DISSERTATIONES IURIDICAE UNIVERSITATIS TARTUENSIS
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Application of principles of European Law in the supreme court of Estonia

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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. Ginter Carri, "Access to Courts for Branches – Some Thoughts Under Estonian and EU Law", 11 European Competition Law Review (2004) pp 708–715.

2. Ginter Carri, "Constitutional Review and EU Law in Estonia" 31(6) European Law Review (2006) pp 912–923.

3. Ginter Carri, "Effective Implementation of the Trade Mark Directive in Estonia", 28(6) European Competition Law Review (2007) pp 337–345.

4. Ginter Carri, "Procedural Issues Relating to EU Law in the Estonian Supreme Court" I Juridica International (2007) pp 67–79.

INTRODUCTORY CHAPTER TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

The author has taken an interest in questions of law of the European Community (hereinafter also referred to as European law) ever since the beginning of his baccalaureate studies in the fall 1996. At that time Estonia was not yet a member of the European Union (EU) and no one could state with absolute certainty that it ever would be. However, Estonia had clearly adopted a strategy directed towards membership. Estonia submitted its application to accede to the EU in November 1995 and started negotiations in March 1998. The Free Trade Agreement[1], which is incorporated into the Europe Agreement[2], was concluded on 18 July 1994 and entered into force on 1 January 1995. The signing of the Europe Agreement took place on 12 June 1995 in Luxembourg and entered into force on 1 February 1998. The documents were aimed at the approximation of Estonian legislation to European Community (EC) legislation.[3] As stated by Prof Pisuke at the time "The ultimate political goal of all the above-mentioned agreements is Estonia's membership of the EU."[4]

Many things have happened between the signing of the Europe Agreement and the drafting of this introductory chapter summarizing the main conclusions of the author's research. Estonia completed the negotiations for accession in Copenhagen in December 2002. The government approved the draft Accession Treaty on 8 April 2002. A very significant step in the process was the national referendum held on 14 September 2003. The Estonian voters did not vote for or against accession, but instead gave their consent to the so called "Third Act" of the constitution stating that Estonia may belong to the EU in accordance with the fundamental principles of the constitution and that the constitution applies

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[1] Agreement on free trade and trade-related matters between the European Community, the European Atomic Energy Community and the European Coal and Steel Community, of the one part, and the Republic of Estonia, of the other part, signed on 18 July 1994 in Brussels, entered into force on 1 January 1995. Ratified by Estonia with Riigi Teataja (RT) II 1994, 34–38, 146; RT = *Riigi Teataja = the State Gazette.*

[2] European Agreement establishing an Association between the European Communities and their Member States of the one part, and the Republic of Estonia, of the other part. Ratified by Estonia with RT II 1995, 22–27, 120. Referred to as the Europe Agreement. English version of the Europe Agreement with Estonia (RT II 1995, 22–27) is available online at http://www.vm.ee/eng/euro/kat_318 (05 January 2008).

[3] See Pisuke Heiki, "Estonia and the European Union: European Integration in Estonia" I Juridica International (1996) pp. 2–4

[4] Id. Prof Heiki Pisuke was at the time Head of the Department of International Law at the Ministry of Justice.

taking account of the rights and obligations arising from the Accession Treaty.[5] Estonian voters did not get to vote *pro* or *contra* to the Accession Treaty because the constitution (*põhiseadus*) expressly forbids putting questions of ratifying international agreements to a referendum.[6] Accordingly the question put to the voters was: "Are you in favour of Estonia joining the EU and the adoption of the Constitution of the Republic of Estonia Amendment Act?".[7] 66.84% of the voters voted in favour.[8] On 1 May 2004 the Accession Treaty providing for the accession of the 10 candidate countries, including Estonia, to the EU entered into force.

Leaving aside the immense political importance of the above events, the impact on the legal system and judicial practice has been equally significant. The development of the *acquis* and its acceptance by the Member States has been turbulent and has provided material for extensive academic discussions and research.

The research at hand focuses on the acceptance, interpretation and application of the principles of European law by the Supreme Court (*Riigikohus*). Against the background of the events of the pre-accession period, it was easy to predict that in the period preceding and following Estonia's accession to the EU the Supreme Court would have to address principles central to European law. The objective of this research was to identify principles particular to European law, analyse the case law of the Supreme Court where indications of application of those principles could be found, analyse how those principles were accepted, applied and interpreted and to verify whether the Supreme Court practice corresponds to the instructions of the European Court.[9]

Considering the vast reforms that took place throughout re-establishing the entire Estonian legal system after regaining independence in 1991 and the central and very active role of the Supreme Court in developing an entirely new legal system in Estonia based on the rule of law, the author posed the hypothesis that Estonia, being a small but very "pro-EU" country with a liberal approach to

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[5] Constitution of the Republic of Estonia Amendment Act (*Eesti Vabariigi põhiseaduse täiendamise seadus)* – RT I 2003, 64, 429 (in Estonian). Referred to as the "Third Act".

[6] Section 106. Põhiseadus. – RT I 2007, 43, 311; 2007, 33, 210 (in Estonian).

[7] The question was formulated in the 18 December 2002 Decision of the Parliament "Rahvahääletuse korraldamine Euroopa Liiduga ühinemise ja Eesti Vabariigi põhiseaduse täiendamise küsimuses" (in Estonian) RT I 27.12.2002, 107, 637. Available online at: http://www.riigiteataja.ee/ert/act.jsp?id=233168 (06 January 2008).

[8] The idea to join the two questions together on referendum is attributed to the Minister of Justice Mr Märt Rask. See Laffranque Julia, Madise Ülle, Merusk Kalle, Põld Jüri, Rask Märt "Põhiseaduse täiendamise seaduse eelnõust" 8 *Juridica* (2002) lk 563–568 at 563.

[9] The term European Court refers to both the Court of First Instance (CFI) and the Court of Justice of the European Communities (ECJ). See http://curia.europa.eu/ (06 January 2008).

economy and law, has shown a remarkable willingness to adapt to EC principles, led in this by its Supreme Court. Although discrepancies with the practice of the European Court may occur, they do not demonstrate clear unwillingness to accept principles of European law.

This research aims to establish whether the interpretations and application of principles of European law have been in accordance with the *acquis communautaire* and whether controversies between the positions adopted by the Supreme Court in different orders (*määrus*) and decisions (*otsus*) can be identified. The research analyses what the effects of the *acquis communautaire* on the practice of the Supreme Court before and after accession were, focusing on the application of the EC Treaty[10], secondary EU law and the Europe Agreement. The analysis in this dissertation is limited by time to positions adopted by the Supreme Court until the end of 2007.

The current research focusing on the systematic study of a particular problem – the interpretation and application of principles of European law by the Supreme Court, utilizes the possibilities of different methods of research. Constituting a compilation of publications, methods of historic and comparative law as well as philosophy and policy of law etc have been used to varying extents. The research resorts to alternative methods including *inter alia* synthesis, systematic and comparative methods.

The term "principles", for the purpose of this dissertation, refers to such principles of European law, which originate from and have with time become an inherent part of European law, having largely been identified and repeatedly applied by the European Court taking into account the particularities of European law.[11] The term general principles is manifold, however perhaps the best differentiating description for the purposes of the current research could be "principles deducted from the nature of the European Community".[12] Tridimas classifies most of them as "systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice."[13] Accordingly, the term principles for the purposes of the current research should

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[10] Consolidated text of the EC Treaty was published in the Official Journal (OJ) C 321E of 29 December 2006 and is available online at: http://eur-lex.europa.eu/en/treaties/index.htm (05 January 2008). All references hereinafter are made to the EC Treaty unless otherwise noted.

[11] The general principles of European Law have been analysed in detail by several authors and therefore the current research does not entail a detailed analysis of the process of creation of those principles by the European Court as this would simply duplicate already existing research. See for example Tridimas Takis, The General Principles of EU Law (2nd edition, Oxford 2006), which, according to the author, is however more focused on principles emanating from the rule of law in general and covers principles particular to the EC selectively (at p 5).

[12] See Ibid at pp 2–3.

[13] Ibid at 4.

not be confused with other general principles of law, such as e.g. protection of property, equality etc, common to most European jurisdictions and deriving from the rule of law in general. Those principles fall out of the scope of the current research, which addresses in particular the Internal Market principle of equal treatment of companies from other Member States[14], the principles of primacy/supremacy[15], direct effect, and consistent interpretation and principles particular to the procedural rules regulating the European preliminary rulings procedure[16] such as *acte clair* and *acté eclairé*[17].

The scope of this research is limited to the practice of the Supreme Court for several reasons. One of the primary reasons is the special position of the Supreme Court in Estonia, where it embodies both the court of last instance as well as the constitutional court. This is largely so because in the beginning of the nineties, when after the collapse of the Soviet Union Estonia was faced with the task of re-establishing the judicial bodies of the state, the establishment of a separate constitutional court was considered impractical.[18] Although the decisions do not have the force of *erga omnes* precedent, they are generally observed as a first hand interpretative source and are very often followed by the courts of lower instances.[19] They have even been described as *de facto*

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[14] "Certain principles, such as those relating to a system of *open markets,* have to be developed into legal rules." See N.Reich *infra nota* 68 at 5. This principle of equal treatment within the meaning of Internal Market could also be described as a principle of substantive Community law.

[15] Wikipedia: "Primacy is the state or condition of being prime or first, as in time, place, rank, etc., hence, excellency; supremacy." See http://en.wikipedia.org/ wiki/Primacy (13 January 2008). For a discussion on the acceptance of Supremacy in the "new" Member States see Albi Anneli, "Supremacy of EC Law in the New Member States" 3 *European Constitutional Law Review*, (2007) pp 25–67.

[16] A procedure arising out of article 234 EC, which allows internal courts to ask for interpretative guidance on questions of EC law from the European Court before rendering a final decision on a particular case.

[17] Substance of those terms is explained in detail in subsection 2.4. of this chapter.

[18] A short history of the Estonian Supreme Court is available in English on the court's homepage at http://www.nc.ee/?id=181 (06 January 2008).

[19] As a good example, one may take the 05 October 2006 decision of the Administrative Law Chamber of the Estonian Supreme Court (hereinafter ALCESC) in case 3-3-1-33-06 where the court declared a national law contrary to the regulation 1972/2003. An English summary of the judgment is available on line at: http://www.juradmin.eu/docs/EE01/EE01000007.pdf (06 January 2008). Although the decision was binding *inter partes* and only for the lower courts reviewing the same matter further, it was generally followed by most administrative court judges dealing with similar cases. See Kanger Liina, "Euroopa Liidu õiguse kohaldamine Eesti halduskohtute praktikas: põllumajandustoetuste ja üleliigse laovaru tasu kaasuste näitel" lk 25 (*in Estonian*) where the author quotes the 06 November 2006 decision of the Tallinn Administrative Court in case 3-05-617. The analysis is available online at:

precedents.[20] Possibly the best term to use by analogy could be "*persuasive authority"*.[21] Therefore the decisions are often carefully worded taking into account the fact that the quality needs to be sufficient to serve as an example. In addition, stronger interest towards an analysis of the practice of the Supreme Court can be predicted at the international level, facilitating publication in external law journals. Hence an analysis of the relevant practice of the lower courts has been left for other authors.[22]

The author's analysis shows that the practice of the Supreme Court proved to be *pro-European.* In fact not a single case could be identified where the Supreme Court had refused to apply European law because of substantive reasons. Only one case was identified where European law should have been applied, but was not due to procedural arguments. In another case, the statement of reasons of the Supreme Court when deciding not to ask for a preliminary ruling, may be debatable. These cases are addressed in more detail below.[23]

The Supreme Court relied on the central importance of the principles of European law long before Estonia's accession to the EU. Already in September 1994, the Supreme Court declared that general principles of law developed by European institutions are incorporated into the fundamental principles of Estonian law.[24] According to the Supreme Court, "*In creating the general* principles *of law for Estonia the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered. These principles have their origin in the general principles of law of the highly developed legal systems of the Member States.*"[25] A contradiction with those principles would constitute a violation of the constitution. A norm contrary to the constitution becomes inapplicable. Such semi-automatic extension of the vast catalogue of general principles of law represents a strong

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http://www.riigikohus.ee/vfs/650/Analyys%20EL%20oiguse%20kohaldamine%20HK%20praktikas%20%28L_Kanger%294.pdf (18 March 2008). Remarkably, later case law of administrative courts in 2007 has still led to references for preliminary rulings in related cases. See *infra nota* 94.

[20] See Laffranque Julia, „Eesti põhiseaduse ja Euroopa õiguse kooselu", 8 *Juridica* (2003) lk 180-190 at 186 (in Estonian).

[21] Used by N. Reich to describe the force of the decisions of the European Court. See N.Reich *infra nota* 68 at 34.

[22] The above referred analysis of Kanger L. in *supra nota* 19 on the practice of the administrative courts may be brought as an example.

[23] The pro-European approach of the Central and Eastern European constitutional courts is also addressed in Albi A. *supra nota* 15 (and expressly concluded at p 34).

[24] The 30 September 1994 decision in case III-4/A-5/94. English translation available online at: http://www.nc.ee/?id=482&print=1 (06 January 2008) and 17 February 2003 decision of the Constitutional Review Chamber of the Supreme Court (hereinafter referred to as the CRCESC) in case 3-4-1-1-03. English translation available online at: http://www.nc.ee/?id=418&print=1 (06 January 2008).

[25] Ibid.

willingness to develop the Estonian legal system in harmony with the European one. It may be seen as a demonstration of the general openness and trust of the Supreme Court towards European institutions.

The pro-European approach of the Supreme Court is further evidenced in its willingness to refer to European sources even in cases where the substance of the case was not directly based on European law. For example the ambiguous legal position of the Charter of Fundamental Rights of the European Union[26] (*Charter*) did not prevent the Supreme Court from referring to the Charter several times even before Estonia's accession to the EU.[27]

On 17 February 2003 the Supreme Court referred to the Charter as one of the most recent international documents on fundamental rights evidencing the existence of the general principle of good administration.[28] The Supreme Court emphasised that the Charter is not legally binding upon Estonia, however it has authority due to the fact that "*/.../ it is based, inter alia, on the constitutional tradition and the principles of democracy and the rule of law, common to the Member States of the European Union*", which are valid also in Estonia.[29]

On 17 March 2003 the Supreme Court referred to the Charter as supportive authority to the existence of a principle that if, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.[30] On 21 January 2004 the Supreme Court stated that even though the Charter is not legally binding, the EU recognises the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.[31]

The Charter has continued to be an authority to the Supreme Court also after Estonia's accession to the EU. For example on 22 February 2005 the Supreme Court used the Charter as an example to prove the existence of ones

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[26] OJ C 303 of 14 December 2007.

[27] Also Justice Laffranque sees the references to the Charter as a demonstration of goodwill in considering European law. See Laffranque Julia, "Pilk Eesti õigusmaastikule põhiseaduse täiendamise seaduse valguses. Euroopa Liidu õigusega seotud võtmeküsimused põhiseaduslikkuse järelevalves" 8 *Juridica* (2007) lk 523–536 at 528 (in Estonian).

[28] 17. February 2003 Decision of the CRCESC in case 3-4-1-1-03 para 15. English translation available online at: http://www.nc.ee/?id=418&print=1 (06. January 2008). The same reference was made also in 19 December 2007 Decision of the ALCESC in case 3-3-1-80-06 para 20.

[29] Id.

[30] 17 March 2003 Decision of the Supreme Court *en banc* in case 3-1-3-10-02; English translation available online at: http://www.nc.ee/?id=419&print=1 (06. January 2008).

[31] 21 January 2004 Decision of the CRCESC in case 3-4-1-7-03 para 20. English translation available online at: http://www.nc.ee/?id=412&print=1 (06. January 2008).

fundamental right to bequeath one's property (Article 17).[32] On 28 March 2006[33] the Supreme Court referred to Article 1 of the Charter when confirming that human dignity is inviolable, a basis for all fundamental rights of a person and the goal of protection of fundamental rights and freedoms.[34]

The above demonstrates that the Supreme Court managed to seek guidance from and give practical value to the Charter, the legal force of which was at the same time heavily debated on the European level. Justice Laffranque has even concluded that the Supreme Court has been ahead of its time and has "given the Charter the value of general principles of law".[35]

Although the non-binding nature of the text was repeatedly reiterated in the decisions referred to above, the instrument was still put to practical use as a document that can be cited as evidence of the existence of a particular fundamental right recognized all over Europe. A clear parallel between the practice of the Supreme Court and that of the European Court in establishing pan-European fundamental rights can be seen.[36]

The articles contained in this compilation focus on analysing the positions adopted by the Supreme Court concerning the application of principles of European law. The analysis demonstrates the generally pro-European approach of the Supreme Court and its acceptance of the general principles of European law.

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[32] 22 February 2005 Decision of the Supreme Court *en banc* in case 3-2-1-73-04. English translation available online at: http://www.nc.ee/?id=394&print=1 (06 January 2008).

[33] 28 March 2006 Decision of the ALCESC in case no 3-3-1-14-06 para 11.

[34] The court also referred to C-377/98, Netherlands v Parliament and Council [2001] ECR I- 7079.

[35] Laffranque J. Eesti põhiseaduse ja Euroopa õiguse kooselu *supra nota* 20 at 187 (in Estonian).

[36] For a discussion on the case law regarding rights protected within the EU see Craig Paul, De Búrca Gráinne, *EU Law, Texts, Cases, and Materials*, (4th edition, Oxford 2007) pp 379–427.

2. SUMMARY OF THE MAIN CONCLUSIONS OF THE PUBLICATIONS INCLUDED IN THIS COMPILATION

2.1. Application of the Internal Market Principle of Equal Treatment on the Basis of the Europe Agreement

In the article "Access to Courts for Branches - Some Thoughts Under Estonian and EU Law"[37] the substantive Community law principle of equal treatment of companies originating from other Member States is analysed in the light of the order of the Supreme Court of 30 October 2003.[38] At the time of the order, European law was not yet directly a part of the Estonian legal system. However, Estonia had already undertaken the obligations of the Europe Agreement and, after the affirmative vote on the referendum of 13 September 2003, was looking towards EU membership. The above referenced article analyses the conclusions of the Supreme Court in the light of the case law of the European Court, the Internal Market principle of equal treatment of Community undertakings and brings parallels to the rules on freedom of establishment.

In the particular case, a branch of the Oracle East Central Europe Limited (*Estonian Branch*) was considered ineligible to participate in public procurement proceedings due to a branch not being a legal person under Estonian law. Accordingly the application of the general principle of equal treatment of companies from other Member States became relevant. Interestingly enough the analysis demonstrated that in applying the Europe Agreement the Supreme Court achieved a more or less equivalent result as the application of the Freedom of Establishment under Articles 43 and 48 EC Treaty would have yielded.

Analysis of the above article demonstrates that the administration and courts resented the application of European law, and the principle of equal treatment went largely unnoticed. The Public Procurement Office, who was and is competent to review challenges to procurements at the first instance, and the Tallinn Administrative Court (*Tallinna Halduskohus*)[39] as well as the Tallinn Court of Appeal (*Tallinna Ringkonnakohus*)[40] opted for a formalistic and grammatical interpretation of the national laws at issue and did not resort to European law for guidance. The Tallinn Administrative Court found that as a

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[37] Ginter Carri, "Access to Courts for Branches - Some Thoughts Under Estonian and EU Law", 11 *European Competition Law Review* (2004) pp 708–715.

[38] 30 October 2003 order of the ALCESC in case no 3-3-1-68-03; available online at: http://www.nc.ee/rkis/lahendid/tekst/3-1-68-03.html (in Estonian) (06 January 2008).

[39] The Court of First Instance in administrative cases.

[40] Order in Administrative case no 2-3/576/03 available online at http://kola.just.ee/docs/public/dokument_115838.pdf (in Estonian) (05 January 2008).

branch was not considered a legal person under Estonian law and only legal persons were entitled to make bids, the Estonian Branch could not participate in the procurement proceedings. The Tallinn Court of Appeal went even further stating that because the branch is not a legal person, it could not even have *locus standi* in court and thus the claim should have been returned without taking it into judicial proceedings.

Thus the European undertaking was not only denied a possibility of participating in the tender; it was also denied any recourse before the courts. Instead of a decision on the merits, the documents were sent back to it and the matter remained unresolved. None of the three levels of proceedings took an interest in the European background of the bidder or the fact that acting through a branch was an imperative requirement for foreign undertakings under the Estonian Commercial Code.

Such approach by the judicial bodies demonstrates the initial unwillingness to apply principles of European law and the need of intervention and guidance from the Supreme Court. Grammatical interpretation prevailed over reason in a situation where dynamic interpretation could have easily led to a different solution.

The above referenced article analyses the statement of reasons used against the branch and brings parallels with the practice of the European Court in the field of Freedom of Establishment. There was an obvious parallel with the *Überseering* case, where the European Court derived a right of standing in court proceedings for a company originating from another Member State from the principle of equal treatment and the Freedom of Establishment.[41] The analysis led to a conclusion that if European law were applicable to the case, then in the light of the Freedom of Establishment, the principle of equal treatment would require allowing the Estonian Branch to participate in both the procurement and judicial proceedings.

Against this background, it was most interesting to come to the conclusion that the application of the Europe Agreement led in fact to exactly the same outcome. Estonia had adopted the obligation of equal treatment of Community companies already with the Europe Agreement. Under article 43 (2) of the Europe Agreement, companies, subsidiaries and branches were to be treated equally.

On the basis of the analysis it could be concluded that the principle of equal treatment of companies of other Member States was embodied in the Estonian legal system already before Estonia's accession to the EU. The Supreme Court noticed the discrepancy of the interpretation provided by the administrative body and the lower courts, took the case into proceedings and gave precedence to the principle of equal treatment and European law *ex officio*. With the guidelines from the Supreme Court, the Tallinn Court of Appeal chose a

[41] Case C-208/00, *Überseering,* [2002] ECR I-9919.

different interpretation accepting that branches of Community undertakings are to be guaranteed equal rights with local undertakings.[42]

The analysis in the above referenced article demonstrates that immediately before accession, the judicial system was not entirely open to the Internal Market principle of equal treatment. An active intervention by the Supreme Court was necessary in order to set things right. The applicant had to engage in litigation before the administrative body and several instances of court to be able to benefit from the principle. The fact that the Supreme Court relied on the principle and referred to the Europe Agreement *ex officio* shows that the court adopted a favourable approach towards European law and its principles. Effect-oriented dynamic interpretation prevailed over formal (grammatical) interpretation.

2.2. Disregarding the Principles of Supremacy and Direct Effect in Constitutional Review Proceedings

In the article "Constitutional Review and EU Law in Estonia" [43] the acceptance of the principles of supremacy and direct effect is analysed with a focus on a landmark case of the Supreme Court from 19 April 2005 (the local government council elections case).[44] In fact, the general assembly of the Supreme Court refused to apply the *acquis communautaire* in constitutional review proceedings. Furthermore, it refrained from making a reference for a preliminary ruling. Even though questions of European law arose, the Supreme Court considered them out of place due to the particular nature of the proceedings. This also eliminated the need to request a preliminary ruling from the European Court. In the article, the conclusions of the Supreme Court are challenged in the light of principles of supremacy and direct effect.

In the particular case the Chancellor of Justice (*Õiguskantsler*; COJ) challenged a norm of national law in the Supreme Court, which imposed certain limitations to the right to stand for election for the local government council.[45]

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[42] The final decision of the Tallinn Court of Appeal resolving the case according to the instructions of the Supreme Court is available online at http://kola.just.ee/docs/public/dokument_164312.pdf (05 January 2008) (in Estonian).

[43] Ginter Carri, "Constitutional Review and EU Law in Estonia" 31(6) *European Law Review* (2007) pp 912-923.

[44] 15 April 2005 decision of the Supreme Court *en banc* in case no 3-4-1-1-05; Unofficial translation available online at http://www.nc.ee/?id=391&print=1 (06 January 2008).

[45] The COJ petitioned to declare § 70^1 of Local Government Council Election Act and § 1(1), the first sentence of § 5(1) and § 6(2) of Political Parties Act partly unconstitutional.

In essence, the Parliament had introduced new limitations which made it relatively difficult to be elected on a local government level without being a member of a political party, and the right to belong to political parties was in turn limited to only Estonian Citizens. The popular possibility to campaign through "citizens unions" was removed. The COJ submitted arguments of unconstitutionality of the limitations, and also argued that the provisions were contrary to Article 19 EC Treaty and the Council Directive 94/80/EC. Article 19 (1) EC Treaty attributes to EU citizens residing in a specific Member State the right to vote and stand as a candidate.[46] The new limitations made it difficult if not impossible for citizens of other Member States, who were resident in a certain municipality in Estonia, to be elected to local government councils.

Leaving the EU citizens resident in Estonia without a real opportunity to exercise their right to stand as candidates in municipal elections would very likely be held to constitute a violation of Article 10 and Article 19 of the EC Treaty by the European Court. Therefore the analysed case could and should have been an example of the effective application of principles of supremacy and direct effect. In its decision the Supreme Court did declare the limitations unconstitutional; however, it expressly refused to apply European law. Judging by the statement of reasons of the decision, this was due to procedural, not substantive, reasons. Potentially, leaving aside the EC Treaty provisions on citizenship in constitutional review, it may even be seen as going against the idea of union citizenship as an independent status.[47]

Under the Chancellor of Justice Act, the COJ is given express competence to review the Estonian legislation for conformity with the constitution and other laws of Estonia.[48] Therefore the Supreme Court considered that the COJ did not have competence to raise the question of potential violation of EC norms in constitutional review proceedings.

Thus a relatively formal approach based on grammatical interpretation prevailed. The absence of a clear authorization in the Chancellor of Justice Act became the sole basis for not applying European law. In addition, the Supreme Court noted that European law does not demand the establishment of abstract norm control procedures if an internal norm conflicts with European law. Instead, European law requires supremacy in application. The Supreme Court

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[46] For a discussion regarding the complexities of European citizenship see Reich Norbert, "The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union", 11 no 6 *European Law Journal* (2005) pp 675-698.

[47] See Reich N., The Constitutional Relevance of Citizenship *supra nota* 46.

[48] Section 1 subsection 1. Õiguskantsleri seadus, RT I 1999, 29, 406- RT I 2007, 16, 77. Unofficial translation available online at http://www.legaltext.ee/text/en/X30041K6.htm (06. January 2008)

referred to the *IN.CO.GE* case where the European Court confirmed the duty to disapply the conflicting national rule.[49]

In the above referenced article those conclusions are disputed. Principles of supremacy and direct effect should have prevailed. The constitution should have been applied in the light of European law. When in doubt, a reference for a preliminary ruling would have been appropriate (Article 234 EC Treaty). Principles of national treatment, supremacy and direct effect are fundamental to European law and cannot be left aside for procedural reasons.

Drawing a line between constitutional review proceedings and other cases is no longer possible due to the Third Act of the constitution[50], which demands that European law be taken into account in interpreting the constitution. Although it is true that European law does not require the establishment of a separate procedure for individual norm control, the need to consider questions of European law arises out of the need to interpret the constitution in the light of European law (conforming interpretation), the principles of primacy, direct effect and national treatment.

The analysis leads to a conclusion that in the particular case the reasoning used when leaving aside principles of European law is disputable. However, the statement of reasons of the decision supports an argument that this was not the result of a denying approach towards those principles, but rather due to the general understanding that the principles were not applicable in abstract norm control proceedings in constitutional review.

It is not insignificant that ultimately the decision had the effect of removing the illegal restrictions and thus the interests that the relevant European principles sought to protect were indirectly protected by the constitution.[51] It is quite possible that had the interpretation of national law led to a different conclusion, the decision of the judges would have been in favour of applying European law.[52] A. Albi has stated, "the Central and Eastern European constitutional courts have displayed inventiveness in finding pragmatic solutions to avoid conflicts with Community law."[53] The fact that a European law conforming solution could be found by application of the constitution

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[49] Joined cases C-10/97 to C-22/97, *Ministero delle Finanze / IN.CO.GE.'90 and others* [1998] ECR I-6307 para 21.

[50] *Supra nota* 5

[51] 09 November 2006 the Parliament amended the Political Parties Act and removed the precondition of Estonian citizenship to belonging to political parties (RT I 30.11.2006, 52, 384).

[52] Laffranque Julia, "A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act" II *Juridica International* (2007) pp. 55–66 at p 59 refers to the possibility that the majority of the court may have been affected by the short time left till the elections and the time cost of the preliminary rulings procedure. The decision was rendered on 19. April 2005 and the elections took place on 16. October 2005.

[53] Albi A. *supra nota* 15 at 34

without additional cost in time may have affected the decision of the Supreme Court.

The above decision of the Supreme Court will be further addressed below in the light of positions adopted by the same court later. The main argument against the position of the Supreme Court is the hypothetical situation where the requirements of the constitution and European law would be conflicting. In such a case, the declaring of an internal norm contrary to the constitution in constitutional review proceedings, which take place in a vacuum from European law, may in fact *ipso facto* be considered a violation of European law by Estonia. Therefore, European law must have its place also in constitutional review proceedings.

As it stands, the decision still seems to be "good law". The Supreme Court has 19 justices in total. In the particular case the grand chamber consisted of 18 justices only 6 of which signed a dissenting opinion in favour of European law.[54] Thus one could conclude that the adopted position reflects the opinion of a clear majority.

2.3. Accepting Supremacy, Direct Effect and Conforming Interpretation

The article "Effective Implementation of the Trade Mark Directive in Estonia"[55] analyses the acceptance of the principles of supremacy, direct effect and conforming interpretation. The first part of the article discusses cases accepting supremacy of European law.[56] The second part of the article analyses the direct effect of directives and the principle of conforming interpretation and the effects of the Third Act of the constitution, explaining how the act was used to justify confirming of unconditional supremacy to European law.

The European Court has described the principles of supremacy and direct effect as "essential characteristics of the Community legal order".[57] Supremacy serves as a guarantee of uniform application of European law.[58] In the order of 25 April 2006, the Administrative Law Chamber of the Supreme Court, relying

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[54] The translation of the dissenting opinion is available online together with the text of the decision. *Supra nota* 44.

[55] Ginter Carri, "Effective Implementation of the Trade Mark Directive in Estonia", 28(6) *European Competition Law Review* (2007) pp 337-345.

[56] ALCSC Order 25. April 2006, 3-3-1-74-05; 11. May 2006 opinion of the Supreme Court *en banc* in case 3-4-1-3-06 re interpretation of section 111 of the Constitution. English translation available online at: http://www.nc.ee/?id=663&print=1 (06 January 2008).

[57] See Opinion 1/91 [1991] ECR I-6079.

[58] Regarding the relationship of supremacy and uniformity see N.Reich *infra nota* 68 at 38-40.

largely on the Third Act, came to the conclusion that a contradiction between European law and the Estonian constitution is not possible (the case related to the effects of Polish challenge to the excess stock rules). This is due to the fact that the constitution must be applied taking into consideration the duties and obligations arising out of European law.[59] The discussed order uses wording that is straightforward and unconditional, showing that the court had no difficulty accepting supremacy. In fact, the order did not include any limitations or phrases, which could serve as grounds for limiting supremacy (e.g., in the case of a contradiction with the fundamental rights, which has been frequently used by the old Member States).[60]

On 11 May 2006 the Supreme Court, this time acting in the form of the Constitutional Review Chamber, adopted an opinion regarding the interpretation of the constitution (the transition to Euro case), which was very much in accordance with the above discussed order of the Administrative Law Chamber.[61] The Supreme Court reaffirmed that the constitution must be interpreted in conformity with European law. According to the opinion:

> [O]nly that part of the constitution is applicable, which is in conformity with the European Union law or which regulates relationships that are not regulated by the European Union law. The effect of those provisions of the constitution that are not compatible with the European Union law and thus inapplicable is suspended.[62]

At this point it may be concluded that the two discussed positions again confirm the openness of the Supreme Court towards principles of European law. The opinion was adopted by a chamber consisting of 9 justices out of whom 2 issued dissenting opinions questioning both the existence of limitations to the interpretation as well as the binding nature of the rendered opinion to further practice.[63]

History of the EU has shown that the highest courts of many of the "old" Member States have been reluctant to accept the EU law as being something above all parts of the national constitutions (mainly in relation to protection of

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[59] 25 April 2006 Order of the ALCESC in case no 3-3-1-74-05 para 12.I.

[60] The question of whether general principles of European law would be positioned above the constitution was still described as being open by Laffranque in Laffranque J. Eesti põhiseaduse ja Euroopa õiguse kooselu *supra nota* 20 at 183.

[61] 11 May 2006 opinion of the Supreme Court *en banc* in case 3-4-1-3-06; Justice Laffranque sees the opinion as a "turning point" in explaining the Third Act. Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 524

[62] 11 May 2006 opinion of the Supreme Court *en banc* in case 3-4-1-3-06 para 12;

[63] Also see dissenting opinions of justices Villu Kõve and Eerik Kerganberg. The translations of the dissenting opinions are available online together with the opinion. See *supra nota* 56.

fundamental rights and questions of *Kompetenz-Kompetenz* of the EU). A thorough analysis of the practice of the "old" Member States has been already conducted by well known authors.[64] Therefore this author did not revisit the same territory in his research, as repetition would not have provided significant new value, would instead merely burden the text and could effectively be replaced by references to valid sources. It suffices to quote F. Hoffmeister when describing the earlier case law in Germany stating that "It is quite obvious that both constructions [referring to the test of when the German Constitutional Court could interfere] imply a challenge to the supremacy and unity of European law."[65] The same is referred to by D. Scheuing stating that "the Community law's claim for supremacy over German constitutional law has encountered long-lasting resistance."[66] M. Maduro describes the practice as "a challenge to the absolute supremacy of EU law on the part of several national high courts."[67]

Currently it seems that as a result of a series of fundamental decisions, an intervention with European law relying on the national constitution by the German Constitutional Court has become more or less unlikely. As described by N. Reich, the German Constitutional Court in the so-called *Banana* litigation "put nearly insurmountably high barriers on proving insufficient protection of fundamental rights and on *ultra vires* action of Community institutions."[68]

The (until now) unconditional acceptance of the principle of supremacy of European law in Estonia is in accordance with the decision of the European Court in *Internationale Handelsgesellschaft,* where "unconditional surrender" of national constitutions to the primacy of European law was declared.[69] As

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[64] For a review of the decisions regarding this see e.g., Craig Paul, "The ECJ, National Courts and the Supremacy of Community Law" Available online at: www.ecln.net/rome2002/craig.pdf (05 January 2008); Also see Lazowski Adam, "Poland, Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005", 1 *European Constitutional Law Review* (2005) pp 601–613, Craig Paul, De Búrca Gráinne, *EU Law, supra nota* 36 at 353–374 and Albi A. *supra nota* 15.

[65] Hoffmeister Frank, Annotation of German Bundesverfassungsgericht: Alcan, Decision of 17 February 2000; Constitutional review of EC Regulation on bananas 38 *Common Market Law Review* (2001) pp 791-804 at 796. Comment added by this author.

[66] Dieter H. Scheuing "The Approach to European Law in German Jurisprudence" 5 German Law Journal no 6 pp 703–719 at 704, available online at: http://www.germanlawjournal.com/article.php?id=446 (02 February 2008).

[67] See Maduro Miguel "Europe and the Constitution: What If This Is As Good As It Gets?", in Marlene Wind and Joseph Weiler (eds), Constitutionalism Beyond the State, (Cambridge: Cambridge University Press, 2003) pp. 74–102 at 97.

[68] Reich Norbert, *Understanding EU Law; Objectives, Principles and Methods of Community Law,* (2nd edition, Intersentia, Antwerpen-Oxford 2005) p 37.

[69] Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125. Also Albi refers to the granting of unconditional supremacy in Albi A. *supra nota* 15 at 45.

Prof Mestmäcker so well puts it "European law is predicated upon its universal and equal applicability in all Member States. Only in this way is it possible to establish an internal market without national frontiers and a system of undistorted competition."[70] Subjecting validity of European law to further test of national constitutions seriously endangers this uniform application.

In the view of this author, within the framework of European law, attempts to limit the supremacy of European law via national constitutions are out of place. Any attempts to the contrary merely constitute an attempt to establish "artificial supremacy of national constitutionalism".[71] Currently both national and European constitutional law compete to have the "role of the higher law".[72] M. Maduro describes this situation as a demonstration of a "clear and present danger of constitutional conflict".[73]

The existing case law of the Supreme Court confirms supremacy of European law over the constitution with no discussion on potential limitations such as in defence of fundamental principles of constitutional law.[74] In all fairness, neither of the two analysed cases posed a need for such arguments. Still, in the interests of clarity, when declaring supremacy of European law a position on the existence or absence of possible limitations to it could have been included.

It may be argued that a potential limitation to supremacy still exists under section 1 of the Third Act, which allows Estonia to be a member of the EU in accordance with the fundamental principles of the constitution. A grammatical interpretation of the provision leads to seeing a connection only between the potential infringement of the fundamental principles of the constitution and Estonia being able to belong to the EU – an exit clause. There is also an alternative interpretation in that the provision can be seen as an interpretative tool giving precedence to fundamental principles of the constitution and demanding the disapplying of the conflicting European norm. The effect of the provisions of the Third Act will be further discussed in section 3 of this chapter.

The analysis also demonstrates a conflict in the positions adopted in the practice of the Supreme Court. In the 25 April 2006[75] order in the case related to the effects of Polish challenge to the excess stock rules and 11 May 2006[76] opinion in the transition to Euro case the Supreme Court stated that a

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[70] Mestmäcker Earnst-Joachim, "On the Legitimacy of European Law", 58 *Rabels Zeitschrift für ausländisches und internationales* (1994) pp 615–636 at p 627.

[71] The same term is used by M.Maduro in a constitutional law context in Maduro Miguel *Supra nota* 80 at 74.

[72] Ibid at 77.

[73] Ibid at 77.

[74] Reference is also made here to the mention of fundamental principles of the constitution in the "Third Act".

[75] *Infra nota* 59.

[76] *Infra nota* 61.

contradiction between the constitution and EU law is not possible due to the fact that the enforcement of those provisions of the constitution which do not accord with EU law is paused, while on 19 April 2005[77] in the local government council elections case the Supreme Court considered it possible to exercise constitutional review without resorting to European law in interpreting the constitution. In section 3 of this chapter, a parallel will be drawn between the 25 April 2006[78] case related to the effects of Polish challenge to the excess stock rules and the 11 May 2006[79] positions of the Supreme Court in the transition to Euro case with that adopted in the 19 April 2005 decision in the local government council elections case.

The 30 March 2006 decision of the Supreme Court (the trademark directive case) accepted principles of direct effect and directive conforming interpretation of European law.[80] In the particular case a dispute arose between a parallel importer and the trademark proprietor. The Supreme Court was faced with a problem of the Estonian Trademark Act[81] (TMA) not being in conformity with the Trademark Directive (TMD).[82] Similar to the case discussed in subsection 0, the courts of first and second instance refused to resort to European law in their decisions. Instead they chose to apply the TMA using its grammatical interpretation. The arguments of the applicant relying on case law of the European Court and the TMD were ignored.

The above referenced article again demonstrates the initial unwillingness of courts of first and second instance to accept arguments of European law and the need for guidance from the Supreme Court. As a result of ignoring the statement of reasons of the earlier decisions of the European Court in similar cases and ignoring of the text of the TMD, substantively incorrect decisions were rendered.

The analysed decision of the Supreme Court adopted several important positions confirming the validity of general principles of European law. To begin with, the lack of horizontal direct effect of directives was reiterated.[83] Then the principle of directive conforming interpretation was applied.

The analysis of the reasoning demonstrates that all the main elements to the test of whether directive conforming interpretation is possible were reflected. The Supreme Court confirmed that the Estonian TMA has to be interpreted in the light of the principles of the directive and the practice of the European

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77 *Infra nota* 44.
78 *Infra nota* 44.
79 *Infra nota* 61.
80 30 March 2006 Decision of the Civil Law Chamber of the Estonian Supreme Court (hereinafter CLCESC) in case no 3-2-1-4-06.
81 Kaubamärgiseadus. RT I 2002, 49, 308; 2006, 7, 42 (in Estonian).
82 30 March 2007 Decision of the CLCESC in case no 3-2-1-4-06. Trade Mark Directive (Note 10).
83 Ibid para 30.

Court.[84] Indirectly, the court also showed regard to the limitation of *contra legem* interpretation[85] and analysed the explanatory memorandum to the draft law to demonstrate that the intent of the legislature was to properly transpose the directive. The statement of reasons of the decision can be seen as confirming the applicability of the doctrine of *effet utile.* Where traditionally an internal judge would have taken guidance from the principle *lex specialis derogat legi generali,* the Supreme Court accepted that European law demands that one look to other acts, including if necessary *lex generali* to seek a solution that would conform with the goal and purpose of the directive. The court did not limit the reasoning with grammatical interpretation and instead seemed to focus on teleological dynamic forms of interpretation looking for the ultimate goal of the legislation and providing for its effective application.

In all of the analysed cases, the Supreme Court gave precedence to the rules of European law. In cases discussing supremacy over the national constitution, the Supreme Court seems to have gone further than the courts of many of the "old" Member States before it. The court confirmed direct effect and directive conforming interpretation and accepted that these principles may require setting aside other legal principles such as *lex specialis*. Accordingly, it may be concluded that the approach of the Supreme Court was pro-European and there were no signs of a defensive approach towards EU law.

2.4. Application of Procedural Principles of *Acte Clair* and *Acte Éclairé*

The final article of this cumulative dissertation, "Procedural Issues Relating to EU Law in the Estonian Supreme Court",[86] analyses cases relating to European law from a procedural law point of view, focusing on procedural principles such as *acte clair* and *acte éclairé.* Accordingly, the article serves as a balance so that both the principles of substantive law as well as procedural law are covered by the research. Although the present case law on this matter is not voluminous, there are interesting aspects to be analysed. This topic constitutes an integral part of the research as the preliminary rulings procedure carries a central importance in the development of the *acquis*.

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[84] Ibid para 31.

[85] See also C-105/03 Pupino [2005] ECR I-5285 para 47 "[T]he principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem."* confirmed also in Case C-212/04 Adeneler *et al.* [2006] ECR I-6057 para 110.

[86] Ginter Carri, "Procedural Issues Relating to EU Law in the Estonian Supreme Court" I *Juridica International* (2007) pp 67–79.

The topic of references for preliminary rulings is of particular interest as there were no references by Estonian courts until 2007.[87] This in spite of the fact that, as the discussion in the above subsections demonstrates, in several cases questions of European law arose. The article aims to analyse the existing case law drawing parallels with the practice of the European Court.

Again, due to already voluminous research on the generalities of the preliminary rulings procedure, this part of research was not repeated. A focus on the particularities of the practice of the Supreme Court and the potential limitations to the obligation to refer a case to the European Court was instead adopted.

In the 25 April 2006 order (in the case related to the effects of Polish challenge to the excess stock rules) the Supreme Court recognized the exclusive competence of the European Court to establish invalidity of secondary Community law, as was uniformly established in *Foto-Frost,* and the obligation of an internal court to make a reference, where doubts as to such validity arise.[88] The above referenced article addresses the question what is the procedural effect of a pending independent action for annulment before the European Court of justice to a parallel proceeding in the Estonian court concerning the same act of secondary Community law. It is argued that an analogy with internal constitutional review proceedings would be appropriate.

The bulk of the above referenced article analyses two cases. First, the 30 March 2006 decision of the Supreme Court in the trademark directive case (also discussed in subsection 2.3. of this chapter) is analysed addressing the application of the doctrine of *acte éclairé,* which relieves the courts of last instance from the duty to refer questions to the European Court that have already been answered. Secondly the 5 October 2006[89] decision of the Supreme Court (the excess stock case) is analysed addressing the application of the doctrine of *acte clair*, which relieves the courts of last instance from the duty to refer questions to the European Court, where the correct answer to the question would be equally obvious to the referring court, to the European Court and to the courts of other Member States.

The referred article demonstrates that the Supreme Court managed to rely on both *acte clair* and *acte éclairé* before it made the first reference for a preliminary ruling. Only three years after Estonia's accession in mid-May 2007,

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[87] See official statistics of the European Court for 2006. Available online at: http://curia.europa.eu/en/instit/presentationfr/rapport/stat/06_cour_stat.pdf (06 January 2008).

[88] *Infra nota* 59 para 21. Case 314/85, Firma Foto-Frost [1987] ECR 4199.

[89] 05 October 2006 Decision of the ALCESC in case no 3-3-1-33-06. An English summary of the decision is available on line at: http://www.juradmin.eu/docs/EE01/EE01000007.pdf (06 January 2008).

the first reference for a preliminary ruling was made by the Supreme Court in a case concerning support for rural development.[90]

In the above referenced article, it is argued that in the 30 March 2006 decision in the trademark directive case the exception of *acte éclairé* was applied in accordance with the guidelines of the European Court. The court recognized its power to make a reference for a preliminary ruling *ex officio.* In seeking the proper application of Estonian law the decision referred extensively to the interpretations already given by the European Court. This serves as evidence that the Supreme Court took guidance from the preconditions introduced by the European Court for relying on the exception of *acte éclairé*[91] and accepted its obligation to specify clear statement of reasons and references to the relevant case law of the European Court to prove that the question has in fact already been answered by the European Court. The decision contains extensive analysis of the European case law and a clear cross-reference to that analysis in the section, where *acte éclairé* is relied upon. This gives credibility to the court's conclusion that the questions posed had already been answered and the refraining from making a reference for a preliminary ruling in this case must be considered justified.

On the other hand the analysis in the above referenced article shows that in the 5 October 2006 decision in the excess stock case the Supreme Court did not sufficiently justify the relying on the exception of *acte clair.* The Supreme Court did refer to the preconditions laid down by the European Court in the 1982 *CILFIT* decision[92] thus recognizing being bound by them. However the Supreme Court did not provide a clear statement of reasons to prove that the European Court and the courts of other Member States would have interpreted the law in the same way. In fact, the statement of reasons of the decision seems to focus on questions of proportionality and legitimate expectations *per se,* without containing an analysis showing that the European Court would assess those questions in the same way. Proving that the European Court has confirmed the applicability of the principle of proportionality in the agricultural sector seems insufficient to justify relying on *acte clair* in a specific case where conformity of internal rules with European law had to be assessed. In the analysed case, many factors had to be balanced and the reasoning of the European Court dealing with the same factors might have been different. The statement of reasons of the decision relying on *acte clair* reflects the internal conviction of the Administrative Law Chamber of the Supreme Court and is not combined with clear references to the hypothetical position of the courts of

[90] 14 May 2007 Order of the ALCESC in case no 3-3-1-95-06.

[91] Case 28 to 30/62 Da Costa *et al.* v. Netherlands Inland Revenue Administration [1963] ECR 31.

[92] Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health [1982] ECR 3415.

other Member States or the European Court. The disputability of the adopted position is illustrated by a brief remark of Justice Lõhmus referring in connection with the discussed case to the need to ask for a preliminary ruling as the arguments to the contrary may have been equally convincing. According to Justice Lõhmus "The response of the European Court could have influenced the decision in this complicated yet fundamental court case."[93] Accordingly, it must be concluded that the relying on the principle of *acte clair* was reasoned insufficiently.

The above position regarding Estonian law being contrary to European law was adopted in a court decision in *inter partes* litigation, in a legal hurdle where several more cases with similar facts were pending in the lower courts. Although the decision of the Supreme Court is not legally binding for those other proceedings, its authority was widely followed in practice.[94]

Considering the central importance of the preliminary rulings in shaping European law, the exceptions should not be relied upon lightly. As T. Tridimas has put it:

> Article 234 has been, more than any other jurisdictional clause, the procedural facilitator of constitutional change. The judicial dialogue which takes effect through the preliminary rulings procedure has enabled the ECJ to lay down the fundamental principles of the Community legal system and set in motion a process towards the constitutionalization of the Treaties.[95]

In the above referenced article a parallel with the 30 March 2006 decision in the trademark directive case is brought, demonstrating that *effet utile* of European law could possibly have been achieved by looking for a solution outside the *lex specialis*. The article introduces arguments demonstrating that a potential solution in conforming interpretation of *lex generali* could have been found without having to declare the *lex specialis* contrary to European law. An analysis of the internal law and practice of the Supreme Court is presented to

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[93] Lõhmus Uno, "Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime?", 3 *Juridica* (2007) lk 143-154 lk 151 (in Estonian).

[94] See Kanger L. in *supra nota* 19 at 35. Interestingly the case of excess stock seems to go to the European Court via the second round of cases following the decision of the Supreme Court. For example in case 3-07-902 the Tallinn Administrative court made a reference for a preliminary ruling via the order of 28 November 2007 to the ECJ. The reference was not related to the court doubting the earlier decision of the Supreme Court but rather to the court doubting whether the later legislation responded sufficiently to the concerns expressed by the Supreme Court.

[95] Takis Tridimas, "Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure." 40 *Common Market Law Review* (2003) pp 9–50, at 11.

demonstrate that the rights of the applicants were in fact protected by the general principles of administrative law.

Although the author has criticized the statement of reasons of the 5 October 2006 decision in the excess stock case, the analysed case does not contradict the hypothesis of the author of a pro-European approach of the Supreme Court. Even if in the decision of 5 October 2006 in the excess stock case the principle of *acte clair* was relied on incorrectly, the Supreme Court still gave precedence to European law by declaring the internal law contrary to the European regulation. In all cases the decisions demonstrate the acceptance of the guidelines of the European Court and the intention of the Supreme Court to abide by them.

3. FURTHER QUESTIONS RELATING TO THE ANALYSED PRACTICE OF THE SUPREME COURT

The logical division of the analysed cases into the above four articles leaves some room for further comments regarding questions which did not fit into this division, which however relate to the same positions adopted by the Supreme Court.

One of the questions to be addressed is the contradiction between the case discussed in subsection 2.2. (the local government council elections case), where the Supreme Court denied applicability of European law in constitutional review, with the cases discussed in subsection 2.3., where the Supreme Court confirmed the incorporation of European law into the text of the constitution (the case related to the effects of Polish challenge to the excess stock rules and the transition to Euro case). The second question relates to the potential unconditional supremacy of EU law *vis a vis* the legal effect of the first section of the Third Act of the constitution, which refers to the importance of fundamental principles of the constitution as a condition for Estonian membership to the EU. From the internal law perspective, the question of the positioning of European law in the Estonian legal system must be addressed.

3.1. Supremacy and Direct Effect to be Included in the Constitutional Review Proceedings

As the analysis in subsection 2.3. showed, the Supreme Court did not have any difficulties accepting supremacy *per se*. Such vigilant application of European law is in accordance with the principle of loyalty as developed by the European Court based on Article 10 EC Treaty. In *Simmenthal* the European Court laid

down the duty of internal courts to apply European law in its entirety and set aside any provision of national law in conflict with it.[96] In IN.CO.GE.'90 Srl the Euopean Court dismissed the Commissions claim as if a provision of internal law contrary to European law must be treated as non-existent.[97] The European Court confirmed that the internal court is merely under an obligation to disapply the conflicting norm. The position of the Supreme Court in the 19 April 2005 decision in the local government council elections case seems to be intended to follow the same approach. It does not deny supremacy of European law, but considers it applicable only in a particular case, not in abstract norm control.[98] It is argued that this position, excluding effects of European law in constitutional review is bound to change in the future. The statement of reasons of the decision, which relies on the grammatical interpretation of law and focuses on the lack of express authority of the COJ to raise issues of European law, does not exclude the possibility of relying on arguments of European law in interpretation and application of the constitution by the Supreme Court in the future.

The fact that supremacy extends over the entirety of the constitution is reflected in the positions of legal scientists and practitioners in Estonia. On 14 December 2004, the Constitutional Committee of the Estonian Parliament formed an expert committee (Constitutional Committee) to analyse whether the constitution and the Third act enable the parliament to ratify the Treaty establishing a Constitution for Europe[99] without having to amend the constitution beforehand.[100] The Constitutional Committee came *inter alia* to the following conclusion:

> By adopting the Constitution of the Republic of Estonia Amendment Act, Estonia approved the already existing fundamental principles of the European Union and confirmed the conformity of those principles with the Constitution. Therefore it is not necessary to check the conformity of those fundamental principles of the Treaty establishing a Constitution for Europe, which may be considered as already existing fundamental principles of the European Union.[101]

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[96] Case 106/77, Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629 para 21.

[97] Joined Cases C-10/97 to C-22/97, IN.CO.GE.'90 Srl [1998] ECR I-6307 para 19–21.

[98] Ibid para 49.

[99] OJ C 310 of 16 December 2004 Available online at: http://eur-lex.europa.eu/en/treaties/index.htm (13 January 2008).

[100] „Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad Euroopa põhiseaduse lepingu ratifitseerimise küsimuses." Available online at: www.riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf (13 January 2008) (in Estonian).

[101] Ibid at p 6 In Estonian "PSTS-i vastuvõtmisega kiitis Eesti heaks Euroopa Liidu senised aluspõhimõtted ning tunnistas nende aluspõhimõtete ja põhiseaduse (aluspõhimõtete) kooskõla. Seetõttu ei ole tarvilik kontrollida täiendavalt nende EPSL-i aluspõhi-

Supremacy, being one of the very first principles of European law confirmed by the European Court, is certainly one, which is included in the scope of the above reference. Considering the fact that the *Internationale Handelsgesellschaft* decision[102], which confirmed supremacy over the constitution, dates long before the Estonian referendum (14 September 2003), the above quote may be interpreted as confirming acceptance of a similar extent of supremacy by the above expert group. Considering that the group consisted of leading legal scientists as well as practitioners (including justices of the Supreme Court) and politicians of Estonia, this must certainly be seen as a strong interpretative authority confirming absence of limitations to supremacy over the constitution. Accordingly, the referendum has given an entirely different legal character to the constitution.

As discussed above, in the 19 April 2005 decision in the local government council elections case the Supreme Court excluded European law from constitutional review. This position can be challenged by posing the question whether the goal of the procedure is in conformity with the text of the constitution or the proper application of the constitution. Justice Laffranque addresses the effect of the Third Act of the constitution arguing that the essence of the Third Act remains unclear to many. "Misunderstandings were based on the fact that [they considered] that there are two different constitutional texts in Estonia: the Constitution and its Amendment Act, and that the two are not particularly related."[103] Although one must agree with justice Laffranque in that there cannot and should not exist two separate versions of the constitution, it may well be argued that the above referenced 19 April 2005 decision led to exactly such an outcome. The possibility of the Third Act having created two different constitutions goes beyond being a myth and may be seen as a reality causing substantial obstacles to the application of European law in Estonia.[104]

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mõtete kooskõla põhiseadusega, mida võib pidada Euroopa Liidu senisteks aluspõhimõteteks."

[102] Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125.

[103] Laffranque J., A Glance at the Estonian Legal Landscape *supra nota* 52 at 58 – the correction is made on the basis of the Estonian version of a similar article published in Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 526. "Arusaamatused seisnesid selles, et leiti, nagu kehtiks Eestis sisuliselt kaks erinevat põhiseaduse teksti – põhiseadus ja selle täiendamise seadus – ning et nende vahel puudub igasugune seos."

[104] See ibid at p 58 where Laffranque refers to criticism of the Third Act in following terms: "However, the shortness of the CAA opens the road for imagination. Innovation that strikes with simplicity, on the one hand, and is very open to interpretation, on the other, can cause various myths and criticism. This is the case with the CAA."; "Ühelt poolt oma lihtsusega rabavad, kuid teiselt poolt just sellest tulenevalt palju tõlgendusruumi pakkuvad uuendused toovad kaasa kõikvõimalikke müüte, sh kriitikat. Nii on see ka PSTS-ga." Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 526.

In the positions adopted approximately a year later, the tight interconnection between the validity of constitutional norms and European law was established by the same court.

As referred to above, the 25 April 2006[105] order in the case related to the effects of Polish challenge to the excess stock rules and the 11 May 2006[106] opinion in the transition to Euro case confirmed that the constitution has been amended in its entirety in the part where it is not in conformity with European law. Only the part of the constitution which is in accordance with European law can be applied. Thus, if the goal of the constitutional review procedure is the proper application of the constitution, then the 25 April 2006 and 11 May 2006 positions exclude the possibility of establishing proper interpretation and application of the constitution, without having regard for European law. Justice Laffranque describes the adopting of the Third Act as the most cardinal change because "it has given the constitution in many aspects a new colour."[107] The question arises that if European law has been interwoven into our constitution and has "coloured" it in many respects, then how can the constitution be applied in constitutional review without first checking which part of it remains valid after Estonia's accession?

This argument is further strengthened by the new competence given to the Supreme Court in December 2005 to give opinions on the proper interpretation of the constitution in the light of European law.[108] The fact that during the legislative procedure the parliament can approach the Supreme Court for such guidance in order to avoid a violation also indicates that the laws that have been adopted should be subject to the same test if they happen to end up in constitutional review.

It is therefore concluded that the original position of the Supreme Court denying supremacy and direct effect in constitutional review for procedural reasons is not in conformity with later positions adopted by the same court. Even if the legislature does not provide for a legal solution empowering the COJ to raise arguments of European law in constitutional review proceedings[109], such rights are *de facto* provided to the COJ by the 25 April 2006 and 11 May 2006 positions of the Supreme Court. It is difficult to argue that the COJ must ignore the effects of European law to the validity of the constitution when performing its tasks. Thus supremacy, direct effect as well as the procedure of asking for a preliminary ruling, is bound to be included in the future constitutional review proceedings.

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[105] *Infra nota* 59.

[106] *Infra nota* 61.

[107] Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 523.

[108] Põhiseaduslikkuse järelevalve kohtumenetluse seaduse ja riigikogu kodukorra seaduse muutmise seadus RT I 22.12.2005, 68, 524.

[109] Albi considers that the Supreme Court delivering a message to the parliament on the need for some adjustments in the legislative activity in the context of Union membership. Albi A. *supra nota* 15 at 42-43.

There are, however, also arguments against the conclusion that the approach of the Supreme Court has merely changed with time. For instance one can simply take a look at the numbers involved in adopting the positions. As discussed above, the position denying applicability of European law was adopted by a chamber of 18 justices (out of the total number of 19) with 6 signing a dissenting opinion in favour of European law. The later positions indicating a possibility to the contrary have been adopted by the Administrative Law Chamber and in the case of the 11 May 2006 opinion in the transition to Euro case, by 9 justices 2 of whom dissented. Therefore, there is in fact no clear indication from the majority of the Supreme Court which of the two approaches will prevail in the future.

3.2. Effect of the Limitation to the Benefit of Fundamental Principles of the Constitution in the Third Act

As discussed above, the Third Act of the constitution, which was approved on referendum, states in section one that Estonia may belong to the EU in accordance with the fundamental principles of the constitution. It is unclear whether this should be seen as what it says grammatically – a limitation to Estonia's membership to the EU, or as an interpretative tool for the benefit of fundamental principles of Estonian constitution in case of conflict with European law. The grammatical text of the Third Act seems to favour the first interpretation. The practice of Supreme Courts of "old" Member States, including but not limited to the famous *Solange* saga on the other hand would rather support the second alternative.

Justice E. Kerganberg criticizes the lack of guidance as to the significance of the first section of the Third Act in his dissenting opinion to the 11 May 2006 opinion in the transition to Euro case. According to justice Kerganberg:

> It is regrettable that the opinion of the Supreme Court contains no explanation as to why it has not considered necessary to include the provisions of § 1 of CAA into the analysis of constitutionality. I find that such an analysis, one related also to the fundamental principles of the Constitution of the Republic of Estonia, would have been imperative for the reason that the second part of the opinion has, in fact, tried to explain the actual implications of the adoption of the Constitution of the Republic of Estonia Amendment Act at a referendum for the entire Estonian constitutional order. Yet, this explanation is and will remain incomplete without taking a stand as to the present status of § 1 of CAA.[110]

[110] The translation of the dissenting opinion is available online together with the opinion. See *supra nota* 56 para 2. The abbreviation CAA refers to the Third Act.

The briefness of the Third Act is criticised and praised at the same time.[111] It may be seen as a pragmatic solution to the desire of the authorities to avoid the discussion on detailed amendments to the constitution before the popular vote giving green light to accession. Not wishing to give further grounds to populist propaganda of Estonia moving from one "Union" to the other (referring to alleged similarities between USSR and EU), the brief wording of the Third Act serves as an appropriate compromise.[112] Still, the mere text of the first section of the Third Act seems insufficient without clear interpretative guidance.

The question of how to determine these fundamental principles, which the Third Act refers to, remains without a uniform answer.[113] The report of the Constitutional Committee defines them as "Fundamental values, without which Estonia and the constitution would lose their substance" [114]. Possibly they could be those legal principles and individual rights which we would want protected from the powers of a temporary majority.[115] Therefore the potential challenge to unity of European law remains without clear limitations.

In addition, the academic opinion regarding whether the Third Act stipulates a precondition to Estonia's membership and a corresponding trigger to exit, or an interpretative tool, remains controversial. Justice Lõhmus describes the provision as follows "On one side the term gives a clear constitutional authority to belong to the European Union, on the other however lays a precondition that membership is permitted only as long as the essence of European Union corresponds to the fundamental principles of our constitution."[116]

Justice Laffranque also discusses the Third Act in a similar way stating that the Third Act stipulates "the condition of Estonia's EU membership – adherence to the fundamental principles of the Constitution...."[117]

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[111] See Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 524–526.

[112] For legal and practical justifications for this choice of form see Laffranque *et al. supra nota* 8 at 565–566.

[113] For a discussion on the defining of the fundamental principles see e.g. Allik Mihkel. "*Eesti Vabariigi Põhiseaduse ja Euroopa Liidu Põhiseaduslikkuse Leppe Aluspõhimõtted.*" (not published, available with the author) paras 2.1.–2.2. (*in Estonian*) and Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad *supra nota* 100 paras 5.1.–5.2.

[114] "Põhiseaduse aluspõhimõtted on põhiväärtused, ilma milleta Eesti riik ja selle nimel kehtestatud põhiseadus kaotavad oma olemuse." Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad *supra nota* 100 para 5.1. at 5.

[115] See also Mestmäcker E-J. On the Legitimacy of European Law *supra nota* 70 at 629.

[116] "Ühelt poolt annab säte selge põhiseadusliku volituse kuuluda Euroopa Liitu, teiselt poolt seab aga tingimuse, et kuulumine on lubatud vaid seni, kuni Euroopa Liidu olemus vastab meie põhiseaduse aluspõhimõtetele." Lõhmus Uno, "Mida teha põhiseadusega?" II *Juridica* (2005) lk 75–83 at 78.

[117] Laffranque J., A Glance at the Estonian Legal Landscape *supra nota* 52 at 59. Also see Laffranque J., Pilk Eesti õigusmaastikule *supra nota* 27 at 527. [PSTS määrab]

The Constitutional Committee on the other hand, the members of which *inter alia* included also justices Laffranque and Lõhmus, reports as follows:

> Secondly the fundamental principle must be determinable and contain regulative character also due to the fact that in case a contradiction with European Union Law and a fundamental principle of the constitution, it would be possible to solve the case based directly on the fundamental principle.[118] /…/ In these cases Estonia should not act on the basis of formal law passed exceeding the competences of the European Union, but of the fundamental principle of the constitution.[119]

The original idea of the initiator of the so called "defence clause" of the Third Act, COJ Mr Allar Jõks, seems to have been to provide for an interpretative tool. According to his opinion reflected in the discussion document of the Constitutional Committee, it carries the purpose of defending the constitution against negative developments of the EU. In a case of conflict, Estonia should act on the basis of the fundamental principles of the constitution.[120] Mr Jõks was also quoted in the media stating the following:

> Constitution of the Republic of Estonia Amendment Act certainly does not confirm supremacy of European Union law in an "ultimate form". On the contrary, upon my recommendation a so called crisis clause was entered to the draft law by the parliament, according to which Estonia sets as a precondition to supremacy of European law that the European law does not go contrary to fundamental principles of the constitution. With this Estonia would have a "guaranteed argument" for the hopefully unlikely case, should the acts of the EU become completely disagreeable to us.[121]

"ühelt poolt Eesti Euroopa Liitu kuulumise tingimuse – põhiseaduse aluspõhimõtetest kinnipidamise…."

[118] Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad *supra nota* 100 "Teiseks peab aluspõhimõte olema määratletav ning teatud regulatiivsuse astet sisaldav ka seetõttu, et juhul, kui on tuvastatud vastuolu Euroopa Liidu õiguse ja põhiseaduse aluspõhimõtte vahel, saaks asja lahendada otse aluspõhimõttest lähtuvalt." para 5.1. lk 5.

[119] "Neil juhtudel peaks Eesti lähtuma mitte Euroopa Liidu pädevust ületades antud formaalsest õigusest, vaid põhiseaduse aluspõhimõtetest." Ibid Para 5.3. lk 7.

[120] Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühma seisukohad *supra nota* 100 para 4.2.3. at 48.

[121] "Põhiseaduse täiendamise seadus kindlasti ei tunnusta ELi õiguse ülimuslikkust "ultimatiivses vormis". Vastupidi, minu ettepanekul viis Riigikogu põhiseaduse täiendamise seaduse eelnõu teksti nn kriisiklausli, mille järgi Eesti seab Euroopa õiguse ülimuslikkuse põhimõtte eeltingimuseks seda, et Euroopa õigus ei lähe vastuollu põhiseaduse aluspõhimõtetega. Sellega oleks hoopis Eestil "garanteeritud argument" loodetavasti ebatõenäoliseks juhuks, kui ELi aktid peaksid meile täiesti vastumeelseks

The same position is confirmed on the basis of the authority of the COJ in other sources.[122]

The above discussion demonstrates that the underlying meaning of the first section of the Third Act remains far from clear. Interpretative sources provide for contradicting opinions. In this light it is regrettable that no guidance has been given by the Supreme Court in the above analysed cases where the relationship between the constitution and European law was determined. The author agrees with the position of A. Albi presented in the light of the local government council elections case that "It looks as if the judges intentionally refused to take a stance on the Act that had been widely perceived as a political compromise to make the accession to the European Union possible at the time."[123]

From the perspective of European law, there can only be one valid solution, which is to claim that any limitations to supremacy are excluded by the case law of the European Court. From the perspective of internal constitutional law the analysed provision of the Third Act should be used as a tool for solving a conflict of European law with underlying principles of the constitution. This solution would resemble the practice of the "old" Member States where the highest courts have made this reservation *vis a vis* supremacy.[124] This would also accord with the goal of the provision, which was the wish to defend those principles the provision refers to. An applicant in a theoretical case, where European law is applied in contradiction to those fundamental principles, would hardly be comforted by a perspective of Estonia commencing exit procedures from the EU instead of disapplying the European norm.[125] The analysed case law of the Supreme Court does not however exclude any of the possible interpretations.

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[122] E.g. Allik M. "Eesti Vabariigi Põhiseaduse ja Euroopa Liidu Põhiseaduslikkuse Leppe Aluspõhimõtted" *supra nota* 113 para 2.1. "Õiguskantsleri analüüsi kohaselt tuleb põhiseadust kohaldada juhul, kui Euroopa Liidu õigus satub põhiseaduse aluspõhimõtetega vastuollu. /…/ vastuolu korral kuulub aluspõhimõte või sellele tuginev põhiseaduse norm otsekohaldamisele."

[123] Albi A. *supra nota 15* at 44.

[124] Regarding the "new" Member States see Ibid at 54.

[125] An exit clause was finally introduced by the Lisbon Treaty making it possible for members to leave the EU. OJ 17.12.2007, C 306. Available online at: http://eur-lex.europa.eu/en/treaties/index.htm (05 January 2008).

4. CONCLUSIONS

The research contained in the compilation of articles constituting this dissertation provides a thorough analysis of the application of the principles of European law by the Supreme Court. The existence of certain principles particular to community law on the European level was identified and the case law of the Supreme Court was tested to check for the proper application of those principles. The fact that the articles containing the analysis were accepted for publication and published by internationally recognized peer reviewed law journals is evidence of international academic interest in the analysed issues and the practice of the Supreme Court.

Although the analysed case law was not voluminous, it is possible to conclude that the Supreme Court has actively promoted and applied principles of European law. In all analysed cases the application reflected acceptance of European law and the principles as a part of Estonia's legal system. Even in cases where discrepancies between the practice of the Supreme Court and the practice of the European Court were discovered, the analysis of the statement of reasons demonstrated that this was not caused by unwillingness to accept principles of European law, but rather due to other reasons. Opting for grammatical interpretation instead of teleological/dynamic interpretation may be seen as one of such reasons.

The non-application of supremacy and direct effect in the constitutional review proceedings was related to the procedural limitations of the COJ to raise issues of European law. Although the position is challenged in the analysed publications and herein, the statement of reasons does not show it as being a demonstration of unwillingness to apply or accept principles of European law. Even in the case where the relying on *acte clair* by the Supreme Court is challenged herein the court ended up giving precedence to secondary European law.

Consequently, the author maintains that the analysis has confirmed the posed hypothesis that Estonia, being a small but very "pro-EU" country with a liberal approach to economy and law, has shown a remarkable willingness to adapt to EC principles, led in this by its Supreme Court. In the coming years it will be possible to see whether the discovered generally positive approach to principles of European law is maintained and the discovered controversies are eliminated.

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SUMMARY IN ESTONIAN

Euroopa õiguse põhimõtete rakendamine Eesti Vabariigi Riigikohtus

Väitekiri on esitatud kaitsmiseks varem avaldatud publikatsioonide seeriana ning koosneb neljast artiklist ja sissejuhatavast ülevaateartiklist. Väitekiri on esitatud kaitsmiseks inglise keeles.

Uurimus keskendub Euroopa Ühenduse õiguse (edaspidi Euroopa õigus) põhimõtete aktsepteerimisele, tõlgendamisele ja rakendamisele Riigikohtu poolt. Uurimuse eesmärk oli määratleda Euroopa õigusele omased õiguspõhimõtted, analüüsida Riigikohtu praktikat, millest võis leita viiteid nende põhimõtete rakendamisele, analüüsida, kuidas neid põhimõtteid aktsepteeriti, rakendati ja tõlgendati ning kontrollida, kas Riigikohtu vastav praktika langeb kokku Euroopa Kohtu juhistega.

Töö hüpoteesiks püstitas autor väite, et Eesti on Riigikohtu juhtimisel üles näidanud silmapaistvat soovi kohanduda Euroopa õiguse põhimõtetega. Kui lahendites esineb erisusi Euroopa Kohtu praktikast, ei näita need erisused selget soovimatust aktsepteerida Euroopa õiguse põhimõtteid.

Uurimus piirdub Riigikohtu praktikaga 2007 aasta lõpuga.

Uurimus, keskendudes küll teatud kindla kvaliteediga probleemi – Euroopa õiguse põhimõtete rakendamine Riigikohtus – süsteemsele uurimisele, rakendab erinevaid uurimismeetodeid. Koosnedes publikatsioonide kogumist, on uurimuses suuremal või vähemal määral kasutatud ajaloolise-, võrdleva õiguse, õigusfilosoofia ja õiguspoliitika meetodeid, sh sünteesi, süstemaatilist ja võrdlevat meetodit.

Terminit "Euroopa õiguse põhimõtted" kasutatakse uurimuses viitamaks sellistele õiguse põhimõtetele, mis tulenevad ja mis on saanud ajaga Euroopa õiguse olemuslikuks osaks, olles olulises osas määratletud ja korduvalt rakendatud Euroopa Kohtu poolt võttes arvesse Euroopa õiguse erisusi. Eelkõige peetakse silmas põhimõtteid, mis tulenevad Euroopa Ühenduse olemusest. Terminit ei tohi käesoleva uurimuse mõttes ajada segamini õiguse üldpõhimõtetega laiemas mõttes, nagu näiteks omandi kaitse jt, mis on omased enamikele Euroopa õiguskordadele ja tulenevad üldisemalt õigusriigi põhimõttest.

Uurimuses käsitleti eelkõige võrdse kohtlemise põhimõtet siseturu tähenduses, ülimuslikkuse, vahetu kohaldatavuse ja kooskõlalise tõlgendamise põhimõtet ning Euroopa eelotsustusmenetlusele omaseid menetluspõhimõtteid *acte clair* ja *acté eclairé.*

Analüüs jõudis järelduseni, et Riigikohtu praktika oli Euroopa õigust tunnustav aktsepteerides vastuvaidlematult kõiki analüüsitud põhimõtteid. Seejuures näitas teostatud analüüs, et Riigikohus näib olevat läinud Euroopa õiguse aktsepteerimisel oluliselt kaugemale, kui nn "vanade liikmesriikide"

kõrgeimad kohtud, kes seisid samade küsimustega vastamisi ajaliselt Eestist varem.

Uurimuse käigus ei õnnestunud leida ühtegi kaasust, kus Euroopa õiguse rakendamisest oleks keeldutud põhimõtteliselt või otseselt protektsionistlikult. Tuvastati üks juhtum, kus autori hinnangul jäeti Euroopa õiguse ülimuslikkuse ja kooskõlalise tõlgendamise põhimõtted kasutamata põhjendamatult ning teine juhtum, kus autori hinnangul olid *acte clair* põhimõttele tuginemiseks esitatud motiivid vaieldavad.

Avatud suhtumist Euroopa õiguse põhimõtetesse näitas Riigikohtu praktika juba enne Eesti liitumist Euroopa Liiduga (EL). Juba 1994.aastal kinnitas Riigikohus Euroopa institutsioonide poolt arendatud õiguspõhimõtete olulist eeskuju Eesti õiguse üldpõhimõtete kujundamisel. Lisaks on Riigikohus mitmes erinevas kaasuses tuginenud õiguspõhimõtete olemasolu tõendamisel EL põhiõiguste hartale, seda sõltumatuna asjaolust, et tegemist ei ole siduva õigusaktiga.

Kumulatiivsesse dissertatsiooni hõlmatud artiklites analüüsitud kaasuste põhjal jõudis autor järelduseni, et võtmekaasustes näitasid alama astme kohtud ja haldusorganid praktikas üles soovimatust arvestada Euroopa õiguse põhimõtetega. Seetõttu osutus Riigikohtu sekkumine Euroopa õiguse põhimõtete kaitseks ja tõhusaks rakendamiseks hädavajalikuks.

Analüüsides siseturu võrdse kohtlemise põhimõtte rakendamist jõudis autor järelduseni, et rakendamine oli võimalik juba enne Eesti liitumist EL-ga nn Euroopa Lepingu alusel. Riigikohus rakendas nimetatud põhimõtet omal algatusel näidates seeläbi üles avatud toetavat suhtumist Euroopa õiguse põhimõtetesse. Uurimuse tulemusena tuvastati muuhulgas asjaolu, et tuletades võrdse kohtlemise põhimõtte Euroopa Lepingust saavutati veel EL-i mittekuulunud riigi õigusruumis praktiliselt samane tulemus, mida oleks asutamisvabaduse sätete rakendamise teel saavutatud EL liikmesriikide õigusruumis.

EL siseturu võrdse kohtlemise põhimõtte rakendamine Riigikohtu poolt omal algatusel tõendab Riigikohtu avatud ja positiivset lähenemist Euroopa õiguse põhimõtete sisseviimisesse Eesti õigusesse.

Analüüsides ülimuslikkuse ja kooskõlalise tõlgendamise põhimõtete rakendamist, tuvastas uurimus, et praktikas on välistatud nimetatud põhimõtete rakendamist abstraktses normikontrollis põhiseaduslikkuse järelevalve menetluses. Põhimõtete rakendamise välistamist põhjendati asjaoluga, et Euroopa õigus ei nõua siseriikliku ja Euroopa õiguse vastuolu korral siseriiklikku õigusesse abstraktse normikontrolli menetluse sisseviimist. Samuti asjaoluga, et Õiguskantslerile ei ole seadusega antud selgesõnalist pädevust algatada põhiseaduslikkuse järelevalve menetlust siseriikliku õiguse ja Euroopa õiguse vaheliste vastuolude korral.

Analüüsis jõuti järelduseni, et kuigi Euroopa õigus ei nõua abstraktse normikontrolli võimaldamist, ei saa lähtuvalt ülimuslikkuse ja kooskõlalise tõlgenduse põhimõtetest välistada Euroopa õiguse küsimuste tõusetumist siseriikliku

abstraktse normikontrollimenetluse käigus. Euroopa õiguse otseste mõjude välistamine põhiseaduslikkuse järelevalve menetluses võiks teoreetiliselt viia soovimatu tagajärjeni, kus Euroopa õigusega kooskõlas olev norm kõrvaldatakse abstraktses normikontrollis siseriiklikust õigussüsteemist seoses põhiseaduse sättega, mis võib olla ise Euroopa õigusega vastuolus.

Lisaks muudab võimatuks Euroopa õiguse välistamise nn põhiseaduse "kolmas akt" ja selle rakenduspraktika Riigikohtus, mille kohaselt hõlmab kolmas akt endas läbivat põhiseaduse muutmist jättes rakendatavaks üksnes need osad põhiseadusest, mis ei ole Euroopa õigusega vastuolus.

Analüüsides asjakohase Riigikohtu lahendi motiive võib ometi järeldada, et Euroopa õiguse põhimõtteid ei jäetud kõrvale tulenevalt protektsionistlikust lähenemisest või soovimatusest neid põhimõtteid aktsepteerida. Motiivid peegeldavad pigem arusaamist, et abstraktse normikontrolli menetluse olemasolu ei ole Euroopa õiguse alusel nõutav ning isikute Euroopa õigusest tulenevad õigused leiavad kaitse *inter partes* menetluste käigus.

Ülimuslikkuse, vahetu kohaldatavuse ja kooskõlalise tõlgendamise põhimõtted leidsid Riigikohtu praktikas selgesõnalist kinnitust. Erandina nn vanadest liikmesriikidest, ei lisanud Riigikohtu kolleegiumid ülimuslikkuse põhimõtte kinnitamisel vastavate lahendite motiividesse mingeid märkusi võimalike reservatsioonide kohta. Ülimuslikkust kinnitati tingimusteta (seni) ning seejuures välistati võimalus vastuolu tõusetumisest põhiseaduse ja Euroopa õiguse vahel. Läbivaks teesiks kujunes konstateering, et põhiseaduse kolmanda aktiga on toimunud põhiseaduse läbiv muutmine Euroopa õiguse inkorporeerimiseks, mis loogiliselt välistab võimalikud vastuolud põhiseaduse ja Euroopa õiguse vahel. Rakendatavaks jäi üksnes see osa põhiseadusest, mis on Euroopa õigusega kooskõlas või mille reguleerimisala jääb väljapoole Euroopa õigust.

Selline ulatuslik ja seni reservatsioonideta ülimuslikkuse aktsepteerimine erineb oluliselt vanade liikmesriikide kõrgemate kohtute praktikast, kus reeglina märgiti ära reservatsioonid seoses põhiõiguste ja põhiseaduse aluspõhimõtete kaitsega. Peab siiski möönma, et olemasolev Riigikohtu praktika ei välista vastavate reservatsioonide selgitamist tulevikus. Teatud tõlgendusvõimalusi annab siinkohal põhiseaduse kolmanda akti esimene paragrahv.

Praktikas leidis kinnitamist ka direktiivide vahetu kohaldatavuse, horisontaalse vahetu kohaldatavuse keelu ning kooskõlalise tõlgendamise põhimõte. Ka nimetatud põhimõtete rakendamise tagamiseks oli vajalik Riigikohtu sekkumine, kuivõrd alama astme kohtud eirasid Euroopa õigusel põhinevaid argumente ning piirdusid siseriikliku õiguse grammatilise tõlgendamisega.

Analüüs näitas, et kooskõlalise tõlgendamise põhimõtte rakendamise võimalikkuse kontrollimisel lähtus Riigikohus otseselt või kaudselt kõikidest peamistest kriteeriumitest, mis Euroopa Kohtu praktikas on kinnitamist leidnud. Seejuures viitas kohus kaudselt ka nn *contra legem* tõlgenduse piirangule, kontrollides seadusandja kavatsusi läbi seaduse seletuskirjas väljendatu. Olulise seisukohana väljendas Riigikohus kaudselt, et kooskõlalise tõlgendamise

põhimõte võib nõuda siseriiklikult kohtult nn *lex specialis derogat legi generali* põhimõtte eiramist ehk lahenduse otsimist väljastpoolt konkreetset eriseadust.

Menetluspõhimõtete analüüsis omasid keskset tähtsust eelotsustusmenetlusega seonduvad põhimõtted *acte clair* ja *acte éclairé*. Mõlemal juhul on Euroopa Kohtu praktika kaldunud kõrvale Euroopa Ühenduse asutamislepingu artikli 234 sõnastusest, mis kohustab viimase astme kohtuid eelotsustustaotlust esitama. Seejuures on viimase astme kohtu poolt eelotsustustaotlusest keeldumise puhul tegemist erandliku olukorraga ning eranditele tuginemist tuleb ulatuslikult põhjendada. Analüüs näitas, et Riigikohus tugines mõlemale põhimõttele enne, kui Eesti kohtusüsteemist oleks tulnud ühtegi eelotsustustaotlust. Kui *acte éclairé* põhimõtte rakendamisel sisaldas Riigikohtu otsus asjakohaseid motiive tõendamaks, et küsimus on juba Euroopa Kohtu poolt vastatud (sh Euroopa Kohtu praktika ulatuslikku analüüsi ning viidet vastavale analüüsile erandile tuginemist põhjendavas lõikes), siis *acte clair* põhimõttele tugineva lahendi motiivid olid vaieldavad. Hinnates *acte clair* põhimõtte rakendamist leidis autor, et Riigikohtu vastava otsuse motiivides ei kajastu nõuetekohaseid põhjendusi, mis võimaldaksid veenduda, et Riigikohtu poolt Euroopa õigusele antud tõlgendus oleks ilmselgelt selline, milleni oleks jõudnud ka Euroopa Kohus ja teiste liikmesriikide kohtud. Ilma vastavate motiivideta võib järeldada, et eelotsustustaotlusest hoidumist kohaldati eirates Euroopa Kohtu poolt *acte clair* erandile tuginemiseks kehtestatud kriteeriumeid. Ometi ei näidanud analüüs Riigikohtu poolset soovi eirata Euroopa õiguse põhimõtteid. Analüüsitud juhul anti eelisõigus Euroopa õigusele tunnistades siseriikliku õiguse sätted Euroopa õigusega vastuolus olevaks.

Tulenevalt dissertatsiooni lisatud artiklite loogilisest jaotusest neljaks osaks, pidas autor oluliseks sissejuhatavas kokkuvõtteartiklis esile tõsta mõningaid seoseid erinevates artiklites analüüsitud seisukohtade vahel.

Esmalt käsitles autor vastuolu Riigikohtu seisukohtades, mis ühelt küljelt justkui välistasid Euroopa õiguse rakendamise põhiseaduslikkuse järelevalve menetluses, kuid teiselt kinnitasid Euroopa õiguse poolset põhiseaduse läbivat muutmist. Analüüsi tulemusena jõudis autor järelduseni, et arvestades Riigikohtu praktika hetkeseisu, peavad Euroopa õiguse põhimõtted loogiliselt leidma tee ka põhiseaduslikkuse järelevalve menetlusse. Ometi jätab häälte jagunemine Riigikohtus nimetatud võtmeküsimuses ukse lahti ka vastupidisele võimalusele.

Lisaks eeltoodule pidas autor vajalikuks esile tuua ka ebaselguse põhiseaduse kolmanda akti esimese paragrahvi tähenduses ülimuslikkuse põhimõtte rakendamisel. Nimetatud sätte kohaselt võib Eesti kuuluda EL-i lähtudes põhiseaduse aluspõhimõtetest. Sätte grammatiline tõlgendus ning olemasolev Riigikohtu praktika viitavad võimalusele, et tegemist on normiga, mis reguleerib formaalset Eesti EL-i kuulumise eeldust. Loogilise järeldusena tooks sätte rakendumine kaasa Eesti EL-st väljaastumise menetluse alustamise. Teise alternatiivina võib tegemist olla ka normikonflikti kõrvaldamise vahendiga, mille rakendumisel jätaks siseriiklik kohus vastava Euroopa õiguse sätte asja

lahendamisel kohaldamata. Läbiviidud analüüs ei aidanud jõuda sätte parema mõistmiseni. Autoriteetsed õigusteadlased ja praktikud, kes olid sätte loomisega otseselt või kaudselt seotud, andsid oma kirjutistes ja väljaütlemises ruumi mõlema alternatiivi toetuseks. Eeltoodu valguses oleks õigusselguse huvides tervitatav Riigikohtu selgitav seisukoht sellest, kas siseriiklikust vaatenurgast tuleneb kolmanda akti esimesest paragrahvist piiranguid ülimuslikkuse põhimõtte rakendamisele. Samal põhjusel toetab autor Riigikohtunike poolt eriarvamustes väljendatud seisukohta, et vastavad selgitused oleks olnud kohased juba analüüsitud lahendites. Euroopa õiguse vaatenurgast on siseriiklikust õigusest tulenevad piirangud ülimuslikkusele siiski välistatud.

PUBLICATIONS

CURRICULUM VITAE

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Education

2006– …	doctoral (PhD) student at Tartu University Law Faculty
2000–2001	Masters studies in Stockholm University Law Faculty. Swedish Masters degree "Juris Magisterexamen i europeisk rätt" translated as "Master of Laws in European Law" (LL.M.)
1996–2000	Baccalaureate studies in Concordia International University Estonia. Estonian baccalaureate degree in law.

Employment

2003– …	Lecturer of European Law (lecturer since 2005, teacher since 2003) Tartu University Faculty of Law, Institute of Law.
2005– …	Attorney-at-law (*vandeadvokaat*), partner since 2006. Advokaadibüroo Sorainen Tallinn.
2000–2004	Attorney-at-law (*vandeadvokaat*) at RODI Law Firm (2000–2003 clerk to Attorney-at-law).

Main areas of research

EU law with a focus on procedures in the European Court and the relationships between internal law with European Law. Application of EU Law in Estonia including in courts and administrative bodies. Relationship between free movement of goods and protection of intellectual property. EU and Estonian competition law. Application of EU procurement rules in Estonia.

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1. Ginter, C. (2008). “Majasisese üksuse” erand riigihankeõiguses. Juridica, 3, 196–203. 1.3.
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Haridus

2006– …	doktoriõpe (PhD) Tartu Ülikooli Õigusteaduskonnas
2000–2001	Magistriõpingud (LL.M) Stockholmi Ülikooli Õigusteaduskonnas. Rootsi magistrikraad "Juris Magisterexamen i europeisk rätt" tõlgituna "Master of Laws in European Law" (LL.M.)
1996–2000	Bakalaureuseõpe Concordia International University Estonia. Eesti bakalaureusekraad õigusteaduses.

Teenistuskäik

2003– …	Euroopa õiguse lektor (lektor alates 2005, assistent alates 2003) Tartu Ülikooli Õigusteaduskond, Õigusinstituut.
2005– …	Vandeadvokaat, partner alates 2006. Advokaadibüroo Sorainen Tallinn.
2000–2004	Vandeadvokaat RODI Advokaadibüroos (2000–2003, vandeadvokaadi abi).

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EL õigus rõhuasetusega menetlustele Euroopa Kohtus ja riigisisese ja EL õiguse suhetele. EL õiguse rakendamine Eestis sealhulgas kohtutes ja haldusorganites. Kaupade vaba liikumise ja intellektuaalse omandi kaitse vahelised suhted. EL ja Eesti konkurentsiõigus. EL riigihankereeglite rakendamine Eestis.

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3 **Marju Luts.** Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus. Tartu, 2000.
4. **Gaabriel Tavits.** Tööõiguse rakendusala määratlemine töötaja, tööandja ja töölepingu mõistete abil. Tartu, 2001.
5. **Merle Muda.** Töötajate õiguste kaitse tööandja tegevuse ümberkorraldamisel. Tartu, 2001.
6. **Margus Kingisepp.** Kahjuhüvitis postmodernses deliktiõiguses. Tartu, 2002.
7. **Vallo Olle.** Kohaliku omavalitsuse teostamine vahetu demokraatia vormis: kohalik rahvaalgatus ja rahvahääletus. Tartu, 2002.
8. **Irene Kull.** Hea usu põhimõte kaasaegses lepinguõiguses. Tartu, 2002.
9. **Jüri Saar.** Õigusvastane käitumine alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimuse andmetel). Tartu, 2003.
10. **Julia Laffranque.** Kohtuniku eriarvamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus. Tartu, 2003.
11. **Hannes Veinla.** Ettevaatusprintsiip keskkonnaõiguses. Tartu, 2004.
12. **Kalev Saare.** Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine. Tartu, 2004.
13. **Meris Sillaots.** Kokkuleppemenetlus kriminaalmenetluses. Tartu, 2004.
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17. **Priit Pikamäe.** Tahtluse struktuur. Tahtlus kui koosseisupäraste asjaolude teadmine. Tartu, 2006.
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19. **Karin Sein.** Ettenähtavus ja rikutud kohustuse eesmärk kui lepingulise kahjuhüvitise piiramise alused. Tartu, 2007.
20. **Mart Susi.** Õigus tõhusale menetlusele enda kaitseks – Euroopa Inimõiguste ja Põhivabaduste Kaitse Konventsiooni artikkel 13 Euroopa Inimõiguste Kohtu dünaamilises käsitluses. Tartu, 2008.