

LUCIJA SOKANOVIĆ*

The Relationship of the Croatian Constitutional Court and Supreme Court to the Court of Justice of the European Union in National Case Law

- **ABSTRACT:** *After a short introduction to Croatia's accession to the EU, this paper deals with the obligations for national courts arising from EU membership in a historical overview and the current state. Furthermore, the relationship between the Croatian Constitutional Court, the Croatian Supreme Court, and the Court of Justice of the European Union in national case law is analysed. In addition, the hierarchy of national and EU laws is questioned, as is the notion of constitutional identity. The relationship between the national constitutional courts of the EU member states, the national Supreme Court, and the CJEU is not conceived as a relation of subordination, but of communication and dialogue, the ultimate goal of which is the harmonisation of the *acquis* of the EU member states and legal security for all its citizens, while at the same time respecting the specificities of each member state.*
- **KEYWORDS:** Constitutional Court of the Republic of Croatia, Supreme Court, CJEU, preliminary questions, *ultra vires*

1. Introduction

Croatia's journey to European Union accession formally started at the Zagreb Summit in November 2000, which brought together the presidents of the state and government of 15 European Union member states, as well as the leaders of Croatia, Bosnia and Herzegovina, Macedonia, Albania, and the Federal Republic of Yugoslavia, when the negotiations for the Stabilization and Association Agreement were opened. On 1st December 2011 the European Parliament approved Croatia's accession to the European Union. Just a few days later, on 9th December, Croatia signed

* Associate Professor, University of Split, Faculty of Law, lucija.sokanovic@pravst.hr, ORCID: 0000-0003-4274-7789.



the Agreement on the Accession of the Republic of Croatia to the European Union. A referendum on Croatia's accession was conducted in January 2012. In March the Croatian Parliament ratified the Treaty on the Accession of the Republic of Croatia to the European Union. Finally, on 1st July 2013 the Treaty on the Accession of the Republic of Croatia to the European Union came into force. One of the many steps in this journey was the amendment to the Constitution of the Republic of Croatia in 2010, which regulated the legal status of the European Union in the national legal order.¹ Based on Article 152 of the Constitution, amendments in Chapter VIII, titled *European Union* entered into force on the date of Croatia's accession to the European Union. The new chapter regulates the legal basis of membership in the EU, the transfer of constitutional powers to its institutions², the participation of Croatian citizens and EU institutions³, the relationship between national law and EU law⁴, and the rights of EU citizens.⁵ The aforementioned constitutional provisions were designed and accepted to provide a constitutional basis for Croatia's legal and EU law-compliant participation in international organisations.⁶ According to Article 145, the exercise of rights arising from the *acquis* of the European Union is equated with the exercise of rights guaranteed by the Croatian legal order. Legal acts and decisions accepted by the Republic of Croatia in the institutions of the European Union are applied in the Republic of Croatia in accordance with the *acquis* of the European Union. The Croatian courts protect subjective rights based on the *acquis* of the European Union. State bodies, bodies of local and regional self-government units, and legal entities with public power directly apply EU law. Article 145 has now been renumbered as Article 141.c. and titled 'European Union Law.'⁷ It was evaluated in the Croatian scientific literature as declaratory and not constitutive in nature, since its essential content crystallises through dialogue between national courts and the European Court, and its main function is to create constitutional prerequisites for the participation of ordinary Croatian courts and the Constitutional Court in the European legal discourse.⁸

The aim of this paper is to analyse the relationship between the Croatian Constitutional Court, the Croatian Supreme Court, and the Court of Justice of the

1 Until 1991 Croatia was part of Socialist Federal Republic of Yugoslavia. On 25th June 1991 the Croatian Parliament adopted Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia. The Constitution of the Republic of Croatia was adopted in December 1990 wherefore it is known as 'the Christmas Constitution.'

2 Art. 143.

3 Art. 144.

4 Art. 145.

5 Art. 146; Rodin, 2011a, p. 88.

6 Ibid.

7 Constitution of the Republic of Croatia, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (consolidated text).

8 Ibid., p. 89.

European Union in national case law.⁹ In addition, the hierarchy of national and EU laws is questioned, as is the notion of constitutional identity.

2. Obligations for national courts

■ 2.1. *Once upon a time*

Obligations for national courts arising from membership in the European Union were formulated in the practice of the Court of the European Union in the sixties and seventies of the 20th century, especially in the cases of *Van Gend en Loos* and *Costa v. ENEL*,¹⁰ as well as *Simmenthal 2*.¹¹ While in *Van Gend en Loos* the European Court established the doctrine of the direct effect, in *Costa v. ENEL* it formulated the doctrine of the supremacy of EU Law over national law, expressing the view that EU Law cannot be overridden by later adopted national regulations but framed, and in *Simmenthal 2*, gave an answer to the question of the legal consequences of the fact that individuals can refer to legal rules of EU Law against the state, bearing in mind the fact that these legal rules have supremacy over national law.¹² Taken together, these judgments form the core of supranational constitutionalism in Europe.¹³

The obligation of the national court to exclude the application of the national law norm that stands in the way of legal protection of subjective rights based on an objective legal rule of the European Union without prior evaluation of constitutionality before the constitutional court fundamentally changed the national systems of judicial supervision of constitutionality and legality.¹⁴ Instead of requesting the decision of the national constitutional court, the judge of the regular court, who decides on the main case, acquired the authority to independently solve the problem of the conflict of norms of national law with the norm of EU law, possibly with the interpretive assistance of the CJEU in the procedure of the preliminary ruling based on Article 267 of the TFEU.¹⁵

■ 2.2. *What about reality?*

While the doctrine of supremacy has not changed significantly since the 1960s, the obligation arising from *Simmenthal 2* has evolved significantly, according to

9 Further in the text: CJEU.

10 Case 26/62 *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963, E.C.R. 1, ECLI:EU:C:1963:1; Case 6/1964 *Flaminio Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.

11 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Judgment of the Court of 9 March 1978, ECLI:EU:C:1978:49. Rodin, 2011a, p. 92.

12 Ibid.

13 Ibid.

14 Rodin, 2011a, p. 93.

15 Ibid.

Rodin.¹⁶ Today, it can no longer be understood only as the procedural side of the doctrine of supremacy of EU Law over national law, but as a complex tissue of reflexive cooperation of national courts with the EU Court.¹⁷ Namely, the doctrines of indirect effect and margins of discretion limited the scope of application of *Simmenthal* in the way that their effect reduced the number of situations in which exclusion of national law was necessary due to conflict with EU law.¹⁸ On the other hand, national judges were given new tasks, particularly to interpret national law in light of EU law and supervise the national margin of judgment in accordance with the practice of the European Court. Finally, it should be noted that *Simmenthal* influenced European interjudicial dialogue and initiated the revival of judicial supervision of constitutionality at the national level.¹⁹

It is fair to mention here that, in December 2022, the CJEU published a proposal on the reform of the preliminary ruling procedure, according to which the General Court would take on answering preliminary references from national courts in several specific areas of EU law.²⁰ The reform of the preliminary ruling procedure would likely redefine the roles of the CJEU and the General Court and push them towards their ideal types: the former towards an EU constitutional court and the latter towards an EU supreme court/council of the state.²¹ The CJEU would thus come closer to a proper Kelsenian constitutional court, which is tasked with the authoritative determination of the meaning of EU Law, particularly concerning the questions of abstract interpretation, and is concerned primarily with the uniformity and coherence of that law at the general level.²²

3. Constitutional Court of the Republic of Croatia

The 1963 Constitution established the Croatian Constitutional Court, and Croatia was still a part of the former Socialist Federal Republic of Yugoslavia.²³ It was primarily competent in abstract norm control but also examined the constitutionality and legality of self-governing general acts.²⁴ Due to the socialist ideology of the supremacy of the elected assembly, in cases where it found a law to be

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 CJEU, Request submitted by the Court of Justice pursuant to the second paragraph of Art. 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf. (Accessed: 26 October 2023).

21 Woude, 2021, cited in Petrić, 2023, p. 42.

22 Petrić, 2023, p. 42.

23 Bačić, 2012, p. 81.

24 Ibid.

contrary to the Constitution, the Court could not repeal the law.²⁵ It would only declare its nonconformity, and the assembly would have six months to enact the new legislation. It was not sufficient to decide on the constitutionality and legality of individual acts.²⁶

The Constitutional Court of the Republic of Croatia was constituted on 5th December 1991. In the scientific literature, it has been stated that the constitutional position of the Constitutional Court follows the Kelsenian, continental European tradition, since it is designed as an intermediate branch which controls all three branches of government: legislative, executive, and judicial.²⁷ It is neither placed above them in the hierarchy nor a part of them in either an organizational or functional way.²⁸

According to Article 125 of the Croatian Constitution, the Croatian Constitutional Court: decides on the conformity of laws with the Constitution; decides on the conformity of other regulations with the Constitution and laws; may decide on constitutionality of laws and constitutionality of laws and other regulations which have lost their legal force, provided that from the moment of losing the legal force until the submission of a request or a proposal to institute the proceedings not more than one year has passed; decides on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia; observes the realization of constitutionality and legality and notifies the Croatian Parliament on the instances of unconstitutionality and illegality observed thereto; decides on jurisdictional disputes between the legislative, executive and judicial branches; decides, in the conformity with the Constitution, on the impeachment of the President of the Republic; supervises the constitutionality of the programs and activities of political parties and may, in conformity with the Constitution, ban their work; supervises the constitutionality and legality of elections and national referenda, and decides on the electoral disputes which are not within the jurisdiction of courts; performs other duties specified by the Constitution.

■ 3.1. *The hierarchy of national and EU law*

Croatian Constitution prescribes in Article 141.c(2) the obligation of national courts to apply the law in a manner consistent with European Union law: all the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*. This provision is described in Croatian

25 Ibid.

26 Barić and Bačić, 2010, p. 407.

27 Bačić, 2012, p. 82.

28 Barić and Bačić, 2010, p. 407.

scientific literature as circular, whereby its circular manner conceals the integral range of the prescribed obligations, which includes not only the self-referential obligation to apply European Union law but also the obligation to apply national law in accordance with EU law.²⁹ While it is self-evident that the norms of EU law are applied in the way they prescribe them themselves, the obligation to apply national law in accordance with EU law derives from principles originating from EU law, such as supremacy and direct effect, and, in a broader sense, from the general principle of international law *pacta sunt servanda*.³⁰ Rodin explains this as follows:

In short, the norm of EU Law will have a direct effect on Croatian Law when it is derived from the norm of EU Law itself; it will be superior to Croatian Law because this is its general feature. Therefore, Article 145(2)³¹ of the Constitution of the Republic of Croatia can be understood as a norm that implicitly prescribes the direct effect and supremacy of EU Law over Croatian Law. These principles are embedded in the foundations of EU law and constitute their original and autonomous legal order. Therefore, Article 145(2), should not be understood in a banal way as a mere conflict rule but as a constitutional declaration of the fundamental principles on which EU law is based. These principles permeate the national legal systems of member states, and without their acceptance, EU membership is not possible.³²

■ 3.2. Case-law

Three recent decisions of the Croatian Constitutional Court are presented in this subchapter with the aim of reviewing the substance of applications submitted as well as reasoning dynamics.

3.2.1. Violation of the applicant's right to fair trial in terms of prohibition of arbitrariness and the right to reasoned judicial decisions

In this case, the Constitutional Court violated the applicant's right to fair trial guaranteed by Article 29(1) of the Constitution of the Republic of Croatia, and Article 6, Part 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in connection with Articles 141.c and 141. d of the Constitution of the Republic of Croatia, in the aspect of the prohibition of arbitrariness and

29 Rodin, 2011a, p. 89. See also Omejec, 2016, pp. 14–28.

30 Ibid.

31 Now it is Art. 141.c(2).

32 Rodin, 2011a, p. 90.

the right to reasoned judicial the decision.³³ The applicant filed a constitutional complaint regarding the judgment of the Supreme Court which rejected his appeal against the decision of the Administrative Board of the Croatian Bar Association, in which the applicant was deleted from the Directory of Lawyers of the Croatian Bar Association. The contested judgment of the Supreme Court confirmed the positions of the competent bodies of the Croatian Bar Association, according to which the applicant, based on then valid Article 56, point 8 of the Law on the Legal Profession, ceased to have the right to practice law because he entered into employment with a German trading company in the position of legal advisor. It follows from the explanation of the contested judgment that the Supreme Court did not express itself on the request of the applicant for a preliminary ruling to the CJEU (regarding the interpretation of Directive 98/5, that is, the interpretation of whether the provision of then-valid Article 56, point 8 is contrary to Article 8 of Directive 98/5) and did not explain the reasons for possible disagreement with reference to the CJEU.³⁴

In its Decision, the Constitutional Court noted that the Supreme Court was not obliged to accept all the proposals of the parties, including those related to referring a request to the CJEU for a preliminary ruling on the interpretation of EU Law. The decision on whether to refer to such a request is a matter of the competence of the Supreme Court and not the parties' disposition. However, as the "national court of last instance," the Supreme Court was obliged to express its opinion on the motion to refer a request in order to make a decision on the previous issue, i.e. to explain the reasons why it considers that in the specific case it was not obliged to refer the request to the CJEU for the preliminary ruling on the interpretation of EU law in the sense of Article 267(3) of the TFEU. Otherwise, the question could be raised whether, in the opinion of the Supreme Court, it is unnecessary to review the application of EU Law because the requested question is irrelevant for the resolution of the specific case or whether it has judged that the correct application of EU Law in the specific case is so obvious that it leaves no room for reasonable doubt (*doctrine acte clair*).³⁵ This was sufficient for the Constitutional Court to establish that there was a violation of the applicant's right to a fair trial from Article 29(1) of the Constitution in connection with Articles 141c and 141d.

In this decision, the Constitutional Court reminded that it follows from Article 267(3) of the TFEU that a national court against whose decision there is no legal remedy ("court of last instance") is obliged to refer a preliminary question to the Court of the EU. According to the established practice of the CJEU summarised

33 Constitutional Court of the Republic of Croatia, Decision U-III/356/2019, 12 April 2022 [Online]. Available at: <https://www.iusinfo.hr/sudska-praksa/USRH2019B356AIII>. (Accessed: 26 October 2023).

34 Ibid., para. 17.

35 Ibid., para. 22.1.

in the case *Cilfit*,³⁶ which was accepted by the Constitutional Court in Para. 12 of the decision number U-III-1966/2016 of 6 December 2016 the court of the last instance may refrain from the obligation to refer a request for the interpretation of EU law to the Court of the EU in the following cases:

The question raised is irrelevant, the Community provision in question has already been interpreted by the Court, or the correct application of Community Law is so obvious that it leaves no scope for any reasonable doubt. The existence of such a possibility must be assessed in light of the specific characteristics of community law, the particular difficulties with which its interpretation arises, and the risk of divergence in judicial decisions within the community.³⁷

In relation to the application of the *acte clair* doctrine, the CJEU in the *Cilfit* judgment set strict criteria according to which an individual national court of “last instance” can conclude that the question of interpretation of EU law is clear:

Finally, the correct application of community law may be so obvious that there is no scope for any reasonable doubt about the manner in which the question raised is to be resolved. Before concluding that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice. Only if these conditions are satisfied will the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed based on the characteristic features of community law and the difficulties in its interpretation. First, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. Thus, an interpretation of the provisions of community law involves a comparison of different language versions. It must also be borne in mind that even where the different language versions are entirely in accordance with one another, community law uses terminology peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in community law or in the laws of various Member States. Finally, every provision of

36 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgment of the Court of 6 October 1982, ECLI:EU:C:1982:335.

37 *Ibid.*, para. 21.

community law must be placed in its context and interpreted in light of the provisions of community law as a whole, with regard to the objectives thereof and its state of evolution on the date on which the provision in question is to be applied.³⁸

3.2.2. Demand from the Constitutional Court to refer to the request for a preliminary ruling from the CJEU

The second case concerned the rejection of the applicant's constitutional complaint submitted for a violation of the right to a fair trial. Based on the misdemeanour decision, the applicant was declared guilty of not preventing damage to the means of identification of the goods as the driver of the means of transport because the tarpaulin on the trailer, which was wrapped around the sides of the trailer and through which the customs cable was passed and on which the customs mark was placed, was cut on the roof of the trailer in the form of letter I, which was determined by the control of customs officials, where three foreign persons were found in the cargo area. It was established that applicants acted contrary to the provisions of Article 31 of the Act on the Implementation of Customs Legislation of the European Union and did not prevent damage to the means for identifying goods placed in accordance with Article 192 of Regulation (EU) No. 952/2013, thus committing a misdemeanour from Article 61(1), Item 11 of the Act on the Implementation of Customs Legislation of the European Union. The applicant is fined HRK 42,000.00.³⁹

The applicant submitted to the Constitutional Court and demanded that the request be referred for a preliminary ruling.

The Constitutional Court noted in its decision that the applicant submitted the demand to refer the request for a preliminary ruling to the CJEU for the first time in a constitutional complaint and that this demand should have been presented before the High Misdemeanour Court, which decided on his misdemeanour liability. In addition, the questions raised by the applicant referred to correctly established facts and the proper application of substantive law to determine his misdemeanour liability in the proceedings before the competent misdemeanour court. Finally, the Constitutional Court noted that, in a specific case, the High Misdemeanour Court did not apply a positive law in an obviously wrong way. Bearing in mind the reasons presented in the explanation of the contested judgment, in this case, referring to the preliminary questions to the CJEU did not appear to be justified.⁴⁰

38 Ibid., paras. 16–20.

39 Constitutional Court of the Republic of Croatia, Decision U-III/573/2020, 7 April 2022 [Online]. Available at: <https://www.iusinfo.hr/sudska-praksa/USRH2020B573AIII>. (Accessed: 26 October 2023).

40 Ibid., para. 14.

3.2.3. Demand from the Constitutional Court to refer to the request for a preliminary ruling by the CJEU

The third case involved the rejection of the constitutional complaint against the judgment of the Supreme Court of the Republic of Croatia No: Rev-x 153/2018–8 of 2nd October 2018.⁴¹ The object of the civil proceedings that preceded the constitutional court proceedings was the payment of foreign currency amounts deposited by natural persons as foreign currency deposits with the applicant, Ljubljanska banka d.d. Ljubljana, in the main branch in Zagreb and other organizational units/branches that the applicant had in the Republic of Croatia. The applicant filed a review of the second-instance verdict⁴² and decision⁴³ due to a significant violation of the provisions of the civil procedure and incorrect application of substantive law. The Supreme Court found the applicant's review to be founded only in relation to the decision on interest. In the remaining part, it considered the review to be unfounded while rejecting the review submitted to the decision as inadmissible.

Besides the violations of constitutional rights^{44,45} the applicant formulated two preliminary questions that she believed Croatian courts had to refer to the CJEU, proposing that the Constitutional Court should do so. Alternatively, if the Constitutional Court did not consider the court of last instance that the questions should be referred to, the applicant proposed to the Constitutional Court to vacate the contested judgment of the Supreme Court and order the same court to refer the mentioned questions to the CJEU, after which the Supreme Court would issue a new judgment. The applicant did not demand proceedings before the regular court's preliminary questions.⁴⁶

The Constitutional Court assessed that in the considered case, apart from the fact that the existing stable and consistent jurisprudence of domestic Croatian courts does not open the possibility of questioning the validity of the legal positions stated therein, a specific dispute is entirely on the merits examined before the competent regular courts and does not fall within the scope of the application of any legal sources of the European Union.⁴⁷ In the revision submitted to the Supreme Court, the Constitutional Court noted⁴⁷ that the applicant did not request a preliminary question to be raised or the case was forwarded to the CJEU. In addition, the Court quoted the case of *Samorjai v. Hungary*,⁴⁸ where the ECtHR

41 Constitutional Court of the Republic of Croatia, Decision U-III/970/2019, 24 June 2020 [Online]. Available at: <https://www.iusinfo.hr/sudska-praksa/USRH2019B970AIII>. (Accessed 26 October 2023).

42 Gž-1026/15-2 of 26 September 2017.

43 Gž-1026/15-3 of 26 September 2017.

44 Arts. 14(2), 18(1), 29(1), 115(3), 141.c and 141.d.

45 Ibid., para. 3.

46 Ibid., para. 3.2.

47 Ibid., para. 17.

48 ECtHR *Samorjai v. Hungary* (Application no. 60934/13), Judgment, 28 August 2018.

found that the jurisdiction of the Supreme Court was limited to the analysis of the questions submitted in the revision and that the applicant did not state the reasons why, according to his opinion, the contested judgment violated Article 234 of the Treaty establishing the European Community, in which circumstances the lack of explanation by the Supreme Court on these aspects was in accordance with domestic procedural rules. Respecting the practice of the ECtHR, the alternative proposal of the applicant of the constitutional complaint that the Constitutional Court should vacate the contested judgment and send it back to the Supreme Court so that the Supreme Court could refer preliminary questions to the CJEU was not founded and was constitutionally acceptable.⁴⁹ The Constitutional Court found that the applicant's objections related to Articles 14(2), 18(1), 115(3), 141.c and 141.d of the Constitution, in the way they were raised in the constitutional complaint and to the extent which, in the circumstances of the specific case, the contested judgments could affect the realisation of the content of those constitutional norms, do not point to the possibility of violation of human rights and fundamental freedoms guaranteed by the Constitution.⁵⁰

4. Croatian Supreme Court

As the highest court of law, the Supreme Court ensures the uniform application of laws and equality before the law, as provided by Article 116 of the Croatian Constitution. Article 20 of the Law on Courts prescribes the competencies of the Supreme Court.⁵¹ The Supreme Court of the Republic of Croatia ensures uniform application of law and equality of all in its application, decides on regular legal remedies when prescribed by a special law, decides on extraordinary legal remedies against final decisions of courts in the Republic of Croatia, decides on a conflict of jurisdiction when it is prescribed by a special law, considers current issues of judicial practice, suggests areas for professional training of judges, court advisors, and trainee judges to increase the efficiency and quality of the judiciary as a whole, and finally performs other tasks specified by law.

■ 4.1. Case *Perković*

Very soon after Croatia's accession to EU the case *Perković* alarmed national and European expert and general public. Factual and legal background of the case originated from the request of the German court, through a European arrest warrant, of the surrender of Mr. Perković in order to conduct criminal proceedings for aggravated murder.⁵² The Framework Decision on the European Arrest

49 Ibid., para. 18.

50 Ibid., para. 19.

51 Law on Courts, OG 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23.

52 The factual and legal background of the case was cited from: Capeta, 2015, p. 50.

Warrant was transposed into Croatian Law on Judicial Cooperation in Criminal Matters with EU Member States.⁵³ Mr. Perković opposed the surrender. The main complaint was that in a specific case, according to Croatian law, the statute of limitations for criminal prosecution had expired. According to German law, however, prosecution for this crime has not become obsolete. Mr. Perković claimed that the onset of the statute of limitations under Croatian law is a reason for refusing surrender. Rather, it was a mandatory reason for refusing surrender because of the way Croatia chose to implement the Framework Decision on European Arrest Warrants. The County Court in Zagreb held that the statute of limitations is not a reason for refusing surrender when surrender is requested due to the conduct of proceedings for criminal offences, for which, based on Article 10 of the Law on Judicial Cooperation in Criminal Matters with EU Member States, the verification of double criminality is excluded.⁵⁴ The Supreme Court of the Republic of Croatia later confirmed this decision in its appeal procedures. According to these two courts, the statute of limitations is an integral part of the double criminality check and, therefore, cannot be checked for the aforementioned crime.

In addition to disputes among practitioners and scientists on the issue of the statute of limitation,⁵⁵ as many as three courts in Croatia refused to request a preliminary ruling on the interpretation of the Framework Decision on the European Arrest Warrant from the CJEU. The reasoning was based on the view that the CJEU cannot have any role in ruling because the interpretation of the Law on Judicial Cooperation in Criminal Matters with EU Member States as a national law is the competence of Croatian courts.⁵⁶ In that sense, the County Court in Zagreb did not accept the lawyer's demand to refer to the CJEU through the Supreme Court of Justice, the question of whether the statute of limitations is assessed for the criminal offence in question according to the provisions of Article 20(2) Items 7 and 10 of the Law on Judicial Cooperation in Criminal Matters with EU Member States, because it did not find it disputable whether the statute of limitations applies to offences from the List.⁵⁷ The Court added that there is a strict division of the role of the European Court and national courts as prescribed by Article 220 of the TFEU, on the basis of which the CJEU is competent for the interpretation of Community and Union law and, *a contrario* the highest national courts for the interpretation of national law, which in this case is the Law on Judicial Cooperation in Criminal Matters with EU Member States.⁵⁸

53 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18 July 2002.

54 Law on Judicial Cooperation in Criminal Matters with EU Member States, OG 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70/19, 141/20.

55 See Derenčinović, 2014, pp. 247–270.

56 Čapeta, 2015, p. 51.

57 County Court in Zagreb, Decision KV-EUN-2/14, 8 January 2014.

58 *Ibid.*

The Supreme Court confirmed the previous position of the County Court and noted that the Law on Judicial Cooperation in Criminal Matters with EU Member States is national law; therefore, the interpretation of that law is in the exclusive competence of Croatian courts.⁵⁹ The Constitutional Court briefly noted that the demand for the preliminary ruling of the CJEU was not considered at all because the same demand was submitted to the first instance and appeal courts, and both courts explained the reasons why they considered such an unfounded demand which could be summed up as the position that interpretation when applying national law is the exclusive competence of Croatian courts.⁶⁰

■ 4.2. *The recent case-law*

4.2.1. *No preliminary questions in the high-profile corruption case*

The Supreme Court of the Republic of Croatia rejected the appeals of the Office for Suppression of Corruption and Organized Crime and accused persons, and confirmed the first instance verdict in the case where three university professors were convicted of accepting a bribe and the parents of the students gave a bribe.⁶¹ Besides other appeal reasons, accused S. J. claimed that the trial court unreasonably refused to remove the judgments based on plea bargaining for Ž. K., D. Z., and A. Z. from the criminal file as illegal evidence. In other words, the contested judgment is based on this evidence. He also suggested that the Supreme Court of the Republic of Croatia refer to the CJEU as a request for a preliminary ruling on those judgments.

Since the first instance court explained in detail why the motion of the accused S. J. was unfounded, the Supreme Court accepted these reasons in its entirety and referred the accused S. J. to them to avoid unnecessary repetition. The Court pointed out that the accused S. J. was also wrong when he claimed that the judgment based on plea bargaining for A.Z. was illegal evidence because it was rendered by Judge R.V. as a single judge instead of a panel. Namely, unlike the judgment based on the plea bargaining for Ž. K., and D. Z., which were rendered at the session of the indictment panel (consisting of three judges), the judgment based on plea bargaining for A. Z. was rendered at the preliminary hearing, which, according to Article 371 of the Criminal Procedure Code, was carried out before the president of the (trial) panel. Therefore, as the president of the (trial) Panel, Judge R. V. was authorised to render a judgment based on plea bargaining for A. Z., because the authority of the president of the Panel clearly derives from the provisions of Article 374(2) of the Criminal Procedure Code.⁶²

59 The Supreme Court of the Republic of Croatia, Decision Kž-eun 2/14, 17 January 2014.

60 The Constitutional Court of the Republic of Croatia, Decision U-III-351/2014, 24 January 2014.

61 The Supreme Court of the Republic of Croatia, Judgment I Kž Us 51/2020-12, 20. April 2022.

62 Ibid., para. 15.1.

Regarding the application of the accused S. J. for the proceedings of the Supreme Court in terms of Article 18 of the Criminal Procedure Code and Article 267 of the TFEU, the Court reminded that a court against whose decision there is no legal remedy, if it is necessary to refer the request for the preliminary ruling to the CJEU, by the fact that in such a situation, it is exclusively and only the national court that completely and independently decides whether the need for an appropriate interpretation of European Union law has arisen in the specific case and whether, in this sense, it will refer to the competent court. Therefore, the request of the parties for a preliminary ruling is not binding but, above all, represents the important and decisive position of the national court. Since it was a question of legality of evidence in a particular criminal case (reading of final judgments based on plea bargaining for Ž. K., D. Z., and A. Z.), an issue which, as the first-instance court correctly concluded, was resolved exclusively in the domain of national legislation, that is, the national court. Therefore, the Supreme Court concluded that there was no need to refer the request for a preliminary ruling to the CJEU.⁶³

4.2.2. *Preliminary question concerning illegal evidences*

The Supreme Court of the Republic of Croatia rejected the appeals of the accused M. B. and Z. A. on the decision to reject the application of the accused for the removal of judgments based on the plea bargaining of A.D. and D. K from the criminal file as illegal evidence.⁶⁴

The Court held that the issue of the legality of the evidence raised in this specific criminal case (reading of the judgments based on plea bargaining of A. D. and D. K) or the admissibility of using this evidence in criminal cases conducted against the accused M. B., Z. A., and others is the issue that is resolved exclusively in the domain of national legislation, that is, by the national court, and it is not a matter which is regulated by the directive itself. So, it was the correct conclusion of the court of first instance that it was not necessary in the specific legal situation to refer the request for preliminary ruling in relation to the issue of compliance with the provisions of Article 363(1) in connection with Article 455 of the Criminal Procedure Code with Article 4(1) of the Directive, given that this conclusion is also in line with the position of the CJEU taken in the *Cilffti* judgment, where it is expressly stated that the national court is not obliged to refer the request for preliminary ruling if, among others, it determines that the question is not essential for the particular criminal case.⁶⁵ For this reason, the Supreme Court of the Republic of Croatia, as a court of second instance—that is, as a court against whose decisions there is no legal remedy for completely identical reasons—did not comply with the request of the accused. According to Article 18: a of the Criminal Procedure Code

63 Ibid., para. 15.2.

64 The Supreme Court of the Republic of Croatia, Decision I Kž Us 26/2020-11, 12 June 2020.

65 Ibid.

and Article 267 of the TFEU, before the adoption of the second-instance decision, it did not refer to the request to the CJEU for a preliminary ruling, considering that the issue was not relevant and important for this particular criminal case: the issue of legality or admissibility of using evidence.⁶⁶

4.2.3. Preliminary question concerning extradition

The Supreme Court of the Republic of Croatia has confirmed the decision of the County Court in Zagreb of 13 November 2020, Kv II-575/2020-7 (Kir-996/2019) which determined that there were no legal prerequisites for the extradition I. N. to the Russian Federation for the purpose of conducting criminal proceedings, and which rejected the request of the General Prosecutor's Office of the Russian Federation No. 81/3-478-13 of 25 September 2019 for the extradition to the Russian Federation I. N. for committing the nine criminal offences of accepting a bribe from Article 290(3) of the Criminal Code of the Russian Federation and five criminal offences of accepting a bribe from Article 290(5).⁶⁷

Considering *ex officio* the decision of the first instance court, the Supreme Court of the Republic of Croatia found that the County Court in Zagreb rejected the request for the extradition of the I. N. to the Russian Federation, for conducting criminal proceedings for criminal offences of accepting bribes, since in this case, during the procedure, doubts were expressed about the choice of the country for extradition, because according to the information in the file, it was clear that the extradited person was granted refugee status. For the above reasons the Supreme Court of the Republic of Croatia, with its previous decision Kž-528/2019-7, 26 November 2019 terminated the decision-making procedure on the extradited person's appeal against first-instance decision of the County Court in Zagreb, Kv II-1054/2019-3, 5 September 2019 by which the legal conditions for the extradition of I. N. to the Russian Federation were granted, until the decision on the preliminary question is issued at the CJEU. On the request for a preliminary ruling from the Supreme Court, the CJEU rendered a judgment in case C-897/19 PPU, *Ruska Federacija v I.N.* on 2 April 2020 answering the preliminary question, with the explanation that the extradition procedure falls within the scope of Union law.⁶⁸ It further stated a privileged relationship between Iceland and the EU, referring to the Agreement between the Council of the European Union, Iceland, and the Kingdom of Norway from 1 November 2019 on the extradition procedure.⁶⁹

The cited judgment also stated that the court of first instance, only in a situation where the Republic of Iceland did not request the extradition of its citizens for criminal prosecution (which the extradited person has become in the

66 Ibid.

67 The Supreme Court of the Republic of Croatia, Decision II 8 Kr 5/2020-4, 7 December 2020.

68 Case C-897/19 PPU, *Ruska Federacija v I.N.*, Judgment of the Court (Grand Chamber) of 2 April 2020, ECLI:EU:C:2020:262.

69 Ibid.

meantime), evaluated and determined the existence of legal presumptions related to the request of the Russian Federation for extradition. At the same time, the Court's position was that the arrest warrant of the Republic of Iceland, equivalent to the European arrest warrant, would have priority over a request for the extradition of a third country, in this case, the Russian Federation. Considering this legal situation, the Supreme Court of the Republic of Croatia vacated the first-instance decision of the County Court in Zagreb on 5 September 2019 Kv II-1054/2019-3, with instructions that resulted from the CJEU judgment.

5. *Ultra vires* and constitutional identity

■ 5.1. *First decisions in EU*

The first constitutional court of a member state to declare a decision of the EU Court *ultra vires* was the Czech Republic. Czech citizens who were employees of Slovak employers received lower pensions and were entitled to payment-specific benefits based on the pension insurance. The High Administrative Court initiated preliminary ruling proceedings before the CJEU,⁷⁰ which, among others, answered that it was contrary to the prohibition of the principle of discrimination to pay specific compensation exclusively to Czech citizens living in the territory of the Czech Republic.⁷¹ In the first similar case, the Czech Constitutional Court declared a specific judgment of the EU Court *ultra vires* based on the EU Court's misunderstanding of the legal relations created by the dissolution of Czechoslovakia, referring to the authorities established in its earlier practice.⁷² In this judgment, the Constitutional Court concluded that the CJEU had overlooked important facts when deciding on the *Landtová* case. According to the Constitutional Court, EU Law is not even applicable to facts; therefore, the decision of the CJEU, which had proceeded to apply EU Law to the situation, was an excess of an EU institution and an *ultra vires* decision.⁷³ The conflict between the judgments of the Czech Constitutional Court in the case of the so-called *Slovak pensions* and the decision of the CJEU in the case of *Landtová* is described in the literature as a

Result of the non-cooperative attitude of the actors responsible at the national level and an expression of the misunderstanding of the relationship between the national judicial system and EU courts, as well as an effort to establish a hierarchy in this relationship.⁷⁴

70 Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení*, Judgment, 22 June 2011, ECLI:EU:C:2011:415.

71 Petschko and Capik, 2014, pp. 61–76.

72 Novak, 2022, p. 39.

73 Pítrová, 2013, pp. 86–101.

74 *Ibid.*, p. 101.

The Danish Supreme Court referred a preliminary question to the Court of Justice of the EU regarding Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupations.⁷⁵ The CJEU found that particular provisions are contrary to the general principle of the prohibition of discrimination, so the national court may not apply them if they cannot be interpreted in accordance with the principle, that is, the directive.⁷⁶ In addition, the CJEU concluded that

a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for a private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.⁷⁷

The Danish Supreme Court concluded that the national regulations could not be interpreted in accordance with Directive 2000/78/EC. Furthermore, nothing in the Danish accession agreements foresees that the unwritten principle of non-discrimination could prevail over Danish legislation in the dispute between natural and legal persons, considering that, as well as the provisions of the EU Charter on fundamental rights, it lacks a direct effect in Denmark.

The ruling of the German Constitutional Court in the *PPSP* presented a continuation of the conflict between the court and the CJEU that began a few years earlier, when the German Constitutional Court referred to the request for a preliminary ruling to the CJEU on the validity of the program of the European Central Bank *OTP* with the announcement that if the CJEU supported the program, it would initiate its own identity control from the Lisbon judgment.⁷⁸ After the judgment of the CJEU in Case C-62/14,⁷⁹ the German Constitutional Court temporarily

75 Novak, 2022, p. 39.

76 Case C-441/14 *Dansk Industri*, Judgment of the Court (Grand Chamber) of 19 April 2016, ECLI:EU:C:2016:278.

77 *Ibid.*, para. 43.

78 Novak, 2022, p. 40.

79 Case 62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, Judgment of the Court (Grand Chamber) of 16 June 2015, ECLI:EU:C:2015:400.

withdrew and noted that it would continuously supervise the programme.⁸⁰ Five years later, the German Constitutional Court referred to the CJEU about the validity of the European Central Bank's *PSPP* program and the European Central Bank's decision in this regard, in connection with the constitutional lawsuits of German citizens. The CJEU gave support to the European Central Bank and the German Constitutional Court, after offering the CJEU the possibility to comment, conducted *ultra vires* control, and declared the acts of the European Central Bank *ultra vires*.⁸¹ The German Constitutional Court held that the CJEU *Weiss* judgment did not consider the principle of proportionality from Article 5 of the TFEU,⁸² so it represented an excess of the authorities transferred to the CJEU by Article 19 of the TFEU, and is therefore *ultra vires* without binding legal effects in Germany.⁸³ Considering the relevance of the above decisions to Croatian constitutional law, it should be noted that they have provoked lively scientific discussion.⁸⁴ In addition, it is acknowledged that decisions of the highest national courts, which declare the decisions of the CJEU *ultra vires* are, and obviously will be, the reality of the European constitutional discourse that should be accepted by the CJEU, that is, the Union.⁸⁵

■ 5.2. What about Croatia?

As noted by Novak, the Croatian Constitutional Court could, in accordance with Article 129 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act on the Constitutional Court,⁸⁶ declare a CJEU judgment *ultra vires* in a hypothetical case in which the human rights and fundamental freedoms guaranteed by the Constitution of the Republic of Croatia would be violated by the CJEU judgment.⁸⁷ Articles 129 and 104 provide for the competence of the Croatian Constitutional Court to monitor the implementation of constitutionality and legality, and to report to the Croatian Parliament on observed instances of unconstitutionality and illegality. The same applies to violations of the constitutional identity of the Republic of Croatia, or exceeding the authorities delegated to the CJEU. Such a decision should result in the submission of

80 Novak, 2022, p. 40.

81 Ibid.

82 Case C-493/17 *Weiss and Others*, Judgment of the Court (Grand Chamber) of 11 December 2018, ECLI:EU:C:2018:1000.

83 Novak, 2022, p. 40.

84 Besides already quoted, see Horvat Vuković, 2019a, pp. 77–94; Horvat Vuković, 2019b, pp. 249–276; Bačić and Sarić, 2014, pp. 27–44; Blagojević, 2017, pp. 210–237; Burazin and Gardašević, 2021, pp. 221–254; Kostadinov, 2011; Rodin, 2009, pp. 247–277; Rodin, 2011b, pp. 11–41.

85 Novak, 2022, p. 45.

86 The Constitutional Act on the Constitutional Court of the Republic of Croatia, OG 99/99, 29/02, 49/02 (consolidated text).

87 Novak, 2022, p. 48.

reports to the Croatian Parliament on perceived unconstitutionality or legality.⁸⁸ However, the Croatian Constitutional Court should initiate a procedure from Article 267 of the TFEU.

Croatian constitutional identity has only recently been discussed in the case law of the Constitutional Court. The Court has defined the following parts of the Croatian constitutional identity: first, Articles 1 and 3 of the Constitution: the highest values of the constitutional order of the Republic of Croatia; second, constitutionally guaranteed fundamental rights, including respect for minority languages and entrepreneurial and market freedom; and third, the Historical Foundation of the Constitution, especially Para. 2, on the equality of national minorities with citizens of Croatian nationality.⁸⁹ The first reference of the Croatian Constitutional Court to constitutional identity can be found in its Decision U-I-3597/2010 *et al.*, from July 2011,⁹⁰ where the principle of equality of members of national minorities with citizens of Croatian nationality was recognised as a part of Croatian constitutional identity.⁹¹

A second important step was made two years later in the framework of the Constitutional Court Communication on Citizens' Constitutional Referendum on the Definition of Marriage.⁹² This Communication was issued on the occasion of the citizens' initiative "In the name of the Family" (U ime obitelji) of mid 2013 requesting the calling of a national referendum to amend the Constitution of the Republic of Croatia whereby the definition of marriage as a living union between a man and a woman would be introduced into the Constitution.⁹³

Blagojević finds it interesting that other Constitutional Court's reflections on constitutional identity can be found in some other cases connected with the citizen – Initiated referendum.⁹⁴

88 Ibid.

89 Blagojević, 2017, p. 227.

90 Decision of the Constitutional Court of the Republic of Croatia, Nos. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, U-I-994/2011, Zagreb, 29 July 2011 [Online]. Available at: [http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec-0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/\\$FILE/U-I-3597-2010.pdf](http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec-0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/$FILE/U-I-3597-2010.pdf). (Accessed: 26 October 2023).

91 Blagojević, 2017, p. 224.

92 Constitutional Court, Communication on the citizens's constitutional referendum on the definition of marriage, No. SuS-1/2013, Zagreb, 14 November 2013 [Online]. Available at: [http://sljeme.usud.hr/usud/praksWen.nsf/.../\\$FILE/SuS-1-2013.doc](http://sljeme.usud.hr/usud/praksWen.nsf/.../$FILE/SuS-1-2013.doc). (Accessed: 26 October 2023).

93 Cit. Blagojević, 2017, p. 225.

94 Remain three cases are analyzed in Blagojević, 2017, pp. 226–227.

6. Conclusion

Croatia's accession to the EU brought about significant changes in all aspects of the rule of law and, in a particular manner, for national courts and judges. National judges were expected to interpret domestic legislation in a way that enabled the full effects of the applicable European provisions on the issue. If such an interpretation were not possible without acting *contra legem*, they could exclude the application of national provisions and directly apply European norms. The obligation of national courts to exclude any provision of national law contrary to EU law still exists regardless of whether it is adopted before or after EU law. Nevertheless, the original doctrine underwent a significant evolution which was partly a result of the CJEU's efforts to preserve equal application and strengthen the effectiveness of EU law and partly as a response to the national practice that challenged the supremacy of EU law over national constitutional law and values.⁹⁵ We can follow the transformation of the original doctrine through three evolutionary lines: the evolution of the doctrine of the indirect effect, the acceptance of the doctrine of the margin of judgment, and the expansion of the preclusive effects of EU law.⁹⁶ At the same time, the national reaction to the described development is marked by the dualistic approach of national constitutional courts and their persistence in protecting national systems of constitutionality control.⁹⁷ The relationship between the national constitutional courts of the EU member states, the national Supreme Court, and the CJEU is not conceived as a relation of subordination, but of communication and dialogue, the ultimate goal of which is the harmonisation of the *acquis* of the EU member states and legal security for all its citizens, while at the same time respecting the specificities of each member state.

⁹⁵ Rodin, 2011b, p. 27.

⁹⁶ Ibid.

⁹⁷ Ibid.

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