. 23.

⁹¹ Venice Commission, p. 7.

dominate, at different levels, in decision-making, has for long been criticised in the “democratic deficit” debate.⁹²

The Lisbon Treaty tries to address this deficit with two innovations: by further strengthening the role of the European Parliament elevating it to a co-legislator in most areas and by creating a (new) role for national Parliaments within the EU system (art. 12 TEU).⁹³ This new role for national Parliaments is developed in detail in Protocols no.1 (Role of National Parliaments) and no. 2 (Preliminary Subsidiarity Control) to the Lisbon Treaty. However, much depends on the creation and use of domestic procedures; these can be considered an important indicator for the state of Parliamentary democracy. For this reason, the EU Commission’s Progress Reports always dedicate thorough attention to the improvement in Parliament’s role of oversight and control of the government.

Nowadays, obligations regarding information and consultation of Parliament by the central government as the main actor at European level have been established in most Constitutions. As an exception from its general “constitutional silence” on EU matters, the Finnish Constitution provides for rules on the participation of Parliament in the process of adopting EU legal acts (art. 96). The relationship between government and Parliament is also addressed in art. 4 Constitutional Act on Membership of the Republic of Lithuania in the European Union (13 July 2004) establishing the obligation of consultation and the possibility for Parliament to express recommendations regarding the government’s position in the Council at EU level.

In Austria, the cooperation between government, Parliament and Länder in matters relating to European integration is based on the constitutional guarantee of the National and Federal Councils’ rights to participate,⁹⁴ i.e. the right to be informed about projects with regard to the EU and the right to give an opinion on them. If the Main Committee of the National Council or the Standing Sub-Committee on matters relating to the EU resolves to give an opinion or make a statement on an EU-related matter, which would have to be regulated by a federal law, or geared towards the passing of an immediately applicable EU legal act relating to matters to be regulated by a federal law, the competent member of the Federal Government is bound by this opinion and can only deviate from it for compelling foreign or integration policy reasons. If this member of the

⁹² Thus, the “democratic deficit” is not only a phenomenon at European level, but multiplied within the Member States due to the domination of executive authorities in the domestic decision-making procedures which left few room for traditional instruments of Parliamentary participation, among other reasons also for the lack of time.

⁹³ The Treaty of Lisbon is the first EU Treaty with a specific article on the role of national Parliaments. The total number of references to national Parliaments in the Treaty is 14. The European Parliament attaches great importance to maintaining close links with the Member States’ national Parliaments through regular meetings. The following institutional and technical links have been created: The Conference of European Affairs Committees (COSAC), web site: [<http://www.cosac.eu/>]; the European Centre for Parliamentary Research and Documentation (ECPRD), web site: [<http://www.ecprd.org/>]; the Inter-parliamentary EU Information Exchange (IPEX), a database and a website [www.ipex.eu] containing parliamentary scrutiny documents and information concerning the European Union. A “political dialogue” between the EU Commission and national Parliaments was launched in 2006 with a view to improving the process of policy formulation. In the context of this dialogue, the Commission sends its new proposals and consultation papers to national Parliaments and replies to national Parliaments’ respective opinions and comments; see [http://ec.europa.eu/dgs/secretariat_general/relation/relation_other/index_en.htm].

⁹⁴ The Austrian Parliament consists of two chambers: the National Council is the House of Representatives, while the Upper House, the Federal Council, represents the constituent entities of the Federation, i.e. the nine Austrian Länder.

government intends to deviate from such an opinion, the matter must again be submitted to the National Council. A deviation is not permissible under any circumstances if the legal act of the European Union which is in the process of being prepared would represent a deviation from the applicable Austrian Federal Constitutional Law.⁹⁵

In the Austrian Federal Constitution a peculiar provision can be found: the nomination of representatives to the different EU institutions is regulated in great detail by art. 23c providing for a general responsibility of the federal government, subject to information of the Federal President and the Main Committee of the National Council (i.e. the lower House of Parliament) and to the approval of the latter.

The democratic principle is one of the fundamental, structural principles of Germany's federal Constitution (Basic Law - GG). From this follows the binding obligation for the whole institutional set up to be organised in democratic structures: the essence of the democratic principle is popular sovereignty as well as its exercise through elections; both are guaranteed against amendments by the "eternity clause" (art. 79 para. 3 GG). In particular, elections have to respect the criteria established in art. 38 para.1 GG, which – according to the German Federal Constitutional Court (BVerfG) – have to be interpreted as guaranteeing sufficiently wide powers of Parliament and as a limit against any transfer of the substance of democratic legitimacy. It was exactly the risk of going beyond this limit which made the BVerfG express its famous admonition in the Maastricht judgment, justified by its preoccupation regarding powers of effective control to be exercised by the European Parliament as the institution of democratic representation at EU level.⁹⁶

Since the constitutional amendment in occasion of the Maastricht Treaty, a detailed constitutional guarantee is part of the "European clause" in Germany's Basic Law (art. 23 GG): the Federal Government is obliged to comprehensive and early information on EU matters (para. 2); in case of legislative acts, the Government has to consult Parliament and to consider its opinion in negotiations (para. 3). Different forms of participation according to the domestic distribution between Federation and Länder are guaranteed to the Upper House, the Federal Council, which can in some case even express binding opinions or send a Länder representative to the Council of Minister meetings in Bruxelles (para. 4-7).⁹⁷ The single constitutional guarantees are subject to regulation in two ordinary acts,⁹⁸ which have been integrated and implemented by further interinstitutional cooperation agreements. In institutional terms, art. 45 GG provides for the establishment of a Committee on European Union Affairs within the Bundestag which "may

⁹⁵ See the detailed regulation in art. 23e of the Austrian Federal Constitutional Law.

⁹⁶ BVerfGE 89, 155 (172, 182, 186, 207-209). Because of the same preoccupation, the BVerfG twice judged the effective participatory rights of the German Parliament as insufficient and declared relevant national legislation as unconstitutional: the implementation of the EU Arrest Warrant (18 July 2005, BVerfGE 113, 273) and the "Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters" as part of the ratification of the Lisbon Treaty (30 June 2009, BVerfGE 123, 267); see below 6.

⁹⁷ See for details Jens Woelk, *A Place at the Window?*, in Roberto Toniatti, Francesco Palermo, Marco Dani (eds.), *An Ever More Complex Union. The Regional Variable as the Missing Link in the EU Constitution?* Nomos, Baden-Baden, 2004, pp. 117–141..

⁹⁸ Adopted on 12 March 1993 (and subsequently amended): Act on cooperation between the Federal Government and German Bundestag in EU affairs (EUZBBG) and Act on cooperation between the Federation and the Länder in EU affairs (EUZBLG).

authorize the committee to exercise the rights of the Bundestag under Article 23 vis-à-vis the Federal Government”.

While the constitutional guarantees have remained unchanged, the ordinary legislation has been updated, most recently after the Lisbon Treaty (and the declaration of the relevant Act on Parliamentary Participation as unconstitutional by the Constitutional Court).⁹⁹ The current regulation, which comprises the “Act on the Exercise of Responsibility regarding Integration by the Parliament and the Federal Council in EU Affairs”,¹⁰⁰ is based on the idea of accompanying the EU decision-making process politically, thus legitimizing it democratically, once that sovereign rights have been transferred to the EU. It comprises detailed and specific regulations on the rights of Parliament (necessity of – qualified – approval, suspensive veto) in the different Treaty revision procedures as well as bridging and flexibility clauses and in the subsidiarity control or subsidiarity complaint to the ECJ.

In the United Kingdom, the European Union (Amendment) Act 2008, which provides Parliamentary approval for the ratification of the Treaty of Lisbon, requires that any amendment to the Treaties of the European Union (TEU, TFEU, and the Treaty Establishing the European Atomic Energy Community) should be approved by an Act of Parliament before the UK can ratify the amendment concerned. However, recently a European Union Bill (Bill 106-EN 55/1) has been introduced in the House of Commons on 11 November 2010. The Bill provides that, in future, a referendum would be held before the UK could agree to an amendment of the Treaties of the European Union; or before the UK could agree to certain decisions already provided for by the Treaties if these would transfer power or competence from the UK to the EU. In addition, an Act of Parliament would be required before the UK could agree to a number of other specified decisions provided for in TEU and TFEU, either in the European Council or in the Council of the European Union; and that certain other decisions would require a motion to be agreed without amendment in both Houses of Parliament before the UK could vote in favour of them in either the European Council or the Council. *Clause 18* of the Bill provides that directly applicable and directly effective EU law is given effect in the law of the UK only by virtue of an Act of Parliament. Being of declaratory nature, it thus places on a statutory footing the common law principle of Parliamentary sovereignty with respect to directly applicable or directly effective EU law.¹⁰¹

In Italy, a unique procedure has been implemented successfully for more than 20 years, the “Community Act”: every year, the Italian Government informs Parliament about the state of the implementation of EU legislation in Italy followed by the presentation of the bill on EU law-implementation and a debate. The Regions as well as other stakeholders are consulted prior adoption of the annual “Community Act” which comprises different means of implementation, including the delegation of further measures to be adopted by the Government in the form of

⁹⁹ BVerfGE 123, 267 (*Lissabon*), 30 June 2009 (see below, 6.). See, for the aspect of participatory rights of Parliament in the judgment, Philipp Kiiver, *The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU*, *European Law Journal*, September 2010, Vol. 16, Issue 5, pp. 578-588.

¹⁰⁰ “*Integrationsverantwortungsgesetz*”; see for an illustration Daiber, *Die Umsetzung des Lissabon-Urteils des Bundesverfassungsgerichts durch Bundestag und Bundesrat*, *Die Öffentliche Verwaltung - DÖV* 7/2010, 296.

¹⁰¹ See the *Explanatory Report to European Union Bill 106 2010-11*, 22 November 2010 [<http://www.publications.parliament.uk/pa/cm201011/cmbills/106/en/2011106en.htm>].

regulations. The concentration in a single comprehensive Act for implementation has rationalised the procedures and permitted Italy to improve its negative track record in implementation considerably.¹⁰²

In its annual Progress Reports on the candidate countries, the Commission also examines and evaluates the role of Parliament vis-à-vis the government as well as internal procedures and organisation.

For Croatia, the EU Commission stated in 2010 that “the capacity of Parliament to scrutinise the legislative process needs enhancing. It adopted amendments to the Constitution necessary for progress in the accession negotiations”.¹⁰³ Art. 144 Croatian Constitution, in its amended version, directly provides for the participation of the Croatian Parliament in the European legislative process “in accordance with the Treaties on which the EU is founded” and thus – indirectly – also with the Protocol on Subsidiarity and Proportionality (para.2). The Government is obliged to inform Parliament about EU draft legislation and decision-making (in addition to the Commission’s obligation)¹⁰⁴ and Parliament can express resolutions to be considered by Government in negotiations (para.3; no binding force is mentioned); further supervision is subject to regulation by law (para.4). However, as Siniša Rodin points out, the recent constitutional amendment does not address or regulate, at least in principle, five out of six functions listed in art. 12 TEU:¹⁰⁵ The parliamentary procedure for adopting a reasoned opinion within the preliminary subsidiarity control has to be regulated. The same is true for monitoring of Europol and evaluation of Eurojust. Who shall nominate the Croatian members of a Convention, or which body shall express opposition under the simplified revision procedure (a commission?)? Who receives new applications for membership? Inter-parliamentary cooperation requires to re-think the relationship between the Committee for European Integration and the more general Committee for Inter-Parliamentary Cooperation. These important points will have to be regulated in an Act on Parliamentary Supervision and in the Rules of Procedure in order to effectively interact between Government and Parliament on EU affairs.¹⁰⁶

Parliamentary Committees oversee and discuss the national programme for the adoption of the *acquis communautaire* in regular sessions and are also tasked with verifying the conformity of proposed national legislation and other measures with European legislation. For coordinating the efforts regarding EU integration specific committees and procedures have been established, such

¹⁰² The so-called *Legge comunitaria* (Community Act) has been introduced in 1989 (Act no. 86/1989, *La Pergola*) and, despite major amendments by Act no. 11/2005 (*Buttiglione*), is still the procedure for complying with EU obligations.

¹⁰³ EU Commission, Croatia 2010 Progress Report, p. 6. Constitutional amendment of 16 June 2010.

¹⁰⁴ Resulting from art. 2 Protocol no.1 on the Role of National parliaments in the European Union.

¹⁰⁵ Critical Siniša Rodin, *Constitutional Role of the Parliament, Competencies of the Croatian Parliament in relation to the Constitution – how could they fit into national EU coordination mechanism?* [http://www.pravo.unizg.hr/_download/repository/Sabor_in_EU_Rodin_.pdf], p.2. The author points to the Act implementing the constitutional provision as well as to the Rules of Procedure for regulating the supervision of the exercise of the passarelle clauses as well as of subsidiarity control.

¹⁰⁶ The questions are raised in the critical analysis by Siniša Rodin, *Constitutional Role of the Parliament*, p.3-4, who stresses that “the present constitutional and legislative framework is broad enough”, but “that regulation is still missing” and that, above all, there is a “lack of structural and institutional capacity”, in particular related to the Parliamentary Committee, lack of administrative capacity and expertise.

as the Parliamentary Committee on EU Affairs and the National Council for EU Integration in Macedonia, the Parliamentary Committee for International Relations and European Integration in Montenegro, a Parliamentary Committee for European Integration in Albania.¹⁰⁷ Also in Serbia, a specific Committee for European Integration has been in place since May 2004 and since 2009 it has held regular hearings of the government on the implementation of the National Plan for European Integration.

The general administrative capacity of Parliaments in the Western Balkan countries has to be strengthened and consolidated further in order to ensure high-quality legislation and to permit substantive debate on the question of compatibility of new legislation with EU law going beyond formal checks of the statement of compatibility with the EU *acquis* provided by the government. It is necessary, in particular, to guarantee sufficient qualified staff in the Parliamentary services.¹⁰⁸ Research and study units within Parliament providing information and analysis are essential in order to allow Members of Parliament to properly fulfil their role and common in the Member States: in its 2011 Progress Report on Macedonia, the Commission criticizes that the Parliamentary Institute is still not operational and its staff have yet to be recruited,¹⁰⁹ while observing that the technical and documentary support provided by the research department of the Parliament in Montenegro has been considerably strengthened.¹¹⁰

The importance of inter-party cooperation for the implementation of reforms needed in view of accession is also stressed in some reports and might be achieved by giving a visible role to the opposition: in Albania, the European Integration Committee is chaired by the opposition;¹¹¹ this is also true in Macedonia for the National Council for EU Integration.

As Parliaments need interlocutors in the Government and integration efforts have to be coordinated also within the executive, which requires specialist technical knowledge, practically all countries have established specific Ministries or Departments on EU affairs.¹¹² But cooperation requires concrete and regular activities after the establishment of institutions and the creation of an institutional culture of cooperation. Regarding the relations with Parliament, the EU Commission observes that in Albania the “Minister and the Deputy Minister of European Integration reported a number of times to the committee on European integration matters, which had not been the case before” (p. 6). But also coordination within the government, especially with line-ministries, as well as with other stakeholders is an important task which Ministers of

¹⁰⁷ For a critical evaluation of the work of the Albanian PCEI see: IDM Center for European & Security Affairs, *Three “Steps” to Improve Parliamentary Dealings on EU Accession*, Policy Brief no. 5, Institute for Democracy and Mediation Policy Series 2010.

¹⁰⁸ These conclusions are drawn from the critical observations in EU Commission, Montenegro 2011 Progress Report, p. 7. Specific concerns about the quality of legislative drafting are expressed for Macedonia, as the Constitutional Court has increased the number of annulments of new legislation by 5% to nearly 30% of laws; EU Commission, The former Yugoslav Republic of Macedonia 2011 Progress Report, p. 11.

¹⁰⁹ EU Commission, The former Yugoslav Republic of Macedonia 2011 Progress Report, p. 6.

¹¹⁰ EU Commission, Montenegro 2011 Progress Report, p. 6.

¹¹¹ However, according to the Commission, “on the whole, the proper functioning of Parliament based on constructive and sustained political dialogue between all parties [...] is not yet ensured.”; Albania 2011 Progress Report, p. 6.

¹¹² In Montenegro, recently the Ministry for Foreign Affairs and European Integration took over coordination of European integration from the stand-alone Ministry for European Integration, which was abolished; EU Commission, Montenegro 2011 Progress Report, p. 8.

Department on EU affairs usually perform. To this purpose often special coordination bodies are created within the government meeting regularly in order to coordinate and prepare its decisions.¹¹³

5.2. *Involvement of Regions and other institutional and non-institutional actors*

Particular problems are raised in federal systems due to the internal division of powers and distribution of functions. In Austria, Belgium, Germany, Italy, Spain or the UK, special internal procedures shall guarantee the participation of constituent units or sub-national entities (especially those with own legislative powers) in the EU decision-making process as well as the timely and effective implementation of EU legislation while respecting the autonomy of the sub-national entities.¹¹⁴ Thus, many European regions are deeply and formally involved in their Member State's domestic EU policy-shaping process, from the pre-legislative phase to the post-legislative.¹¹⁵

In the Federal Republic of Germany, much emphasis has been placed on the protection of the federal principle. Participation of the *Länder* is constitutionally guaranteed by paragraphs 2, 4, 5 and 6 of the 'European clause' according to the logic of compensation for the loss of *Länder* competences in legislation (as well as for the loss of competences of the Upper House, the Bundesrat) by strengthening their participation in the exercise of rights by the federal government at EU level. The different degrees of participation, ranging from information and consultation to rights of direct representation at EU level, correspond to the domestic distribution of competences.¹¹⁶ This institutional arrangement works quite satisfactorily in practice, as the Bundesrat is the institution generally representing *Länder* interests, also within the domestic legislative procedure. In addition, a Chamber for European Affairs has been established whose decisions shall be considered decisions of the Bundesrat and which can act in matters of urgency (art. 52 para. 3a GG).

In order to safeguard the participation of the German *Länder* further, a new distinction has been drawn between a simple transfer of sovereign rights and Treaty revisions: while in the former case an ordinary legislative act is sufficient, in the latter constitutional amendments have to respect the procedural and substantive limits of a constitutional amendment (art. 79 para. 2 and 3 GG).¹¹⁷ By consequence, ratification of the Lisbon Treaty required a constitutional amendment due to the

¹¹³ For instance, the Interministerial Committee on European Affairs within the Italian Government (CIACE – *Comitato interministeriale per gli affari comunitari europei*) established in 2005 [see the website (in Italian): <http://www.politicheeuropee.it/struttura/37/ciace>].

¹¹⁴ See for a comparative analysis Roberto Toniatti, Francesco Palermo, Marco Dani (eds.), *An Ever More Complex Union. The Regional Variable as the Missing Link in the EU Constitution?* Nomos, Baden-Baden, 2004.

¹¹⁵ The EU has acknowledged the importance of the "Regions" with their inclusion in the institutional structure and the policies, e.g. the establishment of the Committee of the Regions, the development of regional policy, the structural funds, the governance debate, and the preliminary subsidiarity control.

¹¹⁶ Art. 23 German Basic Law does not introduce an entirely new set of procedures, but rather 'constitutionalizes' the already established, so-called 'Bundesrat procedure', putting institutional participation through the Bundesrat at the centre. The possibility of direct representation of the Federal Republic in the Council of Ministers by a *Länder* Minister has been reduced by the federalism reform in 2006 to Council meetings regarding the subject matters of instruction, culture and media (typically directly concerning exclusive *Länder* competencies).

¹¹⁷ A textual amendment is not necessary as art. 79 al.1 GG is not included by art. 23 al.1 GG.

new subsidiarity complaint which national Parliaments (and thus the Bundestag and Bundesrat) can file to the ECJ.¹¹⁸

The participation rights of the Austrian Länder and municipalities as defined under Art. 23d of the Austrian Federal Constitutional Law include a right to be informed about and give an opinion on matters relating to their respective areas of competence and jurisdiction. A special constitutional guarantee is also provided for the Italian Regions (art. 117 para. 5 Constitution). Specific information and participatory rights and the respective procedures as well as the principles of autonomous implementation of EU legislation are regulated in detail by ordinary statute.¹¹⁹ In addition, some Italian Regions provide for guarantees of participation of the regional assembly in their own Basic Laws (*statuti regionali*). Following the model at national level, some have also introduced an annual regional “Community Law” in order to guarantee participated implementation of EU legislation by regional authorities. Participation and autonomous implementation of sub-national entities can also be based upon an agreement, as it is the case in Belgium or in the United Kingdom.¹²⁰

Apart from federal Bosnia and Herzegovina, the States in the Western Balkans do not have federal or regional structures with the – partial – exception of Serbia. In fact, the Serbian Constitution (articles 182-187) and the Statute for the Autonomous Province of Vojvodina (which entered into force on 1 January 2010) recognize autonomous legislative powers of the latter and some competences have been transferred in late 2009. Currently, however, the central government of Serbia has no obligation to consult Vojvodina authorities when concluding international and bilateral agreements that apply to the autonomous Province. Experience from other asymmetrical regional systems, e.g. Italy, but also the UK after devolution of special legislative powers to Scotland, Northern Ireland and Wales, show that special procedures of consultation and participation are necessary in order to represent the special situation and interests of autonomous entities at central level and vis-à-vis the EU as well as to guarantee the effective decentralised implementation of EU while respecting their autonomous powers.

The Treaty of Lisbon also introduced the concept of “deliberative ” democracy in the Treaties, i.e. the obligation of information and broad consultations with citizens, representative associations and civil society (art. 11 TEU). The concept of deliberative democracy holds that, for a democratic decision to be legitimate, it must be preceded by authentic deliberation; thus it seems to fit perfectly in the EU system as an additional source of legitimacy. In a number of countries (procedural) elements of deliberative democracy have been implemented with the aim of increasing the legitimacy of decisions by participation and involvement of those concerned, while also improving the quality of legislation.

It seems that National Councils for EU Integration have been established for this purpose in Montenegro and Macedonia. Their mixed composition of Members of Parliament and other

¹¹⁸ New paragraph 1a in art. 23 GG, inserted by 53th amendment on 8.10.2009 (BGBl. I 1926).

¹¹⁹ *Legge Buttiglione* of 5 February 2005, no. 11.

¹²⁰ For devolution and EU integration see Simon Bulmer, Martin Burch, Patricia Hogwood and Andrew Scott, *UK Devolution and the European Union: A Tale of Cooperative Asymmetry?*, *Publius* (2006) 36 (1), 75-93

members shall favour the inclusion of important stakeholders thus reaching out from Parliament to the civil society and NGOs.¹²¹

6. Defining “constitutional tolerance”: the role of Constitutional Courts

In many Member States, the European integration process has been critically accompanied by the respective Constitutional Courts. Defending the national constitutional system and the fundamental rights of citizens, notably the Italian and the German Constitutional Court have developed a “counter-limits doctrine”; some Constitutional Courts in Central Europe have followed suit.

The central question is whether the supremacy of EU law is relative or absolute, i.e. whether it also extends to – contrasting – constitutional law. But if the application of EU law in the domestic legal system is based on the authority of the Constitution, which is obviously the position of Constitutional Courts (in particular in dualistic systems), it is not only consequent to make the sovereignty-transfer dependent from specific procedural requirements (often similar to those necessary for constitutional amendments), but also to introduce substantive limits in order to protect the Constitution. An additional question regards the monitoring role of Constitutional Courts vis-à-vis the European Court of Justice.

6.1. Procedural issues

From the constitutional perspective, the dynamics of EU integration which requires constant adaptation of the domestic legal system is a major problem: in the past, besides formal Treaty revisions, the expansion of the EU’s powers was also a consequence of the ECJ’s teleological interpretation based on the “*effet utile*” and the use of the general “flexibility clause”, art. 352 TFEU (235/305 TEC). Although this expansion has been later confirmed by Treaty revisions, the “open character” of the EU legal system is still present, e.g. in the simplified revision procedures and “bridging clauses” in the Lisbon Treaty permitting progress and change from within the system, mitigated only by the involvement of national Parliaments (art. 48 TEU). By contrast, the constitutional authorisation of European integration has to be foreseeable, circumscribed and specific for the ratification to be legitimate.

In 1987 the Supreme Court of Ireland held that Ireland could not ratify the Single European Act without a constitutional amendment as it would alter sovereignty regarding foreign affairs enshrined in Article 1 and 5 of the Irish Constitution.¹²² The case directly led to the Tenth Amendment of the Constitution and established that significant changes to European Union treaties required an amendment to the Irish constitution (always by means of a referendum)

¹²¹ The Macedonian “National Council for EU Integration” is a coordinating body composed by 9 Members of Parliament (among which members of the EU integration committees) and by six Members representing the Government and other stakeholders (the latter without the right to vote); see [<http://www.sobranie.mk/en/default-en.asp?ItemID=D2098F31745BD34A84D09837D5BC089A>].

¹²² Supreme Court of Ireland, *Crotty v. An Taoiseach*, [1987] IESC 4; [1987] IR 713 (9th April, 1987).

before they could be ratified; Ireland has held constitutional referendums for every new Treaty since.

In a similar way, the Constitutions of France (art. 55) and of Spain (art. 95) introduce procedural limits for the transfer of powers requiring a constitutional amendment for authorizing the transfer, if such a transfer is not compatible with the Constitution. The Spanish Constitutional Court has reminded the constitutional legislator also of the existence of absolute substantial limits which cannot even be overcome by amendment.¹²³

The French *Conseil Constitutionnel* while giving the authorisation to ratify the Treaty of Lisbon stated that such authorisation required a prior amendment to the Constitution.¹²⁴ Reference is made to the specific provisions of the XV title of the French Constitution, regarding EU membership, by which the constituent power recognised the existence of a Community legal order integrated into domestic law and distinct from international law. “When however undertakings entered into for this purpose contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty, authorisation to ratify such measures requires prior revision of the Constitution”.¹²⁵

A similar result was reached by the Constitutional Tribunal of Poland which ruled that while EU law may override national statutes, it does not override the Constitution. In case of a conflict between EU law and the Constitution, Poland can make a sovereign decision as to how this conflict should be resolved (i.e. by amending the Constitution, leaving the EU or seeking to change the EU law).¹²⁶

As the ratification of the Maastricht Treaty by Germany occurred without a referendum, the German Federal Constitutional Court (BVerfG), on individual constitutional complaints by some citizens, had to uphold the Basic Law. In its “Maastricht-judgment” it substantially confirmed the progress of European integration as reached with the Maastricht Treaty and also the constitutional amendment adopted 10 months before.¹²⁷ The problems identified in the judgment concern the democratic legitimacy of the European Parliament, in particular the lack of equality of votes (due to the demographic differences for single seats and to the mediation of the elections by the Member States) and its – insufficient – legislative competencies and powers of control. The constitutional judges require a perfectly parallel development of the processes of democratization and integration. Their main preoccupation is focused on Member States maintaining control of the integration process: constitutional amendments permitting further integration require foreseeable

¹²³ Spanish Constitutional Court, Decision of 13 December 2004 on the Constitutional Treaty (para. II 2).

¹²⁴ Conseil Constitutionnel, Decision n° 2007-560 of 20th December 2007.

¹²⁵ Conseil Constitutionnel, Decision n° 2007-560 of 20th December 2007 (at 9).

¹²⁶ Judgement of the Polish Constitutional Court, 11 May 2005 (K 18/04). See the comment by Krystyna Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, German Law Journal, Vol. 6 no. 10 (2005), p. 1355-1366

¹²⁷ BVerfGE 89, 155 (172, 180 ff) – *Maastricht* (1992), 12.10.1993.

and clear steps in the process which – despite its gradual increase – has not yet turned into the constituent power of a European State.¹²⁸ This makes German participation (still) possible.

The main instrument for avoiding a direct clash between EU law and constitutional law is the concept of “substantive equivalence” which has been applied in the spheres of fundamental rights, the rule of law and democratic participation, in particular by the German Federal Constitutional Court (BVerfG). Although by means of this concept, so far it has been possible for the BVerfG to underline substantive conformity with progress in EU integration, it raises the question of who has the last say. In the judgment on ratification of the Lisbon-Treaty, the BVerfG claims a “reserve competence” vis-à-vis the European Court of Justice (ECJ), envisaging a specific instrument for the control of *ultra vires* acts by EU institutions and conformity with (German) constitutional identity;¹²⁹

Ambiguity is certainly a way of avoiding frontal clashes with the ECJ,¹³⁰ but it seems clear that the BVerfG, although accepting “*de facto*-monism” in the relationship between German and EU legal systems, stands firm in considering the State as the ultimate defense of the rights of citizens. Thus, the question of constitutional limits to integration is not yet definitively resolved.

6.2. Substantive issues and their control

Part of the Member States acknowledge only *relative* supremacy of EU law as all powers were expressly delegated to the EU which has no competence to found new competences. The latter is a typical power, instead, characterizing a State, but not the supranational association of national sovereign entities. Thus, constitutional law, itself legitimating membership in the EU and the transfer of sovereign powers to the Union, remains within the exclusive competence of Member States.

Based on these arguments, the Italian Constitutional Court developed its “counter-limits” doctrine, stating in the *Frontini* case (1973) that “priority is accorded to EC norms only in so far as they do not conflict with fundamental principles of the national Constitution” and that the transfer of powers to the EC cannot imply a change of the structure and the fundamental principles of the national Constitution under which governmental authority is exercised, nor be freed from the constitutional restraints concerning the protection of individual rights. This was the consequence of identifying art. 11 Italian Constitution as constitutional basis for integration. However, EU law can be subjected to judicial review by the Italian Constitutional Court only in case of grave and

¹²⁸ The internationalist and dualistic conception expressed by the BVerfG (considering the EU as a mere “association of States”, “*Staatenverbund*”, halfway between a Confederacy, “*Staatenbund*”, and a federal State, “*Bundesstaat*”, and insisting on a “cooperation relationship with the ECJ” based on parity) has been criticized much by academia, although the latter agrees with the thesis of an absolute limit of State sovereignty ex art. 79 al.3 GG. A European federal State is seen as something qualitatively different from the Federal Republic of Germany; a similar change of constitutional identity can only be realized by the exercise of constituent powers and art. 146 GG; cf. H. Dreier, *Grundgesetz-Kommentar*, C.H. Beck, München, art. 79 (sub. 46).

¹²⁹ This concept has been already developed in the EU Arrest Warrant-judgment, BVerfGE 123, 267 (sub 240 and 241).

¹³⁰ Opening up to asymmetrical solutions, the ECJ seems to take the increasing diversity between Member States into account. In the “*Omega*” judgment, human dignity as the supreme value in the German constitutional system justified a prohibition expressed by German authorities as a legitimate exception from the fundamental freedoms of the Treaties on the grounds of public order and security; C-36/02 (14.10.2004).

persistent breach of fundamental rights, not duly addressed by the judicial institutions of the Union.¹³¹

Conflict between the Courts in the area of fundamental rights seems less probable today, as the “equivalence” in substance seems to be acknowledged, EU legislation concerning the creation of an area of freedom, security and justice has led to defensive reactions by some Constitutional Courts, in particular the EU Arrest Warrant and extradition-rules (as seen above). Here the question of constitutional “counter-limits” to European integration is still topical.

As a fundamental requirement for the legitimacy of EU integration, regularly effective parliamentary participation has been emphasized in Germany. In a judgment on the EU Arrest Warrant, in 2005, the BVerfG declared the German act of its implementation unconstitutional, mainly due to insufficient participatory rights of Parliament;¹³² for similar reasons, also the act accompanying the ratification of the Lisbon Treaty was declared unconstitutional.¹³³ Democratic participation and legitimacy, understood as realized and guaranteed (only) through the participatory rights of the national Parliaments (*Bundestag*) in the integration process, was the main rationale in both judgments: it was disappointing in both cases that the *Bundestag* had not reserved sufficient participatory rights for itself in the first place. However, the approach is ambiguous as on the one hand the openness of the German legal system to integration is underlined, but, on the other, German sovereignty has to be defended.¹³⁴ In its “Lisbon judgment”, the German Federal Constitutional Court also stressed the concept of an essential and inalienable core of principles making up the “constitutional identity”.¹³⁵

By consequence, the constitutional judges consider it their task to watch over the respect of these essential constitutional areas: “The transfer of competences, which has been increased once again by the Treaty of Lisbon, and the independence of decision-making procedures therefore require an effective *ultra vires* review and an identity review of instruments of European origin in the area of application of the Federal Republic of Germany”.¹³⁶ Recently, however, the German Federal

¹³¹ This is the consequence from the constitutional basis and “cover” of integration as identified in art. 11 Italian Constitution. Only norms of the founding Treaties, considered to be the source of the power to violate the fundamental principles of the Italian legal order, could be subjected to constitutional review; Italian Constitutional Court, *Fragd* case (1989), similar to the *Solange II* decision of the German Federal Constitutional Court.

¹³² BVerfGE 113, 273 (*Europäischer Haftbefehl*), 19 July 2005.

¹³³ BVerfGE 123, 267 (*Lissabon*), 30 June 2009.

¹³⁴ With regard to the fundamental principle of the rule of law and to guarantees for the (German) citizen in the judgment on the Arrest Warrant, and with regard to the guarantee of democratic participation of (German) citizens in the judgments on ratification of the Maastricht and Lisbon Treaties.

¹³⁵ The Court indicates a concrete list of essential areas constituting the specific “constitutional identity” of Germany: “...*inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all [...] deprivation of liberty in the administration of criminal law or [...] cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.” In these areas, sufficient space has to be left for democratic decision of the Member States and their democratic institutions; BVerfGE 123, 267 (*Lissabon*), 30 June 2009, at 249.

¹³⁶ BVerfGE 123, 267 (*Lissabon*), 30 June 2009. The fact that the obligation to respect of the national identity of its Member States has been enshrined in the EU Treaty (Article 4 para.2 TEU) “corresponds to the non-transferable identity of the Constitution (Article 79.3 of the Basic Law), which is not open to integration in this respect.” (at 235).

Constitutional Court took one step back, stating that an “*ultra vires* review of acts of the European bodies and institutions by the Federal Constitutional Court may only be exercised in a manner which is open towards European law. It can hence only be considered if a breach of competence on the part of European bodies and institutions is sufficiently qualified. This is contingent on the acts of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union.”¹³⁷

Obliging the ordinary Courts to first refer to the European Court of Justice in order to clarify questions related to Union law (before eventually referring on constitutional grounds to the BVerfG), the German Federal Constitutional Court continues to avoid using the preliminary reference procedure.¹³⁸ On the whole, the Constitutional Courts try to keep distance; the preliminary reference procedure is at best seen as an option, although there are some exceptions (e.g. Austria and Italy).¹³⁹ The Constitutional Courts rather underline their “cooperative relation” with the ECJ (BVerfG), or a relation of loyalty (Polish Constitutional Tribunal) or the “delicacy” of this issue (Czech Constitutional Court).¹⁴⁰

The case-law of the Polish Constitutional Tribunal shows that this Court like few counterparts has decided on practically all important issues in the interrelation between Constitution and EU legal system: on the participation of foreigners in European Parliamentary elections (2004);¹⁴¹ on the European Arrest Warrant (2005);¹⁴² on the EU Accession Treaty (2005);¹⁴³ on competences of Sejm

¹³⁷ BVerfG, Order of 6 July 2010 (2 BvR 2661/06), deciding that the *Mangold* judgment of the European Court of Justice (C-144/04 *Mangold* [2005] ECR I-9981, 22.11.2005) does not transgress Community competence in a constitutionally objectionable manner.

¹³⁸ The German Federal Constitutional Court has recognized the ECJ as “natural judge” in the sense of art. 101 GG: an arbitrary denial of a referral by a German judge would therefore mean a violation of this constitutional principle; see e.g. case *Solange II* in BVerfGE 73, 339 (366 ff.), and BVerfGE 82, 159 (194 ff.).

¹³⁹ In some cases, the Austrian Constitutional Court does not only have to examine the constitutionality of the challenged provisions, but to examine their full legitimacy, just like an ordinary judge (e.g. in case of examination of legitimacy of electoral procedures or controversies regarding competencies). Thus, the referral is the only means to clarify controversial questions relevant for the final decision respecting the ECJ’s monopoly on final interpretation of EU law. So far, the Austrian Constitutional Court has referred three times: decisions of 13 December 2001 (*Energieabgabenrückvergütung*, VfSlg 16.401/2001); of 3 December 2003 (*Vorarlberger Arbeiterkammerwahl*, W I-14/99), of 28 November 2003 (*Offenlegung der Bezüge öffentlicher Funktionäre*, KR 1/00).

In 2008, also the Italian Constitutional Court has referred a preliminary question to the ECJ (judgment 102/2008 and order 103/2008): after the constitutional amendment of 2001, the supremacy of EU law has been acknowledged in art. 117 para.1 Constitution as limit for the regional legislator; in a controversy between State and Region Sardinia the interpretation of Union law was decisive and so the Constitutional Court as the only (Italian) judge in this issue had to refer the question to the ECJ. However, before the amendment of 2001, also the Italian Constitutional Court had never considered a referral.

¹⁴⁰ Mahulena Hofmann, *Legal System Development in Central and Eastern European States to Accommodate International and European Law* [English summary], in: Mahulena Hofmann, *Von der Transformation zur Kooperationsoffenheit? Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Bd. 206, 2009, p. 503-528 (517); besides the *Maastricht* judgment of the BVerfG (of 12 October 1993, BVerfGE 89, 155), the author refers to the Constitutional Tribunal of Poland, Judgment of 11th May 2005 (K 18/04) as well as to the Constitutional Court of Czech Republic, Judgment of 8th March 2006 (Pl. ÚS 50/04).

¹⁴¹ Constitutional Tribunal of Poland, Judgment of 31st May 2004 (K 15/04).

¹⁴² Constitutional Tribunal of Poland, Judgment of 27th April 2005 (P 1/05); Angelika Nußberger, *Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant*, *International Journal of Constitutional Law* (2008) 6 (1), 162-170.

¹⁴³ Constitutional Tribunal of Poland, Judgment of 11th May 2005 (K 18/04).

and Senate committees in respect to EU legislative proposals (2005);¹⁴⁴ on the conformity of a Polish statute with EU law (2006);¹⁴⁵ on electoral law for European Parliament elections (2009);¹⁴⁶ on the Treaty of Lisbon (2010).

In the latter judgement on the Treaty of Lisbon, also the Polish Constitutional Tribunal examined the simplified revision procedures, the bridging and flexibility clauses stating that “those procedures arise from the experiences accompanying European integration and constitute a premiss of an effective functioning of the Union, and additionally they include various guarantees of respect for sovereignty of the Member States of the European Union [...]. In addition, the delegation of competences to the Union require consent, pursuant to Article 90 of the Constitution, regardless of the fact whether this is done by an international agreement, or whether by application of simplified revision procedures.” The Constitutional Tribunal adjudicated on the conformity of the Treaty of Lisbon, ratified in accordance with the requirements set out in Article 90 of the Polish Constitution, which are even more stringent than those for amending the Constitution.¹⁴⁷ However, on this occasion the judges also stress the substantive constitutional limits of integration identifying, as their German colleagues before, a specific “constitutional identity” which comprises: “the respect for the principles of Polish sovereign statehood, democracy, the principle of a state ruled by law, the principle of social justice, the principles determining the bases of the economic system, protection of human dignity and the constitutional rights and freedoms”.¹⁴⁸

Like its Polish counterpart, also the Czech Constitutional Court has addressed a wide range of constitutional issues related to EU integration in its case-law comprising decisions on the European Union Accession Treaty (2004),¹⁴⁹ on the European Arrest Warrant (2006),¹⁵⁰ on regulations on the reimbursement of medications (2007)¹⁵¹ as well as two decisions the Treaty of Lisbon (2008 and 2009)¹⁵².

In its first judgment on the Treaty of Lisbon, the Czech Constitutional Court reminds of the substantive limits set to the transfer of institutional competences to an international organization under Art. 10a of the Constitution, which “cannot go so far as to violate the very essence of the Republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Art. 9 par. 2 in connection with Art. 1 par. 1 of

¹⁴⁴ Constitutional Tribunal of Poland, Judgment of 12th May 2005 (K 24/04).

¹⁴⁵ Constitutional Tribunal of Poland, Procedural Decision of 19th December 2006 (P 37/05).

¹⁴⁶ Constitutional Tribunal of Poland, Judgment of 28th October 2009 (Kp 3/09).

¹⁴⁷ Constitutional Tribunal of Poland, judgment of 24 November 2010 (K 32/09). Article 48 TEU, in conjunction with art. 2 para. 2, art. 3 para. 2 and art. 7 TFEU, was held to be consistent with articles 8 para. 1 and 90 para. 1 of the Constitution of the Republic of Poland.

¹⁴⁸ According to the Constitutional Tribunal of Poland, art. 90 Polish Constitution, “being a normative anchor to the State’s sovereignty, determines the limits of conferring competences on the Union.” See at [http://www.trybunal.gov.pl/eng/news/k_32_09.htm].

¹⁴⁹ Constitutional Court of Czech Republic, Judgment of 3rd April 2004 (Pl. ÚS 1/04).

¹⁵⁰ Constitutional Court of Czech Republic, Judgment of 3rd May 2006 (Pl. ÚS 66/04).

¹⁵¹ Constitutional Court of Czech Republic, Judgment of 16th January 2007 (Pl. ÚS 36/05).

¹⁵² Constitutional Court of Czech Republic, Judgments “*Treaty of Lisbon I*” of 26th November 2008 (Pl. ÚS 19/08) and “*Treaty of Lisbon II*” of 3rd November 2009 (Pl. ÚS 29/09).

the Constitution)”. Further on, the absolute limit for such a transfer is stressed: “If, on the basis of a transfer of powers, an international organization could continue to change its powers at will, and independently of its members, i.e. if a constitutional competence (competence relating to competence) were transferred to it, this would be a transfer inconsistent with Art. 1 par. 1 and Art. 10a of the Constitution.” For the German Constitutional Court this “constitutional competence” would mean the quality of being a State (instead of an international organisation); in a similar way, the Czech constitutional judges focus on the dependence of the EU from its Member States, before concluding that the “Treaty of Lisbon does not have such consequences in relation to the European Union, and the reviewed provisions thereof are consistent with the constitutional order of the Czech Republic”.¹⁵³

Thus both, the Polish and the Czech Constitutional Courts examined and discussed the substantive as well as the procedural limits, although the conformity of the Lisbon Treaty and its ratification with the relative Constitution was stated in the end.¹⁵⁴

6.3. *Excursus: Constitutional challenges for Eurozone members in the economic crisis (Germany)*

New constitutional challenges arise, for Member States in the Eurozone, by the recent economic crisis as huge amounts of financial resources and guarantees are needed in order to contrast speculative attacks. The relative political decisions have to be backed by sufficient democratic legitimacy the degree of which is carefully monitored by the German Federal Constitutional Court which uses, again, the rights of Parliamentary participation as litmus test.

In a first decision on 7 September 2011, the Court rejected constitutional complaints lodged against aid measures for Greece and against the euro rescue package. Determining the boundaries under constitutional law for authorisations to give guarantees for the benefit of other States in the European Monetary Union, it did not consider the Bundestag’s budget autonomy violated.¹⁵⁵ Again, individual constitutional complaints have been lodged against political decisions regarding European integration: in the concrete case, they were directed against the German contribution to the Stability Mechanisms and have been received as admissible only to the extent that the citizens, invoking their right to elect the *Bundestag*, protected by Article 38 GG, challenge a loss of substance of their power to rule, as it is organised in a constitutional State, by a far-reaching, or even comprehensive, transfer of duties and authorities of the *Bundestag*.¹⁵⁶ By adopting various

¹⁵³ Constitutional Court of Czech Republic, Judgment “*Treaty of Lisbon I*” of 26th November 2008 (Pl. ÚS 19/08).

¹⁵⁴ See for a comparative analysis, Anneli Albi, *From the Banana saga to a Sugar Saga and Beyond: Could the Post-communist Constitutional Courts Teach the EU a Lesson in the Rule of Law?* Common Market Law Review 2010, pp. 791-829, and Sven Höbel, *Polish and German Constitutional Jurisprudence on Matters of European Community Law: a Comparison of the Constitutional Courts’ Approaches*, in Croatian Yearbook of European Law and Policy, Vol.3. No.3. November 2007, pp. 515 – 531; but also Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems*, German Law Journal, Vol. 09 No. 10 (2008), 1313-1355; and Zdeněk Kühn, *The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance / Acceptance. The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, in Croatian Yearbook of European Law and Policy, Vol.3. No.3. November 2007, pp. 99 - 133.

¹⁵⁵ German Federal Constitutional Court (BVerfG), 7 September 2011 (2 BvR 987/10; 2 BvR 1485/10; 2 BvR 1099/10).

¹⁵⁶ BVerfG, 7 September 2011 (see above; English summary at [<http://www.bverfg.de/pressemitteilungen/bvg11-055en.html>]). According to the Court, article 38 para.1 GG “protects competences of the present or of a future

Acts regarding the Financial Stabilisation of the Monetary Union, “the German Bundestag did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments”. However, one provision was considered compatible with the Basic Law only “if it is interpreted in conformity with the Constitution, i.e. to the effect that the Federal Government is obliged to obtain prior approval by the Budget Committee before giving guarantees within the meaning of the relative Act” (and not merely obliges the Federal Government “to strive to reach an agreement”).¹⁵⁷

In line with the preoccupation for the guarantee of Parliamentary rights, on 28 October 2011 Germany’s Federal Constitutional Court consequently decided with a temporary injunction “... that until a full decision is taken by the Court, the Bundestag’s right of participation may not be replaced” by a new committee, designed to guarantee speedy decisions on the use of the new Eurozone bailout fund. Under a recent agreement, decisions on the bail-out fund are made either in the plenary of 620-members, the budget committee or a special committee according to their urgency or importance. The special committee has been suspended by the temporary decision following complaints about its legality based on concerns about the rights of Parliament.¹⁵⁸ However, it is quite remarkable that it is again the Constitutional Court which protects the rights of Parliamentary participation against the same Parliament.

6.4. Discrepancies due to difference in perspective

In a system without hierarchical organisation or true coercive powers, respect can only be achieved by dialogue and through persuasion. In the past, the different perspectives between national Constitutional Courts and the European Court of Justice on the protection of fundamental rights have led to consideration and judicial protection by the latter, which have subsequently acknowledged by the Constitutional Courts. More recently, the ECJ seems to apply a wider margin of appreciation regarding constitutional differences, which adds a concrete dimension to the positive guarantee of the fundamental constitutional structures of the Member States, art. 4 para. 2 TEU. The explicit reflections of some Constitutional Courts on constitutional limits of integration and on “constitutional identity” have certainly contributed to the definition of the obligations of mutual respect and consideration. However, due to the different perspectives of the ECJ and the Constitutional Courts the underlying problem can only be mitigated, but not be resolved under the current legal situation. This is particularly true for the safeguard of the democratic principle: according to – at least some – Constitutional Courts the democratic legitimacy regarding decisions

Bundestag from being undermined, which would make the realisation of the citizens’ political will legally or practically impossible. In principle, there is a threat of the act of voting being devalued in such a way if authorisations to give guarantees are granted in order to implement obligations which the Federal Republic of Germany incurs under international agreements concluded in order to maintain the liquidity of Currency Union Member States.”

¹⁵⁷ The critical provision is § 1.4 of the Euro Stabilisation Mechanism Act. –BVerfG, 7 September 2011, see above.

¹⁵⁸ German Federal Constitutional Court - BVerfG, Temporary Injunction of 28 October 2011 (2 BvE 8/11). Two deputies from the opposition had argued that having a special nine-person committee - rather than the plenary or budget committee - take budget decisions while operating behind closed doors is in breach of the Constitution. In response to fears that lengthy parliamentary debate could obstacle the use of the fund, the special committee had been established just two days before with the task to oversee the €211 billion German contribution in the bail-out fund.

with constitutional implications still needs to be backed up within the domestic circuit of legitimacy, i.e. by Parliament or a referendum.¹⁵⁹

7. Making adaptations and constitutional tolerance visible. Conclusive remarks

Considering the experiences of “old” and “new” EU Member States is certainly useful, but comparison has shown above all that standards or model solutions for the adjustment of Constitutions in view of EU accession and membership do not and cannot exist. Despite an increasing convergence in constitutional matters, this result is primarily due to the different constitutional situation and traditions in the single States, to their political situation as well as to the dependence from the results of accession negotiations with the EU.

However, there is a list of constitutional issues to be addressed before accession as well as a number of solutions from which to choose according to a critical evaluation of their functioning in practice as well as to the specific political and legal situation of the country in question. The choice is up to the single country.

While in some “old” Member States an “integration deficit” in the sense of a lack of constitutional integration clauses can still be observed, progress in European integration and the expansion of the competencies of the European Union have convinced most Member States to adopt specific constitutional provisions on membership. This development has been anticipated by accession countries for which EU membership has become a constitutional objective.

According to the purpose of these constitutional provisions, a distinction can be drawn between procedural and substantive issues. Provisions of *procedural* nature are either generally authorising membership (and accession) as well as the transfer of sovereign powers to international organisations (including the EU) or specifically address EU integration. These procedural issues might be further differentiated according to the quality and importance of transferred powers concerned, e.g. introducing the requirement of special majorities, of constitutional amendments or of a referendum prior to the ratification of a Treaty revision.

In the integration clauses frequently *substantive* issues arising from membership are also addressed: in particular, these regard institutional balances and their adaptation for participation in the EU decision-making process and effective implementation of EU law, specific EU *acquis*-related matters, such as rights of EU citizens, and, in some cases, even the identification of constitutional “counter-limits” to integration, i.e. fundamental constitutional principles which cannot be subject of changes induced by EU legislation.

With regard to the drafting technique, specific integration clauses can be concentrated in one article or title of the Constitution, while further requirements for membership might also be inserted in different parts of the Constitution, such as those regarding the judiciary. Usually

¹⁵⁹ The insistence on the democratic principle and the monitoring of its respect seems particularly strong where, as in the case of Germany, no referendum is foreseen as an option.

further regulation in ordinary legislation will be necessary. A further differentiation regards the degree of discretion in adopting provisions on EU integration: while States are free, in principle, to regulate the constitutional foundations and consequences of membership, they have to guarantee the efficiency of EU legislation in their domestic legal system. In some cases, the required degree of harmonisation is already predetermined by the *acquis* reducing the degree of discretion considerably.

The Lisbon Treaty represents a major advance as regards the role of national Parliaments at EU level. It states explicitly that “national Parliaments contribute actively to the good functioning of the Union” (art. 12 TEU). Parliaments can participate in the European decision-making process and do not have to leave the floor to governments alone as in the past. In order to make positive use of this new role and to actively engage, Parliaments need to create institutional structures, adequate procedures and administrative capacity.¹⁶⁰

In constitutional theory, the sovereignty of the State implies its independence, in particular in constitutional matters. Independence has been emphasised in a number of Constitutions of countries of Central and (South) Eastern Europe leading to a rather defensive attitude based on the fear of losing (the new) independence as well as on the conviction of the high quality reached in the own legal system.¹⁶¹ However, European integration is founded upon the idea of sharing sovereignty and upon the conscience of converging constitutional values and principles. As “common constitutional traditions of the Member States” these have become part of the EU’s primary law. Guided by the OSCE concept of “democratic security”, the constitutional transformation in Central and (South) Eastern Europe after 1989 was also inspired by common constitutional values and principles. Membership in the Council of Europe already requires concrete conformity with these values and principles. The European Union is the most integrated legal sphere in Europe: thus membership in the EU means transformation from independent States into “interdependent” Member States.

Further constitutional adaptation should therefore not (only) be seen as a necessary condition for accession to comply with. It should also make the new quality of the State visible in the Constitution. Even more important is the subsequent practical implementation at all levels in order to become a truly “integrated State”.

¹⁶⁰ The importance of expanding the “co-operative constitutionalism” beyond judicial actors, by involving political institutions, is underlined by Anneli Albi, *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of ‘Co-operative constitutionalism’*, *European Constitutional Law Review* 2007 (1), pp. 25-67.

¹⁶¹ Mahulena Hofmann, *Legal System Development*, p. 526.