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THE RELATIONSHIP OF THE EUROPEAN COURT OF JUSTICE WITH THE NATIONAL CONSTITUTIONAL COURTS

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I. INTRODUCTION

Dear Mr. President,
Ladies and Gentlemen,
Allow me first of all to express my grateful thanks to the Constitutional Court of Hungary and, in particular, to its President, Péter Paczolay, for the kind invitation to deliver the first presentation at this Symposium celebrating the 20th Anniversary of the Constitutional Court of Hungary.
Fifteen years after its creation and five years ago, the Constitutional Court of Hungary entered into the circle of what are now 19 constitutional courts operating in the European Union.*(1)* The significant increase in the number of national constitutional courts following the major enlargements of the European Union in 2004 and 2007 has not altogether simplified the delicate relationship between that particular section of the judiciary and the European Court of Justice. The question, fundamentally, is whether there is any basis – given the characteristics and special jurisdiction of the national constitutional courts – for assessing their relationship with our Court of Justice differently from that of the other courts of the Member States. Or, to put it another way: to what extent do the principles and criteria developed in regard to cooperation between the European Court of Justice and the national courts apply equally to constitutional courts?

II. INTERRELATIONSHIPS AT A PERSONAL LEVEL

As regards the nature of relations between our Court of Justice and the national constitutional courts, these can be either personal or institutional. Interrelationships at a personal level can arise from the fact that individual judges of the Member States' constitutional courts are sent to Luxembourg, or that members of the European Court of Justice may be appointed as judges at their respective constitutional courts when their terms of office come to an end. This personal aspect should not be underestimated or undervalued, because former constitutional judges who come to us are able to bring into our deliberations the wealth of experience acquired in their previous posts, while departing judges or advocates general who subsequently join their own constitutional courts can make effective use in their new posts of the knowledge acquired during their term in Luxembourg. If I have counted correctly, there exist at least 10 examples of both kinds of this personal element.

III. INSTITUTIONAL RELATIONS

Turning to institutional relations, I can report, first of all, that we actively seek and maintain contact with the national constitutional courts; we regularly participate in national, European or international events organised by them; we frequently receive delegations from individual constitutional courts in Luxembourg and we value those encounters highly, because they enable us to speak openly with our colleagues and to discuss problematic developments frankly. There really is no shortage of opportunities for bilateral or multilateral meetings, which are extremely useful for all who participate, in so far as they provide an appropriate forum for the exchange of information and ideas but also of concerns. Thanks to this lively exchange of information about the issues which concern us, we all know exactly what we are doing and which law we are applying.
The second area of institutional relations with the constitutional courts of the Member States is of a formal nature, because it is based on the Treaties establishing the European Communities and places the lively dialogue with the national courts in relation to the interpretation and application of Community law at the heart of the comments I am going to make. I am referring, specifically, to the tried and tested method of collaboration via the unique mechanism of the reference to the European Court of Justice for a preliminary ruling, which allows the Court to comment, where the opportunity to do so arises from legal disputes before the national courts, on the interpretation of the Treaties and of secondary Community legislation and on the validity of Community acts adopted on the basis of the founding Treaties.*(2)*

IV. IN PARTICULAR: THE PRELIMINARY RULING PROCEDURE

The 'preliminary ruling' procedure has particularly proved its worth over the past 50 years and continues to be, in

every respect, the main instrument for the development, enforcement and advancement of European Community law. Statistically, it gives rise to the most significant group of cases decided by the European Court of Justice,(3) and it would not be presumptuous to suggest that this form of cooperation between the national courts and the European Court of Justice is advantageous for both, because it is based on a clear division of responsibilities. The interpretation and application of national law, even where this is derived from Community law, is and remains the exclusive domain of the national courts. The European Court of Justice confines itself to interpreting or ruling on the validity of the relevant Community law, and directs the referring court to determine the dispute pending before it on the basis of that preliminary ruling. National law thus remains the national courts' very own domain, and the European Court of Justice concentrates on Community law, in order to ensure that this is interpreted and applied uniformly in all Member States. Thus, the concept underlying the preliminary ruling procedure is relatively straightforward and, so far as the national courts and tribunals are concerned, characterised by the fact that they may make a reference to the European Court of Justice if they are sitting at first instance or on appeal and are subject to appeal to a higher or supreme court, whereas they must bring the matter before the European Court of Justice if no appeal lies against their decision in a dispute. The absolute obligation to make a reference does not apply if the interpretation of the relevant Community law is clear, that is where previous decisions of the Court of Justice have already clarified the point of law in question, or where the correct interpretation of Community law is so obvious as to leave no scope for any reasonable doubt.(4)

1. The capacity of the constitutional courts to refer questions for a preliminary ruling

If we apply the concept just described to the constitutional courts of the Member States, it should be clear that, as the highest tier of the national judicial system, they fall within the second category and are obliged to refer questions to the European Court of Justice if the conditions for a reference are met. That is not to say that any hierarchy is thereby established as between the European Court of Justice and the constitutional courts; nor is it a question of the preliminary ruling procedure creating a superordinate/subordinate relationship. Instead, there is genuine cooperation, in which each side exercises its powers and respects those of the other. In fact, this cooperation does exist at the level of the constitutional courts, because a number of them use the device of making references, thereby giving the European Court of Justice the opportunity to give rulings on important questions of Community law. Thus, we note that questions have been referred by the Austrian Constitutional Court, the Belgian Constitutional Court, the Lithuanian Constitutional Court and the Italian Constitutional Court.(5) We hope to count soon the Hungarian Constitutional Court among this group of constitutional courts that are favourably disposed towards making references.

2. The position of the Italian Constitutional Court

To complete the picture as regards relations between the constitutional courts and the European Court of Justice, I should briefly describe how, after a lengthy period of hesitation, the Italian Constitutional Court recently sought a preliminary ruling from the European Court of Justice. It was apparent from the earlier case-law of the Italian Constitutional Court that, for a long time, the Corte costituzionale did not regard itself as a court or tribunal within the meaning of the Treaty provisions relating to the preliminary ruling procedure. The jurisdiction conferred on the Constitutional Court specifically in matters of constitutional law, and its position as the constitutional body with final, binding authority to monitor compliance with the Constitution, were considered to preclude any such classification.(6) By its order for reference of 15 April 2008, the Corte costituzionale has, for the first time, turned to the European Court of Justice.(7) The Italian court explains in that order that the power to refer questions for a preliminary ruling is determined not by national law but by Community law and, therefore, its status as a constitutional body cannot, per se, preclude a reference. In proceedings for the judicial review of legislation, which are not initiated by a specialist court but for which application is made directly to the Constitutional Court, the latter is the only body that is empowered to give a decision at Member State level. The interest from a Community law perspective in the uniform application of Community law would be significantly compromised if the Constitutional Court were unable to refer questions to the European Court of Justice for a preliminary ruling in such a situation.

3. The frequency of references for a preliminary ruling from constitutional courts

Notwithstanding the examples referred to, the fact remains that the national constitutional courts tend to be the 'outsiders' in terms of the frequency of their references, compared with the total number of references dealt with by the European Court of Justice. If we were to look for reasons we would soon find that, unlike the specialist courts, constitutional courts tend only rarely to be faced with questions of Community law. If a dispute concerns the law governing the organisation of the State, connections with Community law will rarely arise. The position may be different if fundamental rights are at issue, and a constitutional court is called upon to determine whether

measures adopted by State bodies responsible for transposing or implementing Community law are compatible with the fundamental rights enshrined in the national constitution or with the core values of the constitutional order in question.

V. PROBLEMS IN THE RELATIONSHIP OF THE CONSTITUTIONAL COURTS WITH THE EUROPEAN COURT OF JUSTICE

If we consider what happens in practice so as to be able to determine whether, and to what extent, problems have arisen in the relationship of the constitutional courts with the European Court of Justice, we see that tensions can arise in two categories of case where, and as a result of the fact that, disputes are pending before the constitutional courts of the Member States in which the criteria for the legal evaluation and validity of national legislation are provided both by European Community law and by the national constitution.*(8)* The first category of case concerns the review – as to their constitutionality – of national legislative provisions transposing (mainly) directives but also other Community law. Cases in the second category are characterised by the fact that the constitutional courts are required to address the question of the constitutionality of national laws ratifying the founding Treaties, including Treaty revisions.

1. National fundamental rights as a yardstick against which to review national legislation transposing Community law

Where a constitutional court is faced with the question whether national legislation transposing Community law is compatible with fundamental rights under the national constitution, a negative decision on the constitutionality of the provision at issue could have an impact on the validity of the directive transposed if, and in so far as, the national legislation – as is so often the case – merely mirrors the text of the Community act in question verbatim or in general terms. The solution to this conflict lies in the initiation of a preliminary ruling procedure, because, as we know, national courts and tribunals can – and do – put questions concerning the validity of secondary Community legislation to the European Court of Justice in order for the Community judicature to review the directive concerned with regard to its compatibility with European fundamental rights and, if appropriate, to declare it invalid.*(9)* It seems logical that the unlawfulness of a European act may be declared only by the court which is directly (via actions for annulment) and indirectly (via the preliminary ruling procedure) responsible for reviewing the lawfulness of Community acts. It is this simple consideration which justifies the fact that, while the European Court of Justice may not have an exclusive right of review, it does claim a monopoly on the annulment of acts of Community institutions, so as to ensure that those acts apply, or do not apply, uniformly throughout the whole of the European Union.

2. The position of the French Constitutional Council

It is worth mentioning the position of the French Constitutional Council in this connection, because it has a special role in France's constitutional order, as a rule operates preventively and, where appropriate, will not allow laws that have been passed by the National Assembly and the Senate to enter into force if they are incompatible with the Constitution. In recent decisions, the Constitutional Council has pointed out that, in those cases in which the national law at issue before it is derived from Community law, the immediate standard against which the law is reviewed is not the French Constitution but the Community law that is to be transposed; it thereby indicates that national laws are primarily to be assessed by reference to Community law. The Constitution can be involved only if the case touches on fundamental principles of the Constitution.*(10)* The reason given by the Constitutional Council for taking the Community legislation that is to be transposed as its standard for assessment is that the French Constitution provides in Article 88 1 for the participation of the French Republic in the European Union and for the transfer of certain sovereign rights to the European Union, from which it may be inferred that any irregular transposition is, equally, a breach of the Constitution. From a procedural point of view, it is worth noting that the Constitutional Council is calling upon the specialist courts, where appropriate, to initiate the preliminary ruling procedure, but itself claims the right to determine whether national legislation is consistent with Community law. The Constitutional Council justifies its practice by referring to the very short time-limits to which it must adhere under Article 61 of the French Constitution in the context of the preventive review of legislation.*(11)*

3. The review as to their constitutionality of laws ratifying the European Treaties

In the second and more difficult category of cases, it is the constitutionality of laws ratifying Treaty amendments that is under scrutiny. A constitutional court cannot and must not shirk its duty when, and in so far as, a dispute concerns the compatibility of national legislation with the national constitution. In the context of this judicial review of legislation, a constitutional court may conclude that the ratifying law, and thus ultimately also the proposed Treaty amendment, is unconstitutional, thereby giving rise to a constitutional conflict that requires

settlement. If ratification is nevertheless to proceed, the only possible solution is to amend the constitution in order, on the one hand, to establish a situation that is in conformity with the constitution and, on the other, to ensure that the requisite Treaty amendment can enter into force. This approach is well known and is used in order to remove constitutional uncertainties while, at the same time, facilitating ratification. While it is not very likely, it is not altogether inconceivable that a situation might arise in which the proposed Treaty amendment conflicts with constitutional norms forming part of the inviolable core of the constitutional order, and therefore falls outside the scope of the usual procedures for amending the constitution. I am conscious that it is not for me to suggest a way out of this difficult situation. It seems entirely clear to me that the solution must be found at the level of the Member State concerned, precisely because it is the Member States that are responsible for ratification and in fact take responsibility if ratification ultimately fails, with the result that the Treaty cannot enter into force. Whether that is to be regarded as a regrettable development or not, it does at least offer a neat solution, both politically and legally. Furthermore, it is one that is within the realm of possibility, as we know today after the saga of the ratification of the Lisbon Treaty, and as is powerfully demonstrated by the example of the failure of the Treaty establishing a Constitution for the European Union.

4. Constitutionality of ratifying laws subject to reservations

Real problems arise, however, in relation to the review of the constitutionality of laws ratifying Treaty amendments where constitutional courts, with obvious unease, nevertheless rule in favour of constitutionality, but do so in conjunction with a number of safeguards and reservations, thereby signalling their desire to influence or even to prevent what they perceive as undesirable developments in the European Union. The method adopted is particularly problematic, because the constitutionality of ratifying laws is not assessed according to the law currently in force but in relation to real or perceived risks to general constitutional principles. It is not damage repair that is key, but the concern about damage prevention. It is somewhat unfortunate that I find myself compelled on this occasion to comment on this aspect, but any discussion of the relationship between the European Court of Justice and the national constitutional courts would be incomplete without any comment on the judgment recently delivered by the Second Chamber of the Bundesverfassungsgericht (BVerfG) in respect of the Lisbon Treaty.*(12)* Please do not expect me to comment on every passage that merits discussion or even criticism; first, because there are so many and, second, because many of them are not covered by the subject of this address.*(13)* I hope you will understand, therefore, if I concentrate on just two aspects which appear, from the point of view of the European Court of Justice, to present particular problems.

5. The supervisory powers claimed by the Federal Constitutional Court

First of all, the Federal Constitutional Court claims the right to review acts of the European institutions and bodies with a view to determining whether they remain within the limits of the sovereign rights conferred on them by virtue of the limited powers granted, while preserving the European Union principle of subsidiarity. This process, described by the Federal Constitutional Court as an *ultra vires* check, which presumably also encompasses scrutiny of the case-law of the European Court of Justice,*(14)* is to be supplemented by an 'identity check' to determine whether the inviolable core content of the constitutional identity of the German Basic Law (Grundgesetz) has been preserved.*(15)* In plain English this means that the acts of, and decisions taken by, Union institutions may be subject to double scrutiny by the Federal Constitutional Court: first, with regard to observance of the safeguards under the Basic Law, which are subject to the 'immutability guarantee'; second, with regard to compliance with the principle of subsidiarity enshrined in the Union Treaties. Although this is not the first time that the Federal Constitutional Court has announced an *ultra vires* check,*(16)* there can be no doubt that the preservation of subsidiarity as a precondition for the validity of all legal acts of the European Union is a matter which falls to be assessed by the European Court of Justice and is covered by its monopoly on annulment, as evidenced not least by the fact that the Lisbon Treaty introduces a special claims procedure so that, with the substantial involvement of the national Parliaments of the Member States, the question of subsidiarity can be put to the European Court of Justice at the earliest possible stage.*(17)* But carrying out an identity check relating exclusively to the national constitution when actually exercising powers which have been conferred on the European Union is also highly conflict-laden because it places legal acts of the European Union, all of which are subject to review by the European Court of Justice as to their legality, and which can only be annulled or declared invalid by that court, within the national constitutional courts' powers of scrutiny, for the purposes of determining whether the integration-proof constitutional identity of the Member State concerned has been damaged. Both the ultra vires and identity checks mean, ultimately, that acts of the Union institutions may be open to review in 27 Member States in that they may be examined 27 times with regard to observance of the principle of subsidiarity under Union law and 27 times with regard to respect for the integration-proof identity of the Member State concerned. To describe the consequences as succinctly as possible and thereby paraphrasing the theory of a famous German-

born physicist, this would mean the introduction of an absolute theory of relativity for acts of secondary legislation under European Union law.

6. Authentic interpretation of primary law by the constitutional courts of the Member States?

The second area of criticism concerns the claim to the authentic interpretation of primary law if, and in so far as, sovereign rights are transferred to the European Union in areas of particular significance in terms of democracy. The major areas of democratic organisation include, according to the Federal Constitutional Court, citizenship, criminal justice, the civil and military monopoly on the use of force, basic decisions on tax in relation to income and expenditure, including borrowing, the organisation of family circumstances and education, the regulation of freedom of opinion and assembly and press freedom, and even how to deal with religious or ideological beliefs.*(18)* In so far as any transfer of sovereignty in all these areas is even permitted, the relevant provisions must be interpreted strictly. This notion is reiterated in light of the competences in relation to judicial cooperation in criminal and civil matters which are either newly established or reinforced by the Lisbon Treaty, and it is emphasised that, on account of the particularly sensitive issue of the effects of substantive criminal legislation or criminal procedural rules on democratic self-determination, the corresponding legal bases under the Treaty must be interpreted strictly, not broadly, and must be specifically justified in the event of their use.*(19)* To avoid the threat of unconstitutionality, the bodies of the European Union are obliged to exercise their powers in that regard in such a way that, both in terms of scope and of substance, sufficiently important matters which in legal and practical terms are a requirement for a vibrant democracy remain at Member State level.*(20)*

7. Risk of conflict with the jurisdiction of the European Court of Justice

No doubt we could argue over which areas of life can be described as being particularly relevant in terms of democracy, and we might well wonder why basic decisions on tax in relation to income and expenditure, the socio-political organisation of living conditions or issues relating to upbringing, education, and media regulation are inextricably linked with democratic self-determination, compared with other responsibilities of the State, and whether those areas are not at least equally closely connected to the internal market and therefore touch on fundamental principles of the European Union. If, however, the special relevance of democracy means that the transfer of sovereignty enshrined in the Treaties is in the care of the Member States' constitutional courts, which deliver binding rulings on the substantive nature of that transfer, by which the constitutional courts ultimately claim the right to give final judgment on the interpretation of the relevant primary law of the European Union, then this will conflict with the European Court of Justice's jurisdiction in relation to the interpretation of primary law. The founding Treaties leave no room for doubt as to the fact that, in accordance with an entirely reasonable division of responsibilities between the national courts and the Community judicature, the definitive interpretation of primary and secondary law is within the remit of the latter, since Article 220 EC has always provided that the Community courts, 'each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed'. While the European Court of Justice does not have a monopoly on the interpretation of the Union law that is directly applicable in the Member States, it does have the last word. And if that last word is that the transfer of State sovereignty enshrined in the Treaties is interpreted by the Court of Justice as going beyond that which, in the view of a constitutional court, the national constitution can bear, it does not mean that responsibility for the binding interpretation of primary law is suddenly vested in that constitutional court. Not even the subtlest construction of constitutional theory can possibly mean that the task of ensuring that in the interpretation and application of the founding Treaties the law is observed, a task which was assigned to the European Court of Justice under Article 220 EC, is suddenly within the remit of one or more constitutional courts. To determine definitively how primary and secondary law should be interpreted in respect of the whole of the European Union is, and remains, the most important function of the European Court of Justice.

VI. THE FUTURE

The preceding remarks should not create the impression that we are faced with a dramatic situation with unimaginable consequences as far as European integration is concerned. Much of what is obviously regarded as being undesirable or highly dubious can already be achieved and realised on the basis of the current Treaties, in so far as, and as soon as, the political will exists to strengthen integration. It is not entirely far-fetched, therefore, to assume that the reservations signalled by the Federal Constitutional Court refer above all to the development of the European Union, and are not inextricably linked to the fate of the Lisbon Treaty. The clear warnings sounded against signs that the European Court of Justice *(21)* is developing the law in a way that exceeds its remit and is not covered by the principle of conferred powers, which were expressed by the Federal Constitutional Court

in Karlsruhe in its Maastricht judgment, have not yet faded away. But it would be neither productive nor appropriate to the reputation and significance of the Federal Constitutional Court to regard my remarks as some sort of general reckoning with Karlsruhe. It is far more important to me to show where conflicts can arise in our relationship with the constitutional courts of the Member States, so that everyone is aware of his responsibilities. If I am to sum up, I would say that the constitutional courts do not have a special status with regard to the cooperation between the European Court of Justice and the national courts and tribunals that is based on the founding Treaties. They may have a great deal of influence in individual Member States and carry out eminently important work. In relation to the interpretation and application of European Union law, however, their responsibility is no greater or smaller than that of other courts and tribunals; they are required, under the relevant Treaty provisions, to make a reference to the European Court of Justice if they have doubts as to the interpretation of Union law or the validity of Union legislation. The European Court of Justice sets great store by smooth cooperation with the national courts and tribunals in this unique and very successful preliminary ruling procedure. We respect and take account of the exclusive jurisdiction and responsibility of the national courts in relation to the interpretation and application of national law, we refrain in every judgment from determining the validity of national legislation and we confine ourselves quite consciously and deliberately to issues of interpretation and application of Union law. It is for the national courts and tribunals alone to draw conclusions from our decisions in proceedings concerning references for preliminary rulings, which means that the division of competence is clear and each side has its own sphere of responsibility. It cannot be in anyone's interest to allow jurisdictional conflicts to arise which, even once resolved, leave scars and have a lasting detrimental effect on the essential relationship of trust. We at the European Court of Justice have always been, and continue to be, firmly committed to avoiding jurisdictional disagreements with national courts and tribunals, and particularly so with the constitutional courts. It will come as no surprise to anyone, however, that this circumspect approach has its limits when the competences which have been conferred on us and which we have exercised for half a century are under threat. To ensure that, in the interpretation and application of the European Treaties, the law is observed is, and remains, the task of the Community judicature, and we cannot, and will not, shirk our responsibility.

Footnotes:

(1) Of the 27 States of the European Union, only Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Sweden and the United Kingdom have no dedicated constitutional courts. France has a Constitutional Council, which, increasingly, is taking on the appearance of a constitutional court, while in Cyprus the functions of the constitutional court provided for in the Constitution are performed by the Supreme Court.

(2) See Article 234 EC, Article 68 EC and Article 35 EU.

(3) In 2006, a total of 537 cases were brought before the European Court of Justice, including 251 references for a preliminary ruling. In 2007, there were 580 new cases in total, including 265 references for a preliminary ruling. In 2008, there were 592 new cases, including 288 references for a preliminary ruling.

(4) The doctrine of 'acte clair': see Case 283/81 CILFIT and Others [1982] ECR 3415, paragraphs 14 and 16.

(5) See the summary in the Opinion of 2 July 2009 of Advocate General Kokott in pending Case C-169/08 Presidente del Consiglio die Ministri v Regione autonoma della Sardegna, footnote 13: following references from the Austrian Constitutional Court, judgments were delivered on 8 November 2001 in Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke ('Adria-Wien Pipeline') [2001] ECR I-8365; on 8 May 2003 in Case C-171/01 Wählergruppe Gemeinsam [2003] ECR I-4301; and on 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others [2003] ECR I-4989. References from the Belgian Constitutional Court (formerly Court of Arbitration) resulted in the judgment of 16 July 1998 in Case C-93/97 Fédération belge des chambres syndicales de médecins [1998] ECR I-4837; the order of 1 October 2004 in Case C-480/03 Clerens (not published in the ECR); and the judgments of 26 June 2007 in Case C-305/05 Ordre des barreaux francophones et germanophones and Others [2007] ECR I-5305 and of 1 April 2008 in Case C-212/06 Gouvernement de la Communauté française and Gouvernement wallon [2008] ECR I-1683. Case C-73/08 Bressol and Others and Case C-389/08 Base and Others are still pending, while the Belgian Constitutional Court has recently made references in two further cases (Case C-236/09 Asssociation Belge des Consommateurs Test-Achats, and C-306/09 I.B. v Council). Most recently, the Court of Justice delivered judgment on 9 October 2008 on a reference from the Lithuanian

Constitutional Court (Lietuvos Respublikos Konstitucinis Teismas) in Case C-239/07 Sabatuskas and Others (not yet published in the ECR).

(6) See the judgment of 29 December 1999, No 536, available at www.cortecostituzionale.it.

(7) Case C-169/08 Presidente del Consiglio die Ministri v Regione autonoma della Sardegna (pending).

(8) See the Chamber Decision of the Bundesverfassungsgericht (BVerfG) in proceedings for the judicial review of legislation concerning the constitutionality of a German provision serving to transpose Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the [European] Community (BVerfG, Order of 13 March 2007, 1 BvF 1/05, NVwZ 2007, p. 937).

(9) See Case C-305/05 Ordre des barreaux francophones et germanophone [2007] ECR I-5305 (judgment delivered on a reference from the Belgian Constitutional Court).

(10) Constitutional Council, Decision No 2006-540 DC of 27 July 2006 and Decision No 2006-543 DC of 30 November 2006, Recueil des décisions du Conseil constitutionnel 2006, Dalloz, Paris 2006, p. 88 et seq. and p. 120 et seq.

(11) See, in that regard, V. Skouris in: Merten/Papier (Ed.), *Handbuch der Grundrechte in Deutschland und Europa*, *Band VI/2, Europäische Grundrechte II – Universelle Menschenrechte*, C.F. Müller Heidelberg, 2009, § 171, *Nationale Grundrechte und europäisches Gemeinschaftsrecht*, p. 121 (p. 140 et seq.).

(12) Judgment of the Second Chamber of the BVerfG of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09 – Act ratifying the Lisbon Treaty.

(13) Criticism of the judgment of the BVerfG can be found in W. Frenz, Unanwendbares Europarecht nach Massgabe des BVerfG?, EuZW 2009, p. 297 et seq., M. Nettesheim, Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG, NJW 2009, p. 2867, and T. Oppermann, Den Musterknaben ins Bremserhäuschen! Bundesverfassungsgericht und Lissabon-Vertrag, EuZW 2009, p. 473. K.F. Gärditz/C. Hillgruber, Volkssouveränität und Demokratie ernst genommen, JZ 2009, p. 872 et seq., have declared themselves in favour. The contributions in German Law Journal, Vol. 10 No. 8/2009, p. 1201-1308 (e.g. C. Schönberger, p. 1201 et seq., D. Halberstram/C. Möllers, p. 1241 et seq., C. Tomuschat, p. 1259 et seq., A. Grosser, p. 1263 et seq., M. Niedobitek, p. 1267 et seq., and C. Wohlfahrt, p. 1277 et seq.) are predominantly critical.

(14) BVerfGE (Official Collection of decisions of the BVerfG) 89, 155 (209 et seq.): the court seeks to distinguish between the development of the law within the parameters of the Treaties, and law-making that goes beyond the limits of those Treaties and is not covered by current Treaty law. However, the law is (at least in part) developed by courts, and it cannot therefore be ruled out that the case-law of the European Court of Justice would also be subject to ultra vires checks.

(15) BVerfG cited in footnote 12, p. 241 et seq.

(16) BVerfGE 89, 155 (188): 'Were, for example, European institutions and bodies to implement or develop the Treaty on European Union in a way which was no longer covered by the Treaty in the form in which it gave rise to the German ratifying law, any legal acts to which it gave rise would not be binding in German sovereign territory. German State bodies would be prevented on constitutional grounds from applying those legal acts in Germany. Accordingly the Federal Constitutional Court examines whether legal acts of the European institutions and bodies remain within or go beyond the limits of the sovereign rights conferred on them …'

(17) See Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality of 13 December 2007. See, in that regard, V. Skouris, The role of the principle of subsidiarity in the case-law of the European Court of Justice, Speech at the conference: 'Europa fängt zu Hause an' (Europa begins at home), European Conference on Subsidiarity 2006, 18-19 April 2006, St. Pölten (Austria).

(18) BVerfG cited in footnote 12, p. 252 et seq.

(19) BVerfG cited in footnote 12, p. 352 and 358

(20) BVerfG cited in footnote 12, p. 351

(21) See footnote 14 above.