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KOMPETENZ-KOMPETENZ UNDER THE THIRD PILLAR IN EU LAW: CONSTITUTIONAL PUZZLE AROUND THE EUROPEAN ARREST WARRANT

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Introduction

In the judgment on the prominent case *Van Gend en Loos* the European Court of Justice (hereafter – ECJ) pronounced that "the Community constitutes a new legal order of international law…"[1]. Since this notion, although it has not been confirmed by the wording of the Treaties, became the mainstream perception of EC (and later - EU) law as a legal system *sui generis* distinguished from classic international law on the one hand and from national law on the other. However EC/EU law does not exist in a legal vacuum. On the contrary, it borders and often overlaps with both national law[2] and international law[3]. That raises the so-called *kompetenz-kompetenz* issue i.e. who enjoys the competence to determine the boundaries of the EC/EU law or, in other words, what judicial body is empowered to judge whether EU/EC acts are *ultra vires.*

The problem is accentuated by the open wording of numerous provisions of the EC and EU Treaties and the lack of an explicit list of the division of competence between the EC/EU and its Member States in the Treaties. Moreover, as de Búrca and de Witte indicated:

> [T]he ECJ has conspicuously never attempted to delineate a complete doctrine of the division of powers between the EC and the member states, even while it has been quite forceful and doctrinally comprehensive in related fields of European constitutional law, such as that of the

[1] Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

[2] See e.g. G. de Búrca and B. de Witte *The Delimitation of Powers between the EU and its Member States*, European University Institute http://www.eui.eu/RSCAS/e-texts/CR200103.pdf

[3] As an instructive example of such overlapping it is worth mentioning the line of GATT/WTO cases that the ECJ has dealt with from *Fediol v Commission* (case 70/87 [1989] ECR 1781) to *Léon Van Parys* (case 377/02 [2005] ECR I-1465) and beyond, including the famous Banana cases in which the ECJ and DSB reached the opposite conclusions as to the legality of Council Regulation (EEC) No 404/93 on the common organization of the market in bananas.

role and duties of national courts in the enforcement of EC law or the protection of fundamental rights.[4]

Under such circumstances it is not surprising that different answers to the *kompetenz-kompetenz* question have been given by different courts during EC/EU history. Since in the early 70-s some of the highest courts of the member states called in question the authority of the ECJ to play the role of the "final arbiter of constitutionality in Europe"[5] the *kompetenz-kompetenz* issue became one of the most controversial and most complicated matters of European law and thus has been perpetually discussed explicitly and implicitly by the highest courts of the member states and their European counterpart as well as by scholars notwithstanding the fact that discussants fairly rarely employ this German term[6].

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[4] G. de Búrca and B. de Witte *The Delimitation of Powers…* (supra note 2), p. 1.

[5] The expression is borrowed from the title of Mattias Kumm's article, *Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice and the Fate of the European Market Order for Bananas.* Jean Monnet Working Papers #10 http://www.jeanmonnetprogram.org/papers/98/98-10-.html#fn0. The courts that challenged the ECJ's *kompetenz-kompetenz* in the 70-s were: Bundesverfassungsgericht (German Constitutional Court) in the judgment of 29 May 1974 on the case BvL 52/71 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I),* [1974] 2 C.M.L.R. 540 and Corte Costituzionale (Italian Constitutional Court) in the judgment of 27 December 1973 on the case 183 *Frontini v. Ministero Delle Finanze*, [1974] 2 C.M.L.R. 372.

[6] See *inter alia*: Case 22-70 *Commission of the European Communities v Council of the European Communities* [1971] ECR 263; Case 314/85 *Firma Foto Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199; Opinion 1/03 pursuant to Article 300(6) EC (Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) [2006] ECR I 1145; Bundesverfassungsgericht, judgment of 22 October 1986 on the case 2 BvR 197/83 *Wünsche Handelsgesellschaft (Solange II),* [1987] 3 C.M.L.R. 265; Corte Costituzionale, judgment of 21 April 1989 on the case № 232/1989 *Fragd v. Amministrazione delle Finanze dello Stato*, in *The Relationship between European Community Law and National Law: the Cases* ed. by A. Oppenheimer, Cambridge University Press, 1994, pp 653-662; Højesteret (Denmark Supreme Court), judgment of 6 April 1998 on the case № 272/1994 *Carlsen and Others v. Rasmussen*, [1999] 3 C.M.L.R. 854 as well as the articles cited in this paper.

From the beginning it seems that the German and Italian constitutional courts' doubts as to the recognition of the absolute final authority of the ECJ to delimit the EC competence were based mainly on the lack of the fundamental rights protection in the case-law of the latter. However there was note of worry about possible erosion of the core national constitutional principles that could be caused by uncontrolled ECJ made expansion of the EC power even in these early judgments analysed below. Later such an anxiety was elaborated in the German Federal Constitutional Court's (hereafter – GFCC) famous Maastricht judgment[7] where the GFCC comprehensively expounded its view on the *kompetenz-kompetenz* issue. This decision left no doubts that the ECJ and at least some highest courts[8] of the member states understood the problem at stake not just in different, but in contrasting ways. And even though the GFCC refrained from a head-on clash with the ECJ in the *Banana* case[9], the former reaffirmed that it did not count the latter as "the ultimate judicial umpire of European Community competences"[10]. The judicial debate concerning which court enjoys the *kompetenz-kompetenz* came to an apparent standstill.

In the early 2000-s the focal point of the discussion shifted to the political level. It became part of the constitutional debates and led to the recognition in the Laeken Declaration of the necessity for

[7] Judgment of 12 October 1993 on the cases 2 BvR 2134/92 and 2159/92 *Manfred Brunner and Others v. the European Union Treaty* [1994] 1 C.M.L.R., 57

[8] Some years later the Supreme Court of Denmark deciding the case *Carlsen and Others v. Rasmussen* in fact followed GFCC's reasoning in *Maastricht*.

[9] Judgment of 6 July 2000 on the case 2 BvL 1/97, http://www.bverfg.de/entscheidungen/ls20000607_2bvl000197en.html

[10] The expression is borrowed from the common heading for the Schilling - Weiler/Haltern debate http://www.jeanmonnetprogram.org/papers/96/9610.html. The GFCC restates its jurisdiction to judge legitimacy of the EC secondary law in the para. 37 of the judgment.

"a better division and definition of competence in the European Union"[11]. To achieve this goal drafters of the Constitutional Treaty and subsequently of the Treaty of Lisbon included in their texts some competences classification and codification. So, according to both Treaties the power of the EU was explicitly divided into two categories: 1) exclusive competences and 2) competences shared with member states.[12] The areas of each competence were listed in the respective articles.

However, even if the Lisbon Treaty comes into force,[13] this would not solve the problem in question. As de Búrca and de Witte noted, even now:

> [t]he specific powers of the EC and the EU are […] mentioned and delimited in the many individual "legal basis" articles to be found across the Treaties. In fact, *these specific powers are defined in much more detail than is usually the case of the constitutional delimitation of powers in a federal state*. In this sense, *the vertical delimitation of powers is arguably accomplished with grater clarity and precision within the European Union's founding instruments than in the constitutions of most federal states*. (emphasis added)[14]

However, within federations the *kompetenz-kompetenz* problem sometimes arises in its inter-institutional dimension (as a rule with regard to allocation of powers between legislature and judiciary[15]) and does not in the inter-judicial context. There is no doubt for instance that the Federal

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[11] The Laeken Declaration of the Future of the European Union pointed out the necessity for "a better division and definition of competence in the European Union" (Annex I to the Conclusions of the Laeken European Council, 14-15 December 2001, SN 300/1/01 REV 1, pp 21-22).

[12] See Art. I-13 and I-14 of the Treaty Establishing a Constitution for Europe [2004] OJ C310/1 and Art. 3 and 4 of the consolidated versions of the Treaty on the Functioning of the European Union (as amended by Treaty of Lisbon) [2008] OJ C115/47.

[13] Negative result of the Irish referendum as to the Lisbon Treaty ratification made its prospects to came into force quite vague and last European Council meeting did not give an answer to this challenge "agreed to Ireland's suggestion to return to the issue at the European Council meeting of 15 October 2008 in order to consider the way forward".

[14] G. de Búrca and B. de Witte *The Delimitation of Powers…* (supra note 2), p. 2.

[15] So-called judicial activism issue widely discussed particularly in the US.

Constitutional Court is the final arbiter of constitutionality in Germany and that the US Supreme Court is that in the US. It is not the case within the EU because inevitable tension between the EC/EU and national laws is rooted in the very nature of their claim **to be autonomous legal orders**, not in imprecision of the Treaties' provisions. Therefore, it is impossible in principle to delimitate the scope of the EC/EU law so precisely as to remove the *kompetenz-kompetenz* issue once and for all.

The *kompetenz-kompetenz* discussion within the EU got a second wind when the ECJ voluntarily extended its jurisdiction within the area of freedom, security and justice (so-called third pillar of the EU) where the current Treaties emphasised the strengthened inter-governmental character of the cooperation. The answers and even one "pre-answer" to the ECJ from the highest courts of the member states were not long in coming. The debate was triggered by the Framework Decision on the European Arrest Warrant[16] (hereafter – FWD) which introduced a new simplified procedure for extradition between the member states and thus directly or potentially (as to the candidate countries) affected the constitutional principle not to extradite one's own citizens or the rigid conditions on extradition ensured at that time in some national constitutions of European states[17]. So, it is little wonder that the national instruments of the FWD implementation and eventually the FWD as such were challenged before national and respectively European courts. It was the unique case which allowed a number of highest national courts[18] as well as the ECJ[19] to deliver their view on this

[16] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L190/1.

[17] See e.g. Art. 16(2) of the Basic Law for the Federal Republic of Germany; Art. 55(1) of the Constitution of the Republic of Poland; Art. 47 of the Constitution of the Republic of Slovenia as of 2002.

[18] Up to now the courts which have dealt with the FWD are the Polish Constitutional Tribunal in judgment of 27 April 2005 (file reference No P 1/05); German Federal Constitutional Court in the judgment of 18 July 2005 (2 BvR 2236/04); the Supreme Court of Cyprus in the judgment of 7 November 2005 on the case *Attorney General of the Republic v Konstantinou*; the Czech Constitutional Court in the judgment of 3 May 2006 on the case *Re Constitutionality of Framework Decision on the European Arrest Warrant.* It is worth mentioning in this context the

sensitive issue. One topic the judiciary predictably dealt with when discussing the legitimacy of the FWD and its implementation instruments was the *kompetenz-kompetenz* issue under the third pillar of the EU.

This paper focuses on the same subject, namely what judicial body (or bodies) is powered to interpret the scope of EU power in an area of police and judicial cooperation in criminal matters. The dissertation begins with the outline of the history of the debate and the parties' arguments when the dispute was conducted within the scope of Community law. Then it examines recent judgments in regard to the FWD with particular attention to the peculiarities of EU law which distinguish it from EC law. In particular the study estimates the impact of the Constitutional Treaty's failure to come into force and the recent trouble that faced the ratification of the Treaty of Lisbon on the persuasiveness of the different judiciary's reasoning. Finally, it considers the probability of a possible constitutional clash between a highest court of a member state and the ECJ when the different approaches to the *kompetenz-kompetenz* issue on the European level is an accomplished fact.

To complete the introduction it should be emphasized that this essay does not deal with the *kompetenz-kompetenz* issue in all its facets. In particular, the article concerns neither the history of this political and legal concept developed in the XX century mainly by German and Austrian scholars, nor its intra-Union inter-institutional dimension. It is the **judicial *kompetenz-kompetenz*** in regard to the European Union and its member states especially in the area of police and judicial cooperation in criminal matters which the present research focuses on. In other words, the paper mainly debates the question whether the European Court of Justice is empowered to decide alone what lies within the scope of the EU's competence and consequently under the Court's own

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Arbitragehof (Belgium) which referred a question as to the legitimacy of the FWD to the ECJ in the proceedings *Advocaten voor de Wereld VZW v Leden van de Ministerraad*. The French Conseil d'Etat and the Greek Areios Pagos have also reviewed the constitutionality of the FWD national implementing instruments (see infra note 110).

[19] Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633.

jurisdiction, particularly under the third pillar, or whether that issue should be addressed by another existing court(s). Moreover, it raises the question of the possibility and advisability to set up a new judicial body for solving *kompetenz-kompetenz* issues at the European level.

The last preliminary remark that is worth mentioning is why the problem is formulated in such a way that it concentrates on the question who is empowered to identify potential EU action as *ultra vires* and not that of a member state? The case is that the European Union enjoys "attributed", "enumerated" or "limited" competences conferred on it by the states in the Treaties[20]. Theoretically, as the Constitutional Treaty aimed to clarify:

> Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.[21]

However, in practice now

> relatively small (and rarely articulated) list of powers can be said to belong exclusively to the Member States. […] Further, the exclusive power of the States can no longer be described generally in terms of broad policy areas or sectors.[22]

Bearing in mind the fact that the scope of EU/EC law (and policies as well) application has been extended since the founding treaties were concluded in 50-s and, consequently, the scope of

[20] See the Art. 5 of the TEC and reference to it in the Art. 2 of the TEU. The principle of conferral was not explicitly fixed in the original text of the Treaty establishing the European Economic Community (Art. 5 (ex. 3b) was inserted in the Treaty text in 1992 by G5 TEU). However, the limited character of the Community powers was recognized by the ECJ very early in *Van Gend en Loos* (the Community constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit within limited fields*..." (emphasis added).

[21] Art. 11(2) of the Treaty Establishing a Constitution for Europe, [2004] OJ C 310/1.

[22] G. de Búrca and B. de Witte *The Delimitation of Powers…*(supra note 2), p. 7. See also Koen Lenaerts' remark in his article *Constitutionalism and the Many Faces of Federalism*: "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community.", 38 AM. J. COMP. L. 205, 220 (1990).

national law has been contracted one could describe the mainstream of European integration as a permanent transfer of powers from the national states to the supranational community[23]. However to be objective it should be mentioned that in course of the EC/EU history there have been made some attempts to reduce and differentiate the transfer of power from the national capitals to Brussels: the introduction of the principle of subsidiarity[24] and the mechanism of enhanced cooperation[25] as well as recognition the right of a member state not to participate in some areas of the integration[26] in the Maastricht and later treaties are the bright examples of such attempts. Yet mentioned efforts have never changed the main trend of European integration.

Such a dynamic character of the relation between national law and that of the EU/EC and absence of clear and permanent borderline between them brought to exist the principle of the supremacy established by the ECJ in the early landmark judgment of *Costa v. Envil*[27]. According to this principle if conflict between EC and national legal provision arises, the former should prevail over the latter. So, when a member state acts in the sphere where EC enjoys power to govern, national

[23] From this viewpoint the *kompetenz-kompetenz* issue constitutes the part of the wider constitutional debates whether the member states of EU enjoy some inviolable fortress of their sovereignty or it is just a matter of time when Europe become a real federation with all the ensuing consequences.

[24] See the Art. 5 of the TEC inserted by the Art. G5 of the TEU.

[25] See the Articles 27(a),(b),(c),(d), 40, 40(a),(b) and title VII of the TEU as well as Art. 11 of the EC Treaty inserted by the Treaty of Amsterdam.

[26] See e.g. Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992), Protocol on certain provisions relating to Denmark (1992), Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland (1997), Protocol on the position of the United Kingdom and Ireland (1997), Protocol on the position of Denmark (1997).

[27] Case 4/64 *Flaminio Costa v. Enel* [1964] ECR 585. Even though the principle of the supremacy of EC law over national law became one of the cornerstones of the EU judge made law it failed to be inserted into the Treaties' text: although it appeared in Art. I-6 of the Constitutional Treaty it was withdrawn from the Treaty of Lisbon.

law could be simply overruled or rather prevented from being applicable by an act of the European institution(s).

Thus, the *kompetenz-kompetenz* objection could be and is invoked by a member state when EC/EU "invades" new spheres of competencies avoiding to amend the Treaties, but doing so through the "creeping transfer of competences through implicit judicial constitutional change"[28] and not vice versa.

2. Problem's background: *kompetenz-kompetenz* in EC law

The dispute as to the *kompetenz-kompetenz* in the EC/EU has a long history. In the 60-s and early 70-s the ECJ handed down a set of judgments[29] which initiated the process of constitutionalization of the European Community[30]. The increasing power of the EC institutions and thus EC as such which at that time evaded control of the directly elected national parliaments as well as the European Parliament raised the problem of balancing the new power against national constitutional principles and first of all against human rights.

At the beginning it seems there were no doubts that it was the ECJ which has jurisdiction to delineate the margins of the EC law and demarcate the boundaries between EC and national legal orders[31]. In the middle 60-s the Italian Constitutional Court in its judgment on the case *Società*

[28] Expression from Gunnar Beck, *The problem of Kompetenz-Kompetenz: a conflict between right and right in which there is no praetor* E.L. Rev. 2005, 30(1), p. 49.

[29] The landmark decisions were: *Van Gend en Loos* (Case 26/62) [1963] ECR 1 where the Court established direct effect of the TEC provisions; *Flaminio Costa v. Enel* (Case 4/64) [1964] ECR 585 firstly claimed supremacy of the EC law; *AERT* (case 22/70) [1971] ECR 263 founded pre-emption concept.

[30] For an instructive analysis of this process see Weiler, Joseph H.H. *The Transformation of Europe*, (1991) The Yale Law Journal 100: pp. 2403-83.

[31] In 1967 the German Federal Finance Court (*Bundesfinanzhof*) referred to the ECJ the question whether the Treaty confers on the institutions of the Community (not an institution!) the right to establish systems of levy directly

Acciaierie San Michele v High Authority[32] firmly stated albeit as to the European Coal and Steel Community that:

> [T]he organs of our internal jurisdiction are not qualified to criticise acts by organs of the E.C.S.C. because the latter are not subject to the sovereign power of the member-States of the Community, and cannot be found within the framework of any such State…[33]

and thus without any proviso refrained from examining the substance of the Community's acts. The Italian court was sure that such a scrutiny was exclusively for the European Court of Justice[34].

However, later the Corte Costituzionale at the instigation of the Tribunale of Turin, worrying that Italian limitation of national sovereignty in favour of the EEC did not "go beyond a certain limit and bite into the fundamental rights of the citizens and the fundamental principles of the state structure"[35], very civilly reserved for itself the right to supervise Community law to prevent EC institution from violating "the fundamental principles of our constitutional order or the inalienable rights of man".[36] It stated verbatim that:

> [I]t is obvious that if ever Article 189 [now 249] had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that this [Italian

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applicable in the member states (see the case 17-67 *Firma Max Neumann v Hauptzollamt Hof/Saale* [1967] ECR 441); in 1969 France brought before the ECJ an allegation that the Commission had acted outside the limits of the Communities competence (see joined cases 6 and 11-69 *Commission of the European Communities v French Republic* [1969] ECR 523).

[32] Judgment of 27 December 1965 on the case *Società Acciaierie San Michele v High Authority* [1967] C.M.L.R. 160.

[33] *Ibid.*, para. 2.

[34] *Ibid.*, para. 4.

[35] Case 183/73 *Frontini v. Ministero Delle Finanze* [1974] 2 C.M.L.R. 372, para. 17 of the judgment of the Tribunale of Turin.

[36] *Ibid.*, para. 21 of the main judgment.

> Constitutional] Court *would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles*. (emphasis added) [37]

Almost at the same time when the Corte Costituzionale delivered its verdict in the *Frontini v. Ministero Delle Finanze* its German counterpart was dealing with the reference that had been made by the Verwaltungsgericht (Administrative Court) of Frankfurt-AM-Main in the case *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[38]. The referring court asked the GFCC to examine the constitutionality of two Community measures.

First of all the Bundesverfassungsgericht held its jurisdiction to deal with the question at issue and took the view that the reference was admissible. Then it analysed the relationship between national law and Community law:

> [I]n principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. […] This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance.[39]

Thus, it is the duty for the competent organs of both the Community and its member states and particularly for their courts to do their best to act in accordance with both national and Community legal systems. When conflict between the systems nevertheless arises according to the GFCC it

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[37] *Ibid.*

[38] Case 2 BvL 52/71 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 C.M.L.R. 540.

[39] *Ibid.*, para. 20.

could and should be solved at a political level.[40] However, under the circumstances of such a legal clash

> the *guarantee of fundamental rights in the Constitution prevails* as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism. (emphasis added)[41]

Finally, the GFCC drew its famous formula which reserved to it the right to ensure compatibility of Community measures with fundamental rights guaranteed by the German Constitution:

> As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, *is admissible and necessary* if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Constitution. (emphasis added)[42]

Therefore, two constitutional courts of the member states in the first half of the 70-s rejected the ECJ's claim to a judicial monopoly in the Community matters or rather in the spheres where Community competence potentially could be at odds with the constitutional law of the member states. It seems that this challenge to the supremacy principle was provoked by the ECJ itself when

[40] *Ibid.*, para. 21.

[41] *Ibid.*, para. 24.

[42] *Ibid.*, para. 35.

it had gone too far (from the viewpoint of the Italian and German constitutional courts) in its decision in *Internationale Handelsgesellschaft*[43].

Dealing with the reference from the Verwaltungsgericht of Frankfurt-AM-Main, in the case just discussed that was dealt with later by the GFCC, the ECJ asserted absolute primacy of **any** EC legally binding measure over **every** provision of the national law. In particular it declared:

> In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, *however framed*, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either *fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure*. (emphasis added)[44]

In fact it was a statement about the scope of application of supremacy principle and only then about judicial *kompetenz-kompetenz* as such. The courts were considering a possible case where a clash between Community law and national constitutional provisions may occur. On the facts of the case before them all the judges agreed that the Community and the national constitutional norms were adopted *intra vires*. Still, the *kompetenz-kompetenz* question was implicitly discussed.

First of all, it should be highlighted that in both cases brought before the constitutional courts national referring courts asked the former to examine the constitutionality of EC measures and in such a way asserted the competence of the national constitutional judiciary to do so. Moreover, the Verwaltungsgericht referred the question as to the constitutionality of the Community measures to the Bundesverfassungsgericht when it already had obtained the preliminary ruling from the ECJ confirming the validity of the measures at stake in the light of Community law. And if the Corte

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[43] Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

[44] *Ibid.*, para. 3.

Costituzionale admitted only a theoretical possibility that Community law could infringe national constitutional principles and added: "it should be excluded that this Court can control individual [EC] regulations"[45], its German equivalent went forth and virtually obliged German courts to refer to it questions as to the constitutionality of the Community measures when courts already had obtained an interpretation of such measures given by the ECJ and nevertheless regarded the Community rule as incompatible with the German Constitution[46].

So, both constitutional courts – Italians more theoretically and German practically – secured for themselves the role of the final arbiter of the Community measures' constitutionality and thus their applicability within the respective national legal orders. It was quite far from the ECJ claim that the "validity of measures adopted by the institutions of the Community can only be judged in the light of Community law"[47]. But, beyond these explicitly articulated positions as to which legitimately enacted provisions should be counted as supreme law some implicit anxiety that the Community in principle could act *ultra vires* sounded in the text of these early judgments, at least in the Italian one:

> [L]egislative competence of the organs of the EEC is laid down by Article 189 of the Rome Treaty as *limited to matters concerning economic relations* [...], but the precise and exact provisions of the Treaty provide a safe guarantee, so that it appears difficult to form even abstractly the hypothesis that a Community regulation *can have an effect in civil, ethico-social, or political relations* through which provisions conflict with the Italian Constitution. (emphasis added)[48]

[45] *Frontini v. Ministero Delle Finanze* (supra note 35), para. 21.

[46] *Internationale Handelsgesellschaft* before the GFCC (supra note 38), para. 35.

[47] *Internationale Handelsgesellschaft* before the ECJ (supra note 43), para. 3.

[48] *Frontini v. Ministero Delle Finanze* (supra note 35), para. 21.

Thereafter German, Italian and EC highest courts have modified and developed their position, but never renounced their fundamental claim to preserve for themselves the right to be the final adjudicator of legal measures validity within their respective legal orders.

In response to the Bundesverfassungsgericht's denunciation of the lack of "a codified catalogue of fundamental rights"[49] decreed by "parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level"[50] the ECJ developed a substantial human rights case-law and a human rights clause was inserted in the Community primary law[51]. That persuaded the GFCC to mitigate its position and hold in its well-known so-called Solange II judgment[52]:

> *[S]o long as* the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in *so far as* they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court *will no longer exercise its jurisdiction* to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such

[49] *Internationale Handelsgesellschaft* before the GFCC (supra note 38), para. 23.

[50] *Ibid.*

[51] Since Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms [1977] O.J. C103/1 was adopted on 1 April 1977 respect for human rights as a principle of Community law was reiterated in the Preamble of Single European Act [1987] O.J. L169/1 and inserted in the Treaties' body by Art. F of the Treaty on European Union [1992] O.J. C 224/1.

[52] Case 2 BvR 197/83 *Re the Application of Wünsche Handelsgesellschaft* [1987] 3 C.M.L.R. 225.

> legislation by the standard of the fundamental rights contained in the Constitution; references to the Court under Article 100(1) for that purpose are therefore inadmissible. (emphasis added)[53]

Beyond doubt it was a landmark decision that defused the controversy between the ECJ and the GFCC, yet for the purposes of this paper the main words in the cited extract are: "so long as" (that gave the unofficial name of the case Solange II) and "will no longer exercise its jurisdiction". This expression means that the GFCC did not decline its jurisdiction as well as not acknowledging the absolute jurisdiction of the ECJ as to the acts of the Community institutions, but merely stating that until declared conditions were fulfilled the German Constitutional Court will forego from exercising its jurisdiction over (at least some) Community matters. So, the principal *kompetenz-kompetenz* issue was left without solution.

Meanwhile it appears that the Corte Costituzionale even strengthened its position as a guard of Italian constitutional principles from possible infringement by acts of Community institutions. In its judgment *Fragd v. Amministrazione delle Finanze dello Stato*[54] it insisted on its

> competence to verify whether or not a Treaty norm, as interpreted and applied by the institutions and organs of the EEC, is in conflict with the fundamental principles of the Italian Constitution or violates inalienable rights of man. […Because s]uch a conflict, while being highly unlikely, *could still happen*. (emphasis added)[55]

In *Frontini* the Corte Costituzionale employed a cautious formula "it appears difficult to form even abstractly the hypothesis" that a Community provision might conflict with that of the Italian Constitution, in *Fragd* it was more straightforward: "conflict, while being highly unlikely, could still happen".

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[53] *Ibid.*, para. 48.

[54] Case № 232/1989 *Fragd v. Amministrazione delle Finanze dello Stato*, in *The Relationship between European Community Law and National Law: the Cases* ed. by A. Oppenheimer, Cambridge University Press, 1994, pp 653-662;

[55] *Ibid.*, para. 3.1.

The ECJ has repeatedly reiterated since its judgment in *Stauder*[56] that "fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court"[57] and that – since *Nold*[58] – "in safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the member states".[59] The Italian Constitutional Court, however, reasonably paid attention to the lack of clarity in the expression "constitutional traditions common to the member states" and based its claim to reserve its (potential) jurisdiction over the Community's acts in particular on the fact that:

> at least theoretically, it can not be stated absolutely that all the fundamental principles of the Italian constitutional order are to be found amongst the principles which are common to the legal orders of the other Member States and are therefore included in the Community legal order.[60]

So, on the eve of the most significant transformation of Europe the dispute between the ECJ and two constitutional courts of the member states focused on the question who had the jurisdiction to declare Community measures void or inapplicable in a case where they infringe constitutional human rights guarantees or other fundamental principles of national constitutions. In practice, the courts had managed to escape a possible constitutional clash, yet theoretically the question at stake had been left open.

Eventually in the 90-s the GFCC made an attempt to dot the i's and cross the t's in its comprehensive Maastricht judgment[61]. Its reference point was that

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[56] Case 29-69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419.

[57] *Ibid.*, para. 7.

[58] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491.

[59] *Ibid.*, para. 13.

[60] *Fragd v. Amministrazione delle Finanze dello Stato* (supra note 54), para. 3.1.

[61] Case 2 BvR 2134/92 & 2159/92 *Manfred Brunner and Others v The European Union Treaty* [1994] 1 C.M.L.R. 57.

> Germany is one of the 'Masters of the Treaties', which have established their adherence to the Union Treaty concluded 'for an unlimited period' (Article Q) with the intention of long-term membership, but could also ultimately revoke that adherence by a contrary act. *The validity and application of European law in Germany depend on the application-of-law instruction of the Accession Act. Germany thus preserves the quality of a sovereign State* in its own right and the status of sovereign equality with other States within the meaning of Article 2(1) of the United Nations Charter of 26 June 1945. (emphasis added)[62]

So, from the GFCC's viewpoint it is the member states that remain the source of the Union's (as well as Community's) powers and competences. Thus, EC/EU does not enjoy power to determine its power[63]. According to the conferred powers principle the EC/EU is empowered to act only in the spheres where the member states empowered it to act[64]. Contrary to the ECJ's very active purposive interpretation of the Treaties the GFCC stated:

> Although under that principle a specific provision conferring duties or powers can be interpreted in the light of Treaty objectives, a *Treaty objective is not by itself enough to create or extend duties or powers*. (emphasis added)[65]

Finally, the GFCC claimed its own *kompetenz-kompetenz*:

> Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a 'competence to round-off the Treaty' as a whole, and on the basis of considerations relating to the 'implied powers' of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers ('effet utile'), in future it will have to be noted as regards interpretation of enabling

[62] *Ibid.*, para. 55, see also para. 77.

[63] *Ibid.*, paras. 59, 61, 67, 72.

[64] Para. 63 of the judgment stated that "The requirement of an attribution of powers under the Treaties had always been a basic feature of the Community legal order; the powers of the individual States have always been the rule, those of the Community, the exception."

[65] *Ibid.*, para. 98.

> provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. *Such an interpretation of enabling rules would not produce any binding effects for Germany*.(emphasis added)[66]

It is true that *kompetenz-kompetenz* was not explicitly mentioned in the quoted extract. However, the GFCC stated that the power of the EC had been circumscribed by the Member States in the Treaties. The scope of the EC/EU law's legitimate insertion in the national legal order was laid down by means of a national legislative instrument approved by the national legislature. So, legislative *kompetenz-kompetenz* remained for the member states and not for the Union. Since review of the constitutionality and interpretation of national legislative measures is a duty of the Constitutional court it is obvious that it is the GFCC (and other national highest courts of the member states) that possesses the judicial *kompetenz-kompetenz* in regard to the EU/EC.

Moreover, the GFCC directly challenged the practice to expand EC competences evading formal Treaty amending by means of article 235 (now art. 308) TEC which was widespread in the EEC in the 80-s. Bearing in mind that at that time the ECJ never had held that the EC exceeded its competence it is clear that the GFCC reserved for itself to identify when Treaty interpretation in fact substituted Treaty amendment and thus "would not produce any binding effects for Germany". Since any other court was not empowered to declare legal measures void (or that it would "not produce any legal effect") **in Germany** it left no doubt that the GFCC declared its own *kompetenz-kompetenz*.[67]

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[66] *Ibid.*, para. 99.

[67] Due to restrictions of the length of this paper we do not examine the GFCC's claim here leaving that for the final part of the dissertation. In this context it is enough to take note that such a claim took place. For interesting and instructive discussion as to the topic see *Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling – Weiler/Haltern Debate* http://www.jeanmonnetprogram.org/papers/96/9610.html .

Shortly after the GFCC handed down its Maastricht judgment, the Treaty on European Union was challenged before the Danish Supreme Court[68]. Generally in its reasoning and decision outcome the highest Danish court followed its German counterpart. However, it articulated its claim to get a *kompetenz-kompetenz* even more clearly:

> [T]he courts of law cannot be deprived of their right to try questions as to whether an E.C. act of law exceeds the limits for the surrender of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an E.C. act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an E.C. act which has been upheld by the European Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession. Similar interpretations apply with regard to Community law rules and legal principles which are based on the practice of the European Court of Justice.[69]

The Danish Supreme Court held that in principle all Danish courts possessed the *kompetenz-kompetenz* when "with the required certainty" it could be established that the EC acted beyond the power conferred on it by member states and the ECJ upheld such an action.

Summing up *kompetenz-kompetenz* discussion under the first pillar it could be concluded that even though the highest courts of at least some member states have refrained themselves from declaring any EC measure (including the ECJ's ruling) void, they more or less clearly claimed their own *kompetenz-kompetenz* to decide whether EC acts are *intra* or *ultra vires*. What is also essential is that the Italian Constitutional Court, the GFCC and the Danish Supreme Court derived EC power not from the Treaties as such, but from provisions of national constitutions that allow transfer of power to international organisations and from national legislative measures based on such

[68] Case *Hanne Norup Carlsen and Others v Prime Minister Poul Nyrup Rasmussen* [1999] 3 C.M.L.R. 854.

[69] *Ibid.*, para. 33.

constitutional provisions by means of which Treaties were ratified[70]. For these courts national constitutions remain the basic law in the strict sense and thus Community competences is asserted as based on and derived from the national constitutions. As a guard of national constitutions these courts reserve for themselves the right to be an ultimate arbiter of the constitutionality of EC measures.

That does not mean that the courts intend to perform the ECJ's business as to the review of EC measures against the Treaties, but to go over whether the Community as such notwithstanding which institution acts on its behalf goes beyond the limits of EC competence. Perhaps it is worth stressing again that all highest courts which challenged the ECJ's *kompetenz-kompetenz* appealed to a national act of accession to EC or to a relevant ratification instrument that inserted amending treaties provisions into a national legal order as a basis of the surrender of sovereignty. Consequently they have never claimed the right to interpret Community law instead of the ECJ or to override the ECJ's construction of EC law. On the contrary, highest national judiciaries asserted that they called on to interpret national law which laid down the extent of transfer of power from national to supranational level and thus circumscribed the scope of EC competence. In turn, the ECJ claims its own monopoly to examine validity (or rather to declare invalidity) of Community measures whatever the basis of the challenge to them[71]. The main (and it should be recognised

[70] The House of Lords took the similar approach in the *Factorimate* and subsequent cases deriving the supremacy of Community law from the European Community Act 1972. See inter alia para. 4 of the case *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1990] 3 C.M.L.R. 375, para. 15 of the case *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 C.M.L.R. 391. As well French Cour de Cassation in *Café Jacques Vabres* [1975] 2 C.M.L.R. 336 and Counceil d'Etat in *Raoul Georges Nicolo* [1990] 1 C.M.L.R. 173 deduced primacy of EC law from the Article 55 of the French Constitution and not from Treaties provisions as such.

[71] See the case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

strong) rationale for the ECJ's assertion is a requirement for the uniform application of EC law over the whole territory of the EC[72].

Therefore, the perception of the *kompetenz-kompetenz* in regard to the Community law from the viewpoint of highest courts of some member states[73] and that of the ECJ could be asserted as a theoretical deadlock[74] which has never turned into overt conflict. Moreover, pressure from the national judiciary has forced the ECJ to employ and develop human rights concepts and abstain from intervention in the very sensitive sphere of national identity protected by national constitutions as in the case of the abortion ban in Ireland[75]. In turn the Bundesverfassungsgericht, the leading opponent of the ECJ, mitigated its position as to the subsequent constitutional review of the Community measure in *Solange II*. Consequently, it could be argued that the declared basic disagreement between the highest national and European courts concerning *kompetenz-kompetenz* induced an implicit dialogue between the judiciaries at the national and European levels and persuaded both to converge their position to some extent. In response to this theoretical challenge scholars brought about the theory of constitutional pluralism to find a way out of the theoretical

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[72] *Ibid.*, para. 15: "requirement of uniformity is particularly imperative when the validity of a community act is in question". See also e.g. joined cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415 [1991], para. 26: "uniform application [of Community law] is a fundamental requirement of the Community legal order".

[73] It seems that highest courts of some other member states i.e. UK and France have not dealt with *kompetenz-kompetenz* issue at all. See P. Craig and P. de Búrca *EU Law*, 3[d] edition, OUP, 2007, pp. 357, 371.

[74] This standstill is described and scrutinised in detail in chapters 2 and 3 of Mattias Kumm *Who is the Final Arbiter…* (supra note 5).

[75] See the case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR 4685. For different assertion of this judgment see *inter alia* Coppel & O'Neill, *The European Court of Justice: Taking Rights Seriously?* 29 CML Rev 669 (1992) and responding article Weiler & Lockhart, *'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, Parts I&II 32 CML Rev (1995). For the purposes of this paper it is crucial that the ECJ left it entirely to the national court to rule on this sensitive issue.

clash between the ECJ's EC-centred monism and the nation-state-centred monism professed by the highest national courts[76].

As stated above[77] the merits of the courts' positions and scholars' theories in the context of this problem will be scrutinised in the final chapter of this dissertation. Now this paper proceeds to the *kompetenz-kompetenz* issue under the third pillar of EU law.

3. *Kompetenz-kompetenz* under the third pillar: case-law in regard to the European Arrest Warrant

At the outset it should be mentioned that reasoning of the courts (as well as scholars) when they deal with the issue in question primarily employ the same arguments that they use as to the first pillar[78]. Yet, the police and judicial cooperation in criminal matters possesses its own characteristics which distinguish it from Community law. First of all, the stress on the intergovernmental nature of the cooperation. That appears in particular in:

1) the essentially reduced role of the European Parliament in the decision-making under the third pillar in comparison with the first one[79];

2) the absence of the Commission monopoly to draft and propose new legal measures[80];

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[76] See *inter alia* Mattias Kumm *Who is the Final Arbiter of Constitutionality in Europe?* (supra note 5); M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action* in N. Walker (ed.) *Sovereignty in transition* (Hart, 2003); N. Walker *The Idea of Constitutional Pluralism* (2002) 65 Modern Law Review 317.

[77] See supra note 67.

[78] See e.g. the judgment of the Polish Constitutional Tribunal on the case K 18/04 *On the conformity of the EU Accession Treaty with the Polish Constitution* where the PCT elaborated its view on the relationship between national and EU law http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf

[79] According to the Articles 39, 40a(2) and 42 of the EU Treaty the European Parliament should be consulted and informed as to some matters in the sphere of police and judicial cooperation and is empowered to "ask questions of the Council or make recommendations to it" and has no other powers within the scope of the third pillar.

3) the unanimity within the Council as a basic rule for adopting measures within the scope of the third pillar[81];

4) the lack of a directly applicable legislative instrument corresponding to a regulation under the EC Treaty[82];

5) the lack of the state responsibility for failing to fulfil obligations under the EU Treaty comparable with that under Articles 226-228 of the TEC;

6) the restricted and conditional jurisdiction of the European Court of Justice under the third pillar[83].

The highest courts of the member states as well as the ECJ took an opportunity to deliver their vision on the relationship between national and EU law within the scope of the third pillar in the context of the European Arrest Warrant (EAW). By way of background some words should be said

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[80] According to Art. 34(2) of the EU Treaty the Council adopts relevant measures "on the initiative of any Member State or of the Commission".

[81] See Art. 34(2) of the EU Treaty.

[82] Wording of Art. 34(2)(b) and (c) emphasises that decisions and framework decisions adopted under this Article "shall not entail direct effect"; common positions "defining the approach of the Union to a particular matter" mentioned in Art. 34(2)(a) due to their very nature are prevented from having direct effect; conventions established under Art. 34(2)(d) to entail direct effect within a member state legal order should be adopted in accordance with respective national constitutional requirements.

[83] According to Art. 35(2) of the EU Treaty Member States *could accept* the ECJ's jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under the third pillar and on the validity and interpretation of the measures implementing them. Consequently, Member States could not accept such a jurisdiction, moreover until they accept it the Court has no abovementioned jurisdiction. Furthermore according to Art. 35(5) "The Court of Justice *shall have no jurisdiction* to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security." (emphases added).

about the *Puino* case[84] in which the ECJ showed that it did not take distinctions between the Union's pillars outlined above very seriously. Employing arguments well-known from the history of how directives obtained direct effect within national legal orders[85] (while the Treaty's wording very clear distinguished them from regulations on this very ground), the ECJ tried to make a step towards establishment of the same effect for the framework decisions adopted under Article 34(2)(b) of the EU Treaty[86].

The French and Italian governments placed in doubt the admissibility of the application from the Tribunale di Firenze as "the Court's answer would not be useful in resolving the dispute in the main proceedings".[87] Supported in effect by the UK and Swedish governments they stressed that "in accordance with the very wording of Article 34(2)(b) EU, Framework Decisions cannot have […] direct effect"[88] and thus it is impossible to "apply certain provisions of the Framework Decision in place of national legislation"[89].

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[84] Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I- 5285.

[85] See the case 41-74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, the case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 1629 and following cases.

[86] Cp. the ECJ's statement in the *Pupino* (supra note 84): "When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU" (para. 43) with the wording of the ECJ's judgment on the case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135: "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [now Art. 249] of the Treaty" (para. 7).

[87] *Pupino* case (supra note 84), para. 23.

[88] *Ibid.*, para. 24.

[89] *Ibid.*

The ECJ rejected such objections since its jurisdiction to give preliminary rulings under Article 35 of the EU Treaty "would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States".[90]

It is symbolic that the ECJ handed down its judgment in the *Pupino* case momentarily after the French and Dutch people had rejected ratifying the Constitutional Treaty[91] which intended to abolish the 3-pillar structure of the EU and to declare the principle of EU law supremacy. Therefore, the ECJ showed that it had in mind to make and shape EU law as it used to do in regard to that of the Community and would try to carry out further integration by judicial means when politicians failed to succeed by more democratic instruments[92].

The extension of the principle of loyal cooperation to the third pillar in the *Pupino* is a good example of such an attempt to communitarise EU by judicial means. Employing its favoured although very broad and ambiguous concept of "ever closer Union among the people of Europe"[93] and purposive interpretation of the Treaty[94] the ECJ concluded that the mentioned principle (laid down in the Art. 10 of the EC Treaty, but had no equivalent in the EU Treaty) should be applied to

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[90] *Ibid.*, para. 38.

[91] The French and Dutch referenda which shelved the Constitutional Treaty took place on 29 May and on 1 June 2005 respectively, the Court delivered its judgment on *Pupino* on 16 June 2005.

[92] In this respect see the instructive article Vassilis Hatzopoulos *With or without you ... judging politically in the field of Area of Freedom, Security and Justice* (2008) EL Rev 33(1), 44-65. The author concluded that "the vast majority of the ECJ's judgments relating to the AFSJ are: a) delivered by the Full Court or, at least, the Grand Chamber; b) with the intervention of a great many Member States; and c) often obscure in content. This is due to the fact that the Court is called upon to set the foundational rules in a new field of EU law, often trying to accommodate divergent considerations, not all of which are strictly legal", p. 45.

[93] *Pupino* case (supra note 84), para. 41.

[94] *Ibid*., para. 42.

the area of police and judicial cooperation in criminal matters[95]. Then as it was the case with establishing the indirect effect of directives the main EU bench inferred from the principle of loyal cooperation (just extended to the third pillar) the national courts' obligation to interpret national law "in the light of the wording and purpose of the framework decision"[96].

For the sake of completeness it should be mentioned that in the *Pupino* the ECJ explicitly made the reservation that "the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity"[97] and "the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*"[98] as well as "[t]he Framework Decision must thus be interpreted in such a way that fundamental rights […] are respected"[99] – the latter was apparently made in order to appease the national judiciaries sensitive to the human rights issue.

The implicit response to the ECJ from national highest courts was not long in coming. Even before the ECJ established the obligation to interpret national law "as far as possible in the light of the wording and purpose of the framework decision" the Polish Constitutional Tribunal (hereafter – PCT) reviewed the constitutionality of the Polish Act[100] implementing the Council Framework Decision on the European arrest warrant[101]. The essence of the case was the incompatibility of the

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[95] The Italian and United Kingdom Governments in opposed argued that "unlike the EC Treaty, the Treaty on European Union contains no obligation similar to that laid down in Article 10 EC", *ibid*., para. 39.

[96] *Pupino* case (supra note 84), para. 43.

[97] *Ibid*., para. 44.

[98] *Ibid*., para. 47.

[99] *Ibid*. para. 59.

[100] Article 607t § 1 of the Code of Penal Procedure of 6 June 1997 as amended by Act of 18 March 2004 (Dz.U. 2004, No.69, pol. 626).

[101] Judgment of 27 April 2005 on the case P1/05 *Re Enforcement of a European Arrest Warrant* [2006] 1 C.M.L.R. 36.

framework decision in question with the provision of Article 55(1) of the Polish Constitution which prohibited Polish citizens' extradition.

The Polish Constitutional Tribunal faced the difficult choice between its belief that the Polish Constitution and only it constitutes the supreme law in the strict sense within the legal order of the Republic of Poland[102] and requirements of fair fulfilment of Poland's obligations under EU law. It should be borne in mind that contrary to the "old" member states for which the EU Treaty provides no liability for failing to fulfil their obligations under the second and third pillar, Article 39 of the Accession Act comprises a so-called disciplining clause for "new" members of the Union.[103]

Perhaps due to this dilemma the Polish Constitutional Tribunal deciding the case was very cautious. The PCT managed to pass between the Scylla and Charybdis: it held that the implementing Polish Act and the Framework Decision as such are incompatible with the Polish Constitution, yet postponed bringing its judgment into force and implicitly encouraged the legislature to amend the Constitution to avoid a constitutional clash.

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[102] Art. 8(1) of the Constitution of the Republic of Poland declares "The Constitution shall be the supreme law of the Republic of Poland"; moreover, the Preamble states that the Constitution is established "as the basic law for the State".

[103] Art. 39 of the *Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded* [2003] OJ L236/33 provides: "If there are serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty in a new Member State, the Commission may, until the end of a period of up to three years after the date of entry into force of this Act, upon motivated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities under which these measures are put into effect."

The PCT did not deal directly with the *kompetenz-kompetenz* issue, however some signs of its position in this matter can be found in the text of the judgment. Pointing out that framework decisions "essentially correspond with directives, with the sole difference however that the Treaty clearly precludes the possibility of the framework decisions having direct effect"[104] the Tribunal generally agreed that the obligation to apply consistent interpretation "cannot be ruled out" but stressed that "the obligation to apply a pro-EU interpretation of the national law has its limits"[105]. Less than a month later the PCT elaborated this notion in its landmark judgment as to the Polish accession to the EU[106] in which it manifested itself as a faithful disciple of its counterpart (and to some extent mentor) from Karlsruhe:

> The principle of interpreting domestic law in a manner "sympathetic to European law" […] has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution.[107]

In the same judgment the PCT unequivocally claimed the member states' legislative *kompetenz-kompetenz*:

> The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.[108]

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[104] The PCT's judgment of 27 April 2005 (see supra note 101), para. III-3.4.

[105] *Ibid.*

[106] Judgment of 11 May 2005 on the case K 18/04 *Poland's Membership in the European Union (the Accession Treaty)* http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf

[107] *Ibid.*, para. 14.

[108] *Ibid.*, para. 15.

However, the Constitutional Tribunal was much more ambiguous as to the judicial *kompetenz-kompetenz*. On the one hand it clear stated that:

> The direct review of the conformity with the Constitution of particular decisions of the ECJ, as well as the "permanent jurisprudential line" derived from these decisions, does not fall within the Constitutional Tribunal's scope of jurisdiction.[109]

On the other hand the PCT emphasized that "interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States."[110]. Furthermore, it could be concluded from paragraph 13 of the judgment[111] that if the ECJ's construction of the EU/EC provisions collided with the wording of the Polish Constitution, the PCT would reserve for itself the right to declare such case-law unconstitutional. Like the Bundesverfassungsgericht in Solange I[112] the PCT believes that it is for political bodies to solve such a collision by means of "amending the Constitution; or causing modifications within Community provisions; or, ultimately, by Poland's withdrawal from the European Union".[113] However identification of the possible clash between national constitutional and EC/EU laws remains the business for the constitutional court. Since the PCT did not recognise the pre-emption concept in the constitutional field (according to it the constitution could be "overruled" by an

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[109] *Ibid.*, para. 19.

[110] *Ibid.*, para. 16.

[111] "[C]ollision [between provisions of EC/EU law and Polish Constitution] may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union."

[112] See supra note 40.

[113] The PCT's judgment of 11 May 2005 (supra note 95), para. 13.

EU/EC measure just by means of constitutional amendments) it may be assumed that the PCT as a guardian of the Polish Constitution and constitutionality implicitly left for itself to judge whether the EU/EC acted within the scope of their (conferred) competence or if they invaded the field of (national) constitutional monopoly.

The next national judiciary which reviewed the constitutionality of a national Act implementing the EAW framework decision was the German Federal Constitutional Court[114]. At the outset three remarks should be made. First, while the PCT handed down its EAW judgment before the ECJ in the *Pupino* established an obligation for the national courts to interpret national law "as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU"[115] (but not *contra legem*[116]) the Bundesverfassungsgericht delivered its verdict a month later. Second, judges from Karlsruhe, the highest judiciary of one of the founder member states and the biggest member state, are used to arguing with their Luxembourg counterparts on an equal footing and felt themselves much more confident in explaining their views on the matter in issue than their counterparts from Warsaw. Third and last, Germany unlike Poland was not under the imminence of possible sanction for failure to fulfil its obligations to implement the framework decision concerned[117].

At the first site the GFCC dealt exclusively with the national implementing act and did not review the framework decision. It analysed the latter just from the viewpoint whether Union measure at issue had left room for manoeuvre for national legislator to avoid collision with national constitutional provisions and held that it had. Finally the Bundesverfassungsgericht declared

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[114] Judgment of 18 July 2005 on the case 2 BvR 2236/04 *Re Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant* [2006] 1 C.M.L.R. 16.

[115] *Pupino* case (supra note 84), para. 43.

[116] *Ibid*., para. 47.

[117] See supra note 103.

implementing act void, yet guided the legislature how to implement framework decision in compliance with Basic Law.

However, in the context of this paper not the main line of reasoning, but some dicta attract our attention. Even though there is no explicit dispute with *Pupino* in the GFCC's judgment, yet indirect discussion could be traced without any doubts. Considering the state of the case the Bundesverfassungsgericht made some general remarks concerning EU law. Firstly it stated that a "Framework Decision is situated outside the supranational decision-making structure of Community law"[118] and went on:

> Union Law is, in spite of the advanced state of integration, still an incomplete legal system that is intentionally characterised as a part of international law. Thus a Framework Decision must be adopted by a unanimous vote of the Council. It must be transposed by the Member States and *implementation via judicial decision is not a possibility*. The European Parliament, sole source of legitimacy of European Law, is merely "heard" in the legislative process (*cf.* Art.39(1) EU), which complies with the requirements of the principle of democracy in the context of the "Third Pillar", because the legislative bodies of the Member States retain their political power to shape legislation when it comes to transposition of the instrument, or *if necessary through a refusal of transposition*. (emphasis added)[119]

Therefore, according to the German Constitutional Court framework decisions constitute no more than an ordinary instrument of international law and until they have been implemented by the national legislature they are unable to produce any direct legal effect within the national legal order[120]. Moreover it could be concluded from the quoted extract that the GFCC took the dualist approach to the international law reserving for the national legislature the choice to fulfil or to

[118] The GFCC's judgment on the case 2 BvR 2236/04 (supra note 114), para. 81.

[119] *Ibid.*

[120] However it could be assumed that the GFCC did not deny an indirect effect of non-implemented framework decisions usual for the unratified international treaties as it is provided by the Art. 18 of the Vienna Convention of the Law of Treaties (1969).

violate state's international obligations by implementing or not a framework decision. It should be recognised that such an assertion is quite far from the *Pupino* requirement[121]. Moreover, the GFCC undoubtedly construed EU law in the opposite way than the ECJ did:

> By excluding direct applicability in the EU Treaty, the Member States specifically sought to prevent the case law of the European Court on the direct applicability of Directives being extended to Framework Decisions…[122]

The last statement directly concerned the *kompetenz-kompetenz* issue. It is quite clear that the GFCC sent out a signal to Luxembourg: if the ECJ tried to equal directives and framework decisions in their legal consequences for domestic legal orders of the member states, the GFCC would count such an interpretation as lying beyond the ECJ's competence. It is emblematic that both courts cited the wording of the Art. 34(2)(b) TEU as to the lack of the direct effect of the framework decision, but drew their conclusions like chalk and cheese. Still, it is not very surprising keeping in mind the longstanding relationship between Karlsruhe and Luxembourg marked by *Solange I, Solange II* and the *Maastricht* judgments.

The next highest national judiciary which dealt with the constitutionality of their national implementing instrument of the EAW was the Cyprus Supreme Court. It happened at the end of 2005[123] when its German, Polish, Greek and French counterparts had delivered their opinion as to the same matter[124]. Yet, it should be noted that the Cyprus legislature in fact passed all the

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[121] The dissenting opinion of judge Gerhardt on the judgment of the Second Senate of 18 July 2005 clear demonstrates that the German European Arrest Warrant Act could be (at least partly) interpreted consistent with the Framework Decision. GFCC's judgment on the case 2 BvR 2236/04 (supra note 114), paras. 185-202.

[122] *Ibid.*, para. 80.

[123] Judgment of 7 November 2005 on the case *Attorney General of the Republic v Konstantinou* [2007] 3 C.M.L.R. 42.

[124] *Ibid.*, paras. 14-16.

provisions of the framework decision concerned in the form of an act[125]. That means that the Cyprus Courts actually reviewed the constitutionality of the framework decision as such.

What is more, the Cyprus constitution unlike for instance the Polish one does not contain a clear and unambiguous ban on the extradition of Cyprus citizens. Article 11(2) thereof merely provides: "No one shall be deprived of his liberty, unless and until the legislation provides otherwise in the cases of…" and gives an exhaustive list of such cases. There is no extradition of citizens among the listed exclusions. Still the Supreme Court in its earlier judgment of *Gregoriou* held:

> [T]he procedure for the extradition of fugitives from justice, which is envisaged in the relevant legislation, concerns solely aliens. On the contrary, in the case of Cypriot nationals, extradition is strictly forbidden in view of the provisions laid down in Art.11.2(f) of the Constitution.[126]

Thus, the Cyprus judicature decided that the EU measure adopted under the third pillar could not override not just the clear wording of the Cyprus Constitution, but also the interpretation given to the Constitution by the Supreme Court. In substance, the Court following their German and Polish counterparts stated that

> [The framework decision concerned] does not have a direct effect. It is only through the relevant legal procedure, which is applicable in each Member State, that the aims of the Framework Decision shall be transferred in the legislation currently in force. This has not happened in our country for the reason that the provisions of the Act contradict the provisions of the Constitution, reference to which has already been made.[127]

Furthermore, the Court noted that it was aware of the ECJ's *Pupino* ruling, but "no provision in the Act, which was promulgated by the House of Representatives, could be interpreted in such a way so as to prevail and to be applied as regards the nationals of the Republic"[128]. From the formal point of

[125] *Ibid.*, para. 3.

[126] *Ibid.*, para. 20.

[127] *Ibid.*, para. 22.

[128] *Ibid.*, para. 24.

view there was no contradiction between the *Pupino* requirement and the Cyprus Supreme Court's approach in the *Konstantinou*. The Cyprus highest bench construed the national constitution, the supreme national law, in such a way that did not allow it to reconcile the national Act implementing the EAW with the constitution provisions. As the ECJ did not required national courts to interpret national law "in the light of the wording and purpose of the framework decision" *contra legem* the Cyprus Supreme Court did not infringe such a requirement. However, even though no justice delivered an dissenting opinion which evidenced possibility of different, more pro-European, interpretation of the Cyprus constitution[129], the doubts concerning unavoidable contradiction between the EAW implementing Act and the national Constitution still left.

As to the *kompetenz-kompetenz* the Cyprus Supreme Court did not deal with this issue directly. On the one hand it declared that it was aware and faithful "of the settled case law of the Court of Justice of the European Communities, pursuant to which the law of the European Union has primacy over the law of the Member States"[130]. On the other hand the Cyprus highest judiciary did not will to override its own construction of the national constitution to interpret the latter in conformity with the Framework Decision. Therefore, it is quite difficult to conclude the answer of the Cyprus Supreme Court to the *kompetenz-kompetenz* question more precisely not least because of the of judgement brevity.

Half a year after the Cyprus Supreme Court handed down its judgment the Czech Constitutional Court (hereafter – CCC) came to the point[131]. It was in a better position than its Polish peers since the Czech Constitution did not clearly prohibit extradition but merely provided that "no citizen

[129] It was one of the arguments of the Attorney General: "the provisions of the Act could be applied by using an interpretation so as to be in harmony with the provisions of Art.11 of the Constitution and in particular para.2(c) thereof", *ibid*., para. 12.

[130] *Ibid*., para. 23.

[131] Judgment of 3 May 2006 on the case *Re Constitutionality of Framework Decision on the European Arrest Warrant* [2007] 3 C.M.L.R. 24.

might be forced to leave his homeland"[132] and thus left wider room for Euro-friendly interpretation of the constitutional provision in question. The CCC seized this opportunity and delivered a compromise decision. On the one hand it held that the national implementing instrument was consonant with the Constitution and reiterated a Euro-friendly approach to the construction of the national law[133].

On the other hand the constitutional bench made a reservation that it "refused to recognise the ECJ doctrine insofar as it claims absolute primacy of EC law"[134] and went on to virtually restate the position of the Italian and German constitutional courts formulated in *Fragd* and *Solang II* as well as in the CCC's own decision in *Sugar Quota Regulation II*[135]:

> [D]elegation of a part of the powers of national organs unto organs of the European Union may persist only so long as these powers are exercised by organs of the European Union in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understanding that, unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court […] will not review individual norms of Community law for their consistency with the Czech constitutional order.[136]

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[132] Art. 14(2) of the Constitution of the Czech Republic.

[133] The CCC's judgment of 3 May 2006 (supra note 131), para. 85 stated: "If the Constitution […] can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the European Union, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it".

[134] *Ibid.*, para. 77.

[135] The judgment of 8 March 2006 on the case *Sugar Quota Regulation II* http://angl.concourt.cz/angl_verze/doc/p-50-04.php.

[136] The CCC's judgment of 3 May 2006 (supra note 131), para. 77.

Then the Court noted that the case concerned "involves not Community law in the classic sense, that is under the First Pillar, rather Union law under the Third Pillar"[137] and stressed that in its view "unless they are implemented into national law, framework decisions cannot be invoked against natural or legal persons"[138]. However, it left open the main question whether it is empowered to review the constitutionality of a "framework decision, which leaves no room for discretion as to the choice of means"[139]. According to the CCC the answer to this question should be given by the Luxembourg Court:

> The ECJ left open the issue of what obligation national courts have in a situation where they cannot interpret their national law in conformity with a framework decision.[140]

The Czech constitutional judiciary did not directly deal with the *kompetenz-kompetenz* issue. From the general context of the judgment one could draw the conclusion that the CCC's approach was more pro-European than that of its Polish counterpart and much more so than the GFCC's or Cyprus Supreme Court's. Still the Brno judicature claimed legislative *kompetenz-kompetenz* for the national legislature:

> If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, then it is up to the Constituent Assembly alone to amend the Constitution. Naturally, the Constituent Assembly may exercise this authority only under the condition that it preserves the essential attributes of a democratic law-based state (art.9 para.2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art.10a of the Constitution can transfer the authority to modify these attributes.[141]

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[137] *Ibid.*, para. 79.

[138] *Ibid.*

[139] *Ibid.*, para. 80.

[140] *Ibid.*, para. 82.

[141] *Ibid.*, para. 106.

Since "interpretation of constitutional law" falls within the ambit of the constitutional court and not of that of the ECJ it could be tentatively assumed that the CCC presumed its own judicial *kompetenz-kompetenz* even though it did not state that clearly[142].

Due to the restrictions of this paper it is necessary to finish the description of the national decisions[143] as to the EAW and proceed to the ECJ's view. The Luxembourg Court received a reference asking it to review the validity of the EAW framework decision from the Belgian *Arbitragehof* (Court of Arbitration) on 29 July 2005 and delivered its judgment on 3 May 2007[144]. Thus, the ECJ was in the position that allowed it to take (as well as not to take) into account rulings of national judiciaries in regard to the matter in question. Formally the EC judges ignored the views

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[142] Court's majority was strictly criticised for such a caution by dissenting Justice Eliška Wagnerová who called to demarcate clear Court's approaches to the EU and EC measures: "[T]he doctrine formulated by the Constitutional Court in relation to Community law cannot be applied in relation to acts in the Third Pillar, or to national enactments implementing framework decisions. In such cases, the threshold for review cannot be lowered all the way to the level of the essential attributes of the democratic, law-based state, or the fundamental attributes of national sovereignty. On the contrary, in such cases the entire constitutional order must be applied as referential criteria for the adjudication of the constitutionality of the implemented framework decision" (para. 151 of the judgment).

[143] On 25 March 2003, France had amended its Constitution to enable the implementation of the Framework Decision on the European Arrest Warrant because the *Conseil d'Etat* decided that the Framework decision contravened the unwritten constitutional principle of the France that the latter should reserve the right to refuse extradition for criminal acts of a political nature (Opinion No. 368.282 of 26 September 2002) – see Jan Herman Reestman *Conseil Constitutionnel on the Status of (Secondary) Community Law in the French Internal Order*. Decision *of 10 June 2004, 2004–496 DC European Constitutional Law Review*, 1: 2005, p. 310. The *Areios Pagos* in its judgement No 591/2005 held that 'the warrant's execution was not opposite to any of the [Greek] Constitution's provisions', see the summary of the judgement in English in the Council document 11858/05, Annex A (available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545 &id=78), p. 3. In both cases the national judiciaries in fact presumed that national constitutional provisions and the framework decision must to be compatible with each other but the latter could not simply override the former.

[144] Case C-303/05 *Advocaten voor de Wereld VZ v Leden van de Ministerraad* [2007] ECR I-3633.

of their colleagues from the highest national courts, not mentioning any relevant national judgment in their own judgment. However, a tacit dispute took place.

It should be mentioned at the outset that the referring court unequivocally recognised the competence of the ECJ to deal with the challenge brought before the former court by virtue of the fact that the claimant actually challenged the validity of the framework decision and merely as a consequence – the validity of the national implementing instrument[145]. So, the Belgian referring court believed that "the Court [of Justice of European Communities] alone has jurisdiction to give a preliminary ruling on the validity of framework decisions"[146] and thus indirectly accepted ECJ's judicial *kompetenz-kompetenz*.

It was quite foreseeable that the ECJ tried to use the reference concerned to pursue integration in so sensitive sphere as judicial cooperation in criminal matters and to extend its own jurisdiction or at least to clarify the existence of its competence unexpressed in the Treaty wording. At the beginning the EC bench rejected the argument of the Czech government that the former has no jurisdiction to interpret the provisions of the Treaty of European Union:

> Under Article 35(1) EU, the Court has jurisdiction, subject to the conditions laid down in that article, to give preliminary rulings on the interpretation and validity of, inter alia, framework decisions, which necessarily implies that it can, even if there is no express power to that effect, be called upon to interpret provisions of primary law, such as Article 34(2)(b) EU where, as in the case in the main proceedings, the Court is being asked to examine whether a framework decision has been properly adopted on the basis of that latter provision.[147]

[145] *Ibid*., para. 14.

[146] *Ibid*., para. 15. The Belgian court explicitly stated that divergent views on the validity of framework decisions and 'the validity of the legislation which constitutes the implementation of those measures in national law jeopardise the unity of the Community legal order and adversely affect the general principle of legal certainty.' At para. 14. So the Belgian court was going further than the ECJ went in the *Pupino*. This is an example of the judiciary in an old member state referring a case to the ECJ in order to try to reinforce Community/Union law.

[147] *Ibid.*, para. 18.

There is a clear distinction between art. 234(1) of TEC and art. 35(1) TEU from which one could conclude that the founders of the latter deliberately did not empower the ECJ to interpret the Union Treaty. So, it is obvious that in this case the Luxembourg judiciary by its own decision established its jurisdiction to construe the Treaty wording. It is true that in the context of the judgment concerned the ECJ's reasoning sounds plausible[148]. Still bearing in mind the history of "judicial integration" within the scope of the European Communities one could foresee that it was the first but not the last step in the expansion of the ECJ's jurisdiction beyond the scope circumscribed by the EU Treaty wording.

Therefore, the question whether the ECJ went beyond the purview laid down for it by the Treaty founders in this specific case was left open. However it is obvious that the ECJ in the judgment concerned did not go outside the Union's competence as the framework decision was reviewed against the Treaty and the question was if the Council had chosen the appropriate instrument to embody its common will and not whether the Council had exceeded the Union's jurisdiction.

The bottom line of analysis made is that there are three main interpretations of the *kompetenz-kompetenz* under the third pillar. First represented by the Polish and Czech constitutional courts presumes that national courts are obliged to interpret national law, including constitutional provisions, as far as possible in the light of the EU law objectives and wording. Yet such an interpretation has its inherent limits: it is acceptable "so long as these powers are exercised by organs of the European Union in a manner that is compatible with the preservation of the foundations of state sovereignty"[149] and "does not threaten the very essence of the substantive law-

[148] The ECJ's arguments would have been even more convincing if it mentioned Art. 35(6) of the EU Treaty which suggests a broader jurisdiction for the Court since, in reviewing the legality of framework decisions and decisions on the ground of "lack of competence", the Court inevitably engages in EU Treaty interpretation.

[149] See supra note 136.

based state"[150] and (at least for the PCT) "in no event may it lead to results contradicting the explicit wording of constitutional norms"[151].

However, it seems that both constitutional courts reserved for themselves to define where such limits are laid down. Both of them faced with the constitutional challenge of the EAW had room for manoeuvre since neither the Polish nor Czech constitution employed the word "surrender" used as a main concept in the wording of the framework decision established by the EAW. It is clear that "extradition" and "surrender procedures" are similar but not identical concepts. And it is symbolic that the courts drew the opposite conclusion as to the compatibility of the EAW with their national constitutions[152]. Those courts derived the obligation of a member state to fulfil its EU commitments (particularly to implement a framework decision) from the relevant national constitutional provisions[153] (and not from the Treaty as such), but rejected "direct review of the conformity with the Constitution of particular decisions of the ECJ"[154]. In fact this position does not draw a clear-cut demarcation between the first and the third pillar.

Second, the more extreme approach which stresses the inter-governmental nature of the police and judicial cooperation in criminal matters is represented by the Bundesverfassungsgericht and to

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[150] *Ibid.*

[151] See supra note 107.

[152] It is true that the Polish Constitution provided for the direct ban of the citizens extradition while the Czech one just stated that "no citizen might be forced to leave his homeland", however it should be admitted that both provisions in principle could be interpreted as compatible as well as incompatible with "surrenders procedures".

[153] Art. 9 of the Polish Constitution: "The Republic of Poland shall respect international law binding upon it" and Art. 1(2) of the Czech Constitution "The Czech Republic shall observe its obligations resulting from international law" in conjunction with Art. 10a(1) therein "Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution."

[154] See supra note 109.

some extent by the Supreme Court of Cyprus[155]. It stipulates that the Union's law approved under the third pillar does not enter into the domestic legal order until it is implemented in accordance with national constitutional procedures. Legal measures passed by the Council do not oblige national legislatures to put them into effect. The GFCC noted that a framework decision is an instrument of international law and thus it is the national parliament's discretion to enact it or not[156]. It is obvious that from Karlsruhe's viewpoint the ECJ's jurisdiction under Art. 35 of the EU Treaty is restricted to interpretation of the secondary EU law as far as it is properly (constitutionally) implemented in the national legal order. Beyond this the ECJ's construction of EU law does not call forth any legal consequences for national courts. Furthermore, it seems that it was the least of the Bundesverfassungsgericht worries that nullification of an implementing measure on the ground of its unconstitutionality inevitably leads to (at least temporary) failure to fulfil the state's obligations under the EU Treaty[157].

Another approach took the ECJ which circumspectly pushes the communitarisation of EU law by means of employing time-proved reasons like an *effet utile*[158] and the ECJ's favoured purposive

[155] The same position was presented by Justice Eliška Wagnerová in her dissenting opinion in the CCC's judgment of 3 May 2006 (supra note 131).

[156] As was noted above the GFCC took the dualist approach to international law which stipulates that a state – signatory of an instruments of international law – enjoys the right to violate its international obligation by not ratifying signed document.

[157] As it was the case with the Cyprus judgement the GFCC's judgment from the formal point of view did not infringe the *Pupino* requirement since the ECJ left to national courts the discretion "to determine whether […] a conforming interpretation of national law is possible" (para. 48). However as the dissenting opinion of judge Gerhardt showed the German Basic Law and the European Arrest Warrant Act could be interpreted in much more pro-European way.

[158] *Pupino* case (supra note 84), para. 38. The ECJ utilised *effet utile* argument to substantiate the much less controversial doctrine of interpreting national law in conformity with EU law where this does not require a *contra legem* interpretation.

interpretation[159]. It could be concluded finally that the last two positions claim *kompetenz-kompetenz* for the national highest courts (explicitly) and for the ECJ (cautiously and implicitly) while the first one inclines to some type of compromise stance:

> [I]nterpretation [of the Community law] should be based upon the assumption of mutual loyalty between the Community-Union institutions and the Member States. This assumption generates a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms.[160]

Even though this extract concerns Community law it could be applied to the third pillar without prejudice to the sense of position concerned. As it was noted above, the judicial *kompetenz-kompetenz* demand has not been articulated by the PCT and the CCC unambiguously, still the clearer claim for legislative *kompetenz-kompetenz* hints that even under this compromise approach the highest national courts reserve the last word as to the scope of the EU competences for themselves.

4. Constitutional *déjà vu*?

Examining the aforementioned recent cases it is difficult to dispose of the impression that the *kompetenz-kompetenz* dispute under the third pillar to some extent reruns that within the scope of Community law. That is why the *kompetenz-kompetenz* dialogue as to the first pillar was described

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[159] *Ibid.*, para. 42. As was pointed out above employing one of the most unambiguous objectives of the European Union namely "creating an ever closer union among the peoples of Europe" the ECJ controversially imported the principle of loyal cooperation from the EC Treaty into the framework of the EU. It is worth bearing in mind the fact that it was the principle which the ECJ utilised as a rationale for establishing 'indirect effect' of directives in the *Von Colson* (case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26).

[160] The PCT's judgment of 11 May 2005 (supra note 106), para. 16.

fairly fully in the second chapter of this paper. The following scrutiny will be focused on both types of reasons: common to the first and third pillar as well as concerning just the latter.

First and foremost it is worth stressing that the distinctions between the European and national judiciary's approaches to the *kompetenz-kompetenz* issue are quite logical and result from their very nature. As Mattias Kumm pointed out, claiming to be the final arbiter of the constitutionality of any legal measures, whatever the nature thereof within their domestic legal order, constitutional justices perform just "what they are expected to do by the people who have put them in office and to it they have sworn their respective oaths of allegiance"[161]. At the same time the ECJ's demand for the uniform application of EU law over the whole territory of the Union[162] is trenchant argument and such an application could be assured exclusively through the ECJ's jurisprudence[163]. Moreover, the power of the ECJ to review of the legality of EU/EC acts is directly settled in the Treaties wording[164]. Furthermore, Treaties set forth that one of the grounds for ECJ's review is "lack of

[161] Mattias Kumm *Who is the Final Arbiter*… (supra note 5).

[162] See paras. 42-43 of the case C-66/08 *Execution of a European arrest warrant issued against Szymon Kozłowski* (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0066:EN:HTML) as to the third pillar and supra note 72 in regard to the first.

[163] The optional character of the jurisdiction of the Court of Justice to give preliminary rulings on police and judicial cooperation in criminal matters (at least Denmark, Ireland and the UK have not made the declaration that they accept the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the EU Treaty – see the document *Jurisdiction of the Court of Justice to give preliminary rulings on police and judicial cooperation in criminal matters* available at: http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/art35.pdf) of course weakens uniform application argument of the ECJ. What more undermines this ECJ's rational is the lack of a doctrine of direct effect of EU law. Still the recent ECJ's judgment on the *Kozłowski* case (supra note 162) shows that the Luxemburg bench has been continuing to try importing concepts well established in Community law into the area of freedom, security and justice (it is not impossible that in such a way the ECJ reflected to the serious problem with ratification of the Treaty of Lisbon which arose as a consequence of the outcome of the Irish referendum).

[164] Art. 35(6) of the TEU and Art. 230(1) of the TEC.

competence"[165], however it is not clear to what sort of competence – institutional within EU/EC power or EU/EC as such – these provisions refer to.

The issue is further complicated by the lack in the Statute of the European Court of Justice of a competence-competence clause as in Art. 36(6) of the Statute of the International Court of Justice which provides "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". Therefore, dealing with the *kompetenz-kompetenz* problem within the EU one inevitably should recognise the existence of one or other type of constitutional pluralism within the European legal order. Each aforementioned approach to the issue in hand has its own well-grounded rationale and obviously not based merely on the ambitions of judiciaries. The problem stemmed from the fact that national and European judicatures unavoidably have different points of reference:

> If a dispute arises between the EU and one or more of its Member States as to the existence of a Union competence, then the EU and national court systems will each decide the matter in accordance with the logic internal to each judicial system. The ECJ will decide on the basis of its interpretation of the treaties and with a view to ensuring the uniform application of Union law. The national constitutional courts will decide with sole reference to the requirements of national constitutional law. Each legal system has its own hierarchy of norms, and, although both systems have influenced each other and partially overlap, each ultimately retains its own *rule of recognition.* If they come into conflict, their relation can only be one of right against right, a conflict in which there can be no *praetor.*[166]

However, nothing prevents scholars from assessment of strengths and weaknesses in the courts' reasoning. Apart from that, within the scope of this paper there was intent to elaborate peculiarities of the problem at issue under the third pillar particularly in the light of the European Constitution fiasco and obstacles with Lisbon Treaty ratification. This will be done in this part of the paper. Yet

[165] Art. 35(6) of the TEU and Art. 230(2) of the TEC.

[166] Gunnar Beck *The problem of Kompetenz-Kompetenz…*(supra note 28), p. 67.

as a starting point of further scrutiny it is worth saying some words about the seeming brilliant solution of the *kompetenz-kompetenz* issue proposed by prof. J.H.H. Weiler and his co-authors in their article "European Democracy and Its Critique":

> We would propose the creation of a Constitutional Council for the Community, modelled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution, any Member State or by the European Parliament acting on a Majority of its Members. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the Constitutional Council no single Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a Union solution by a Union institution.[167]

This proposal has been reiterated by the author[168] and discussed by scholars[169]. Still it ignored one of the Bundesverfassungsgericht's main counterarguments against the EU and particularly the ECJ's *kompetenz-kompetenz* namely the lack of the European demos and thus the deficit of

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[167] J.H.H. Weiler and U. Haltern & F. Mayer *European Democracy and Its Critique* http://www.jeanmonnetprogram.org/papers/95/9501ind.html#V .

[168] See e.g. J.H.H. Weiler & Ulrich R. Haltern *The Autonomy of the Community Legal Order – Through the Looking Glass* http://www.jeanmonnetprogram.org/papers/96/9610-The-2.html; J.H.H. Weiler *To be a European citizen - Eros and civilization* (1997) Journal of European Public Policy 4:4, p. 516-517; J.H.H. Weiler *A Constitution for Europe? Some Hard Choices* (2002) Journal of Common Market Studies 40(4), p. 573-574.

[169] For supporting opinion see e.g. Theodor Schilling *Rejoinder: The Autonomy of the Community Legal Order. In Particular: The Kompetenz-Kompetenz of the ECJ* http://www.jeanmonnetprogram.org/papers/96/9610-Rejoinde.html#fn255; for rather sceptical view see e.g. N Walker *Sovereignty and differentiation integration* (1998) European Law Journal 4(4), p.387.

democratic legitimacy at the supranational level[170]. Supplementation of the Council of Ministers by the Council of Judges in no way gives a satisfactory answer for this GFCC objection. If a majority in the proposed Constitutional Council (however counted) were empowered to interpret the scope of the EU/EC jurisdiction, that would mean the transfer (or at least firm confirmation that such a transfer already had been made) of sovereignty from national to supranational level. So, from (at least some) national constitutional court's viewpoint establishment of the European Constitutional Council is not an acceptable solution of the problem. At the same time the ECJ for a long time has been counting itself as a EU/EC constitutional court which possessed judicial *kompetenz-kompetenz* and has not seen any sense in the creation of an additional judicial body[171].

So, back on track after the aforesaid diversion let us focus on the third pillar. The GFCC as a main and the most sophisticated ECJ opponent put forward persuasive arguments[172]:

1) there is insufficient parliamentary control – at European and national levels – when measures concerning police and judicial cooperation in criminal matters are passing through the Council;

2) that lack of democratic legitimacy could and should be balanced out when the national legislature implements the framework decisions; consequently national parliaments reserve the right to refuse transposition;

3) that parliamentary discretion may not be substituted, restricted or influenced by the ECJ;

4) (temporary) non-implementation of a framework decision after the expiry of the time-limit fixed in its text does not infringe German participation in the European Union.[173]

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[170] Para. 41 of the FGCC's *Maastricht* judgment (supra note 7).

[171] See e.g. Ole Due *A Constitutional Court for the European Community* and F.G. Jacobs *Is the Court of Justice of the European Communities a Constitutional Court?* in the Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T.F. O'Higgins, ed. by D. Curtin & D. O'Keeffe, Butterworth, 1992.

[172] See paras. 80-81 of the FGCC's judgment of 18 July 2005 (supra note 114).

This message from Karlsruhe could be interpreted in a sense that the further integration in the area of freedom, security and justice could be advanced exclusively by means of Treaty amendment and not by judicial activism of the ECJ. However, the first attempt to fully communitarise the third pillar in the Constitutional Treaty failed and now, after the Irish people have rejected to ratify the Lisbon Treaty, the second effort is open to question[174]. That strengthens the GFCC's position and impugns the ECJ's essays in pursuing communitarisation of the third pillar through the back judicial door like it cautiously did in *Pupino* and in *Kozłowski*.

However if the Treaty of Lisbon nevertheless the current hardship with its ratification enter into force the things change substantially. Beside the provision that the ECJ

> shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security[175]

another current constraints of the ECJ's competence under the third pillar in comparison with the first one will be abolished. So it almost obvious that the Luxemburg judiciary will applies all Community law concepts like supremacy, pre-emption or direct effect to the area of freedom, security and justice. Still full analogy is incorrect. The Treaty of Lisbon provides that some member states namely the UK, Ireland and Denmark do not participate on the same basis with other member states in the development of the area of freedom, security and justice reserving for

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[173] This standpoint distinguishes the GFCC and the PCT since the latter in fact allowed unconstitutional provisions to remain in force for fulfilment of Poland's obligations under EU law.

[174] Beside the negative outcome of Irish referendum, Czech Republic cannot complete their ratification process until the Constitutional Court delivers its positive opinion on the accordance of the Lisbon Treaty with the Czech constitutional order (Presidency Conclusions of the Brussels European Council of 20 June 2008 11018/08, p.1) as well as German President Horst Kohler has decided not to sign the Germany's ratification instrument until the GFCC has confirm Treaty's compatibility with German Basic Law (http://www.dw-world.de/dw/article/0,2144,3443430,00.html) .

[175] Art. 276 of the Consolidated version of the Treaty on the functioning of the European Union [2008] OJ C 115/47.

themselves intergovernmental approach to the cooperation in this sphere[176]. Therefore part of future *acquis* in this area will be not applied in these three states and the interpretation of such *acquis* by the ECJ will be not binding upon or applicable within their jurisdictions.

In such a way some member states among other things protect themselves from the possible judicial "creeping integration" in the sensitive area of police cooperation and judicial cooperation in criminal matters in the case of their communitarisation through the amendments of the Treaties. Indirectly outlined stance of the UK, Denmark and Ireland strengthens the national courts' logic grounded on the assertion that the scope of the EU/EC competences is demarcated by each member state, 'a masters of the Treaties', which remains free to determine how much sovereignty to transfer to the supranational level and thus possesses the ultimate *kompetenz-kompetenz.*

Summing up all aforementioned it should be concluded that it is generally not correct to speak about constitutional *déjà vu* comparing the process of the judicial constitutionalization of the European Communities in the 60-s and 70-s and the attempts of the ECJ to communitarise EU in the 2000-s.

5. Conclusion

As we have seen there is no univocal answer to the *kompetenz-kompetenz* issue. Moreover, under the third pillar this issue has been discussed far less than within the scope of Community law. The position of the main potential discussant – the ECJ and the highest national judiciary – remains quite vague. Therefore it is correct to draw some tentative conclusions about current trends and signs bearing in mind the lack of well established practices and clear articulated stances of the parties.

[176] See Protocol № 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol № 22 on the position of Denmark [2008] OJ C 115/295 and 115/299 respectively.

There are some hints that ECJ tries importing some community law concepts into the Union's legal framework as it did as to the principle of loyal cooperation (*Pupino* case) or in regard to the doctrine of uniform interpretation (*Kozłowski* case). Doing so the European judiciary in effect indirectly widens the scope of its own and thus EU power contrary to the clear distinctions between EC and EU Treaties. Therefore one could deduce from that oblique ECJ's claim for the *kompetenz-kometenz* under the third pillar. Still it worth stressing that such a clime was cautious, tentative and implicit and quite far from the clear assertion that only ECJ is empowered to interpret the scope of Community competence like it was declared in the *Foto-Frost*[177].

In turn some of the national constitutional courts explicitly stated that they did not review constitutionality of the "particular decisions of the ECJ, as well as the "permanent jurisprudential line" derived from these decisions"[178]. From the viewpoint of others constitutional review of EU measures under the third pillar is a mindless exercise since they do not entail direct effect within the national legal orders. At the same time, the Bundesverfassungsgericht, the leading ECJ rival, manifestly utilizing its own construction of the Treaty's wording admonished the latter not to try to establish such an effect[179] "via judicial decision"[180]. So, the GFCC quite clear reaffirmed that it counts itself as an ultimate arbiter whether EU acts is *intra vires* as it did as to the EC in the Maastricht judgment.

Even though it may be assumed that the positions of the main discussants – the ECJ and the GFCC – in the dispute as to the *kompetenz-kometenz* under the third pillar generally speaking are the similar to their stances in regard to the Community law, these positions are articulated and grounded in a quite different way. Cautious attempts of the ECJ to communitarise EU law by judicial means are far from the brave constitutionalization of EC law in the 60-s and 70-s in the *Van*

[177] See supra note 71.

[178] See supra note 109 and *mutatis mutandis* para. 77 of the CCC's judgment of the 3 May 2006 (supra note 131).

[179] See supra note 122.

[180] See supra note 118.

Gend en Loos, *Costa*, *AERT* or *Van Duyn*. The main unwritten ECJ-made principles of EC law like direct effect or supremacy have not become EU "customary law" yet and it seems quite problematic that it is possible to import them into the area of freedom, security and justice through the ECJ's jurisprudence in the foreseeable future. Therefore, under the current circumstances the claim of the national judiciary for the *kompetenz-kometenz* under the third pillar is much more plausible than ECJ's.

Probably, the situation change essentially if the Treaty of Lisbon come into force. Communitarisation of the area of freedom, security and justice through the Treaties amendment give the ECJ a strong rational for applying to this area the same approach as it applies now to Community law. So one could expect that (if the Treaty of Lisbon enter into force) some highest national courts and European judiciaries more clear claim theirs own *kompetenz-kompetenz* as it was within the scope of EC law and neither the first nor the second exhaustively possess it.

Perhaps, such a relationship could be best described as a "cold peace"[181] between (the part of) highest national and highest EU judiciaries. That has led to the so to say dynamic and **shared *kompetenz-kompetenz***. The borderline of the EU legal order are being shaped in the dialogue or rather dispute between national and EU highest benches. As a history of such a discussion evidences neither national nor European judicatures will to escalate their virtual debate into the overt clash and sometimes take a step towards each other[182]. Therefore, that dynamic parity and

[181] The old article *Cold War & Cold Peace* (Times of Monday, Oct. 20, 1952) provided concise definition: "a cold peace means a sustained truce without a settlement".

[182] Within the scope of the Community law, for instance, the ECJ not long ago for the first time recognized that Community (not one of the Community institutions) had exceeded its power in intervening into the areas reserved for the exclusive member state's competence (the judgment of 5 October 200 on the case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECR I-8419). On the other hand the Bundesverfassungsgericht rejected the possibility to hold the unconstitutionality of the Community measure in the Banana case (supra note 9). Another example: the ECJ has refrained to restate as to the EU Treaty its statement that the Treaties constitute a "constitutional charter of the Community" (see the case 294/83 *Parti écologiste "Les Verts" v*

shared *kompetenz-kompetenz* is seemed to be acceptable and even inevitable for the meantime when the constitutional nature and the final ends of the EU remain ambiguous[183].

Finally, it would be wrong to overestimate the *kompetenz-kompetenz* issue. As Gunnar Beck properly pointed out, if the ECJ blatantly exceeded its power,

> the resultant political crisis at EU level would, analogously to a domestic crisis provoked by the perception of a national constitutional court overstepping the fine line of judicial power, necessitate a political resolution of the conflict between national governments and the Court where legal arguments about the Court's *Kompetenz-Kompetenz would matter little in the face of political will*. (emphasis added) [184]

After all courts and particularly the ECJ have neither the sword nor purse. So, they are powerful and influential as far as people and political bodies directly or indirectly formed by the people trust them. Therefore, persuasiveness of the ECJ's claim for the *kompetenz-kompetenz* ultimately depends on the further development and success of the European project as such and on the Luxembourg's bench wise self-restraint in politically sensitive matters when it could and should be necessary. If the European Union followed the USA (which is unlikely at the present stage of European integration), one day the ECJ would find itself in the position similar to the US Supreme Court namely as the ultimate arbiter of the constitutionality in Europe; if this is not the case, the highest EU judiciary inevitably will shape the boundaries of and the relationship between the European legal order and national laws together with its national counterparts.

European Parliament [1986] ECR 1339, para. 23 and the case *Beate Weber v European Parliament* [1993] ECR I-1092, para. 8).

[183] Cp. "The *Kompetenz-Kompetenz* problem will persist in its present form for as long as the EU derives its powers by conferral from Member States which themselves remain bound by their national constitutions and, for that reason, subject to review by their national constitutional courts." (Gunnar Beck *The problem of Kompetenz-Kompetenz*…, supra note 28, p. 67).

[184] Gunnar Beck *The problem of Kompetenz-Kompetenz*…, (supra note 28), p. 51.