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# A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act

The Estonian Constitution is 15 years old. The first Estonian Constitution was passed in 1920.<sup>\*1</sup> The amendments adopted by a referendum in 1933 were so essential and important that they are often called the 1933 Constitution.<sup>\*2</sup> In 1937, President Konstantin Päts submitted to the National Assembly a new draft Constitution, which entered into force on 1 January 1938.<sup>\*3</sup> The current Constitution of the Republic of Estonia is among the most stable ones in Estonian constitutional history. It was adopted by a referendum on 28 June 1992<sup>\*4</sup> and remained completely unaltered for more than ten years. On 25 February 2003, the Constitution of the Republic of Estonia Amendment Act was passed in the Riigikogu for the election of local government councils for a term of four years<sup>\*5</sup>; it entered into force on 17 October 2005. Another major amendment was made as a result of the referendum of 14 September 2003<sup>\*6</sup>, when it was decided to pass the Accession to the European Union (EU) and the Constitution Amendment Act (CAA). The next amendment took place in April 2007, and entered into force on 21 July 2007; the preamble of the Constitution was amended to include the state's objective of guaranteeing the preservation of the Estonian language through the ages.<sup>\*7</sup>

The CAA entered into force on 6 January 2004, three months after its proclamation, and its implementation has become increasingly topical after Estonia's accession to the EU on 1 May of the same year. After the first application and interpretation issues, which have reached the Supreme Court<sup>\*8</sup>, it is suitable to discuss whether the CAA has justified itself, what shortcomings it has, and what are the positive aspects of Estonia's chosen approach.

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<sup>1</sup> RT 1920, 113/114 (in Estonian).

<sup>2</sup> See R. Narits, H. Schneider, L. Madise. – *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia. Commented Edition). Panel of editors led by E.-J. Truuvali. Tallinn: Juura 2002, Sissejuhatus (Introduction), p. 21 (in Estonian).

<sup>3</sup> RT 1937, 71 (in Estonian).

<sup>4</sup> RT 1992, 26, 349 (in Estonian).

<sup>5</sup> *Eesti Vabariigi põhiseaduse muutmise seadus kohaliku omavalitsuse volikogu valimiseks neljaks aastaks.* – RT I 2003, 29, 174 (in Estonian).

<sup>6</sup> *Eesti Vabariigi põhiseaduse täiendamise seadus.* – RT I 2003, 64, 429 (in Estonian).

<sup>7</sup> *Eesti Vabariigi põhiseaduse muutmise seadus.* – RT I 2007, 33, 210 (in Estonian).

<sup>8</sup> The Supreme Court is the highest court in Estonia that functions as the cassation stage in the civil, criminal (incl. misdemeanour) and administrative matters. The Supreme Court is also the court of the constitutional review (see Constitution § 149). The Supreme Court has administrative, civil, and constitutional review chambers. Important constitutional questions are deliberated by Supreme Court *en banc* that comprises all 19 justices of the Supreme Court and has a quorum of 11 justices.

This paper observes the changes that have occurred on the Estonian legal landscape in connection with the CAA: how Estonia's EU membership and European law have affected our valid Constitution, its application and interpretation.<sup>9</sup> It begins with discussing the position and nature of the Constitution Amendment Act on the Estonian legal landscape, and related debates. The opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006, on the interpretation of § 111 of the Constitution in conjunction with the Constitution Amendment Act and European Union Law may be considered to be a turning point in the interpretation of the CAA. This is why the paper first takes into consideration the discussions of the CAA that took place before the aforementioned opinion of the Supreme Court was adopted, and the earlier case-law of the Supreme Court. After that the paper analyses the attribution to the Supreme Court of the competence to provide opinions and the opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006. Finally, the paper tries to assess the issues pertaining to this topic which have not yet been solved in Estonian law, especially in the judicial review process.

## 1. Position and nature of the Constitution Amendment Act on the Estonian legal landscape

Following is a discussion of, firstly, the reasons why a separate CAA was preferred to detailed amendments to the Constitution; secondly, the position and influence of the CAA in Estonian law, and the constitutional law discussions that have been raised by problems with interpreting the CAA.

### 1.1. Birth of the Constitution Amendment Act

Unfortunately, it must be admitted that the issue of amending the Constitution was avoided in the initial phase of preparations for Estonia's accession to the EU. Politicians saw the issue as too risky, and so the questions of whether and how the Constitution was to be amended were left to be answered at the last minute. The result was somewhat of a compromise. Although experts had already addressed the issue, to a greater or lesser extent since 1996, when the legal expertise committee was set up that analysed the Constitution as a whole<sup>10</sup>, the necessity of amending the Constitution became clear to everyone only in the second half of 2002, and lawyers and politicians reached, more or less, a consensus as to whether it was to be done.<sup>11</sup>

The next question was of how it was to be done. Various options were considered. The following aspects were decisive in the amendments to the Constitution: (1) amendments concerning EU accession had to be separate and not pending other amendments; (2) amendments had to concern the EU specifically and not international organisations in general; (3) it was not expedient to amend all provisions of the Constitution which could be contradictory, but an interpretation was to be preferred that facilitated integration.<sup>12</sup> With these considerations Estonia decided in favour of an original solution — a separate CAA, which had to be adopted by a referendum, because the amendments concerned sections of the Constitution which may be amended only by a referendum.<sup>13</sup> Lithuania is the only other EU Member State that did something similar: its Constitution was also amended by a separate constitutional act, which, however, is much more detailed in terms of its content than the Estonian CAA.<sup>14</sup> Typically, the Constitutions of EU Member States contain either very general provisions on delegating a partial exercise of certain powers to international organisations (the Netherlands, Denmark,

<sup>9</sup> This paper is an expansion of the author's presentation at the Estonian Judges Forum in Tartu on 15 June 2006.

<sup>10</sup> Võimalik liitumine EL-iga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt. PS juriidilise ekspertkomisjoni aruanne, 1998 (Potential Accession to the EU and Its Legal Implications in Terms of Estonian Constitutional Law. Report of the Expert Committee on the Constitution, 1988). Available at <http://www.just.ee/10746> (5.05.2007).

<sup>11</sup> Opinions differed only as to how the Constitution was to be amended, see: Ühispeördumine seoses nn Põhiseaduse kolmanda akti riigiõiguslike probleemidega (Joint Address in connection with Constitutional Law Problems regarding the so-called Third Constitutional Act). – *Juridica* 2002/5, pp. 352–353 (in Estonian); A. Albi, R. Maruste. Eesti Vabariigi põhiseadus Euroopa Liidu õiguskorras (The Constitution of the Republic of Estonia in the Legal System of the European Union). – *Juridica* 2003/1, pp. 3–7 (in Estonian).

<sup>12</sup> See K. Merusk, J. Pöld, J. Laffranque, M. Rask, Ü. Madise. Põhiseaduse täiendamise seaduse eelnõust (Draft Act to Amend the Constitution). – *Juridica* 2002/8, especially p. 565 (in Estonian).

<sup>13</sup> According to the Republic of Estonia Constitution, Chapter I “General Provisions” and Chapter XV “Amendment of the Constitution” of the Constitution may be amended only by a referendum (see Constitution § 162). Chapter I “General Provisions”, which, inter alia, contains § 1 according to which Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable; and § 3 of the Constitution according to which the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

<sup>14</sup> See Constitutional Act No. IX-2343 of 13 June 2004 on Membership of the Republic of Lithuania in the European Union. The Act is based on the will of the Lithuanian nation as expressed in the results of the referendum held on 10–11 May 2003 and the EU accession treaty. Available at [http://www3.lrs.lt/c-bin/eng/preps2?Condition1=239806&Condition2=\(14.12.2005\)](http://www3.lrs.lt/c-bin/eng/preps2?Condition1=239806&Condition2=(14.12.2005)). See also I. Jarukaitis. Ratification of European

Luxembourg, Slovenia), separate provisions concerning the EU (Germany) or whole Chapters regulating EU membership (Austria, France).<sup>\*15</sup>

Therefore both those who find that the choice in favour of the CAA was pragmatically the best considering the political and legal environment, which naturally does not preclude a need for more thorough constitutional amendments in the future, and those who consider the chosen option a unique approach to regulating the relations between EU law and domestic law, are right.

## 1.2. Constitution Amendment Act and preamble to the Constitution

The CAA has only four sections, the meaning of which is far-reaching and builds a bridge between the Estonian legal order and EU law. The core of the Act consists of its first two sections, which provide for a “protective clause” stating that Estonia may belong to a European Union which respects the fundamental principles of the Estonian Constitution (§ 1), and stipulates that the Estonian Constitution shall be applied taking into account the applicable EU *acquis* transposed by the Accession Treaty, which essentially covers the principles of superiority and direct applicability of European law (§ 2).

The fundamental principles of the Constitution are the core values without which the Estonian state and Constitution lose its essence. They are universal in character and connected with the general principles of EU law.<sup>\*16</sup> Neither the Constitution nor the CAA defines the fundamental principles of the Constitution. As the protective clause is to be used if EU law is in conflict with the fundamental principles, the fundamental principles need to be defined. Theoretical approaches derive the fundamental principles of the Constitution from its preamble, Chapter I, “General Provisions” and §§ 10 and 11 of Chapter II, “Fundamental Rights, Freedoms and Duties”. Experts have concluded that the fundamental principles should be defined in the form of an open catalogue, which covers, above all, the following principles: national sovereignty; the state’s foundations of liberty, justice and law; protection of internal and external peace; preservation of the Estonian nation and culture through the ages; human dignity; social statehood; democracy; the rule of law; respect for fundamental rights and freedoms; proportionate exercise of the authority of the state.<sup>\*17</sup> Heinrich Schneider believes that, for its essence and functions, the CAA is in line with the preamble of the Constitution, as the CAA refers to fundamental principles, whose “real home” is in the preamble of the Constitution.<sup>\*18</sup> Schneider even argues that the CAA itself is among the fundamental principles of the Constitution.<sup>\*19</sup> Although certain fundamental principles of the Constitution, such as liberty, law and justice, internal and external peace and the preservation of the Estonian nation, language, and culture, can be found in the preamble of the Constitution, it is not advisable to place the entire CAA in the preamble of the Constitution, but rather a reference to the CAA in the preamble or general provisions of the Constitution should be considered. This would be important for a better understanding of the nature of the CAA and its linking to the Constitution.

## 1.3. Constitution Amendment Act as a “Third Act”

After amendments, the Estonian Constitution consists of three documents: The Constitution, the Constitution Implementation Act<sup>\*20</sup> and the Constitution Amendment Act, which is why the latter has been called a “Third Constitutional Act”. From the formal legal point of view, the Third Act as a constitutional document and not merely a constitutional law should be equal to the Constitution in its legal power and position. However, the CAA seems to be superior to the Constitution when it comes to EU related areas in the same way as EU law is superior to Estonian law. The exercise of superiority requires a conflict situation (conflict of laws) in both

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Constitution in Lithuania and its Impact on the National Constitutional System. – A. Albi, J. Ziller. *The European Constitution and National Constitutions: Ratification and Beyond*. Kluwer International Law 2007, pp. 17–24.

<sup>15</sup> See A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks (Amendment of the Constitution for Accession to the European Union). – *Juridica* 2001/9, pp. 606–608 (in Estonian). See also J. Laffranque. Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles (Legal System of the European Union and the Role of Estonian Law in It). Tallinn: Juura 2006, Annex I, pp. 487–524 (in Estonian).

<sup>16</sup> See J. Laffranque. Eesti põhiseaduse ja Euroopa õiguse kooselu (Coexistence of the Estonian Constitution and EC law). – *Juridica* 2003/3, pp. 182–183 (in Estonian).

<sup>17</sup> The positions of the constitutional law analysis working group for the Treaty establishing a Constitution for Europe on the issue of ratification of the Treaty, pp. 5 and 6. Available at [http://www.riigikogu.ee/public/Riigikogu/epsl\\_20051211\\_ee.pdf](http://www.riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf) (6.05.2007).

<sup>18</sup> See H. Schneider. Põhiseaduse aluspõhimõtete seaduse ja võimalikke lahendusi. – Riigikohus. Lahendid ja kommentaarid 2005 (Issues and Possible Solutions relating to the Fundamental Principles of the Constitution. – Supreme Court. Decisions and Commentaries 2005). Tallinn: Juura 2005, p. 1326.

<sup>19</sup> *Ibid.*, p. 1332.

<sup>20</sup> Põhiseaduse rakendamise seadus. – RT I 2007, 43, 312 (in Estonian).

cases. The superiority of application can be avoided if we try to interpret the Constitution on the basis of the CAA in as much conformity with EU law as possible. Handling either of these constructions — superiority of application and the conforming interpretation of the CAA (i.e., naturally in conformity with European law) — and distinguishing between them is an extremely subtle exercise.

Based on the above it may be concluded that the pragmatic and unique CAA is a Third Constitutional Act and is certainly closely related to the preamble of the Constitution. Certainly the CAA itself does not merely imply permission for Estonia's accession to the EU. As important as allowing Estonia to lawfully accede to the EU, is that the Constitution be applied, in the context of EU membership, based on the CAA and thereby on European law.<sup>\*21</sup> This sounds simple and logical; at first glance it seems that the alleged difficulties in understanding the CAA are artificial problems. The CAA renders the Constitution much more flexible and adaptable. 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.

## 1.4. Problems with understanding the Constitution Amendment Act

Unfortunately, the essence of the CAA was unclear to many people for a long time. Misunderstandings were based on the fact that there are two different constitutional texts in Estonia: the Constitution and its Amendment Act, and that the two are not particularly related. Some authors believe that failure to amend the “principal” text has clouded the substance and meaning of the Constitution's provisions and resulted in a conflict with the principle of legal certainty.<sup>\*22</sup> Such misunderstanding was demonstrated in its most drastic form when questions arose regarding whether the introduction of the euro is in line with our Constitution or not (see below for more details). The difficulties in understanding the CAA and its essence also sprang from the insufficient answers to the questions of by whom, when, and how the CAA should be interpreted and explained. This task would probably be best suited to the constitutional institutions: the Riigikogu, Chancellor of Justice, and Supreme Court.

Rushing ahead, it should be stated that by now the Supreme Court has provided an explanatory interpretation of the CAA, which helps to better understand the essence of the CAA and precludes conflict with the principle of legal clarity. However, this does not mean that further discussion on corrections and amendments to the Constitution is not necessary.

The extremely rapid reforms in Estonian legal policy and legislative drafting, as well as the EU's own developments, have triggered many proposals concerning how to make more thorough amendments to the Constitution or even formulate an entirely new Constitution.<sup>\*23</sup>

## 2. Constitution Amendment Act before the Supreme Court's opinion of 11 May 2006

In general, two periods may be distinguished in the issue of application of the CAA and, in connection with this, the Constitution, based on Supreme Court case-law: the CAA issues before and after the opinion of the Constitutional Review Chamber of the Supreme Court (CRCS) of 11 May 2006. As the most significant disputes concerning EU law, the first period covers the decision of the Supreme Court *en banc* (SCeb) of 19 April 2005, in matter 3-4-1-1-05, as well as some decisions of the Administrative Law Chamber of the Supreme Court (ALCSC) which have relevance to the application of the CAA. The opinion of the group of experts set up at the Constitutional Committee of the Riigikogu originates from outside case-law.

<sup>21</sup> See also J. Laffranque. Millist Põhiseadust vajab Eesti Euroopa kontekstis (What kind of a Constitution Estonia Needs in the European Context). – Sirp, 20 May 2005 (in Estonian).

<sup>22</sup> A. Tupits. Ühisraha euro kasutuselevõtu riigiõiguslikud aspektid (National Legal Aspects in Introducing the Common Currency, the Euro). – Juridica 2005/7, p. 459 (in Estonian).

<sup>23</sup> See U. Lõhmus. Mida teha põhiseadusega (What Should Be Done With the Constitution)? – Juridica 2005/2, p. 83 (in Estonian); R. Maruste. Käes on aeg uue põhiseaduse teksti koostamiseks (It's Time to Draft a New Constitution). – Postimees, 23 April 2005 (in Estonian); A. Jõks. Rahvahääletust ei ole vaja karta (The Referendum Need Not Be Feared). – Postimees, 28 April 2005 (in Estonian); U. Reinsalu. Kas vajame uut põhiseadust (Do We Need a New Constitution)? – Juridica 2005/3, p. 147 (in Estonian); A new Constitution was also discussed at the XXVIII Estonian Jurists' Days in Tartu on 21–22 October 2004.

## 2.1. Decision of the Supreme Court *en banc* in the so-called election coalitions II case

In the so-called election coalitions II case<sup>\*24</sup>, the Chancellor of Justice<sup>\*25</sup> raised the issue of the conformity of Estonian law with EU law in the course of an abstract review of provisions. Subsection 5 (1) of the Political Parties Act (PPA) allowed only Estonian citizens to belong to a political party and, according to the opinion of the Chancellor of Justice, restricted the rights of citizens of other EU Member States to set up their candidacies for municipal elections.<sup>\*26</sup> The Chancellor of Justice found this to be contrary to EU law and, via the CAA, with the Constitution. The SCeb decision of 19 April 2005 did not answer this question and did not analyse the CAA. A majority of the court took the view that neither the Chancellor of Justice Act nor the Constitutional Review Proceedings Act (CRPA) gives the Chancellor of Justice the authority to ask the Supreme Court to repeal an Act because it is contrary to EU law. There are many ways how to bring domestic law into conformity with EU law; neither the Constitution nor EU law requires a constitutional review process for this purpose.<sup>\*27</sup> The Supreme Court takes the view that it is up to the legislature to decide to allow for a review. Neither did a majority of the SCeb relate the issue of conformity with EU law with the CAA.

It may be asked whether such a position was adopted because of the limited competence of the Supreme Court, or rather the lack of competence of the Chancellor of Justice to initiate a review of the conformity of Estonian law with EU law, or the court's cautiousness in handling the CAA. Delving into EU law could have led to asking for a preliminary ruling from the European Court of Justice and, considering the short time left till the elections of local government councils, been unreasonable in the opinion of a majority.<sup>\*28</sup> The Supreme Court *en banc* did, however, briefly discuss the relations between Estonian law and EU law, noting as follows: "European Union law does indeed have supremacy over Estonian law, but taking into account the case-law of the European Court of Justice, this means supremacy upon application. [...] The national act, which is in conflict with European Union law, should be set aside in a specific dispute. [...] This does not mean that such an abstract review procedure over national law should exist on the national level."<sup>\*29</sup> The Supreme Court *en banc* did not say whether EU law can have supremacy over the Estonian Constitution.

In the dissenting opinion attached to the decision it was found that the Chancellor of Justice essentially also contested the conformity of the PPA to the Constitution, the substance of which had been renewed by the CAA, and the Supreme Court *en banc* should have answered this question in the framework of constitutional review, using the help of EU law for interpretation purposes and even asking the European Court of Justice for a preliminary ruling, if necessary.<sup>\*30</sup>

## 2.2. Application of the Constitution Amendment Act in decisions of the Administrative Law Chamber of the Supreme Court

The SCeb decision of 19 April 2005 was followed by ALCSC decisions in which the judicial panel was not able to ignore the CAA in specific issues.

In its ruling of 25 April 2006, in matter 3-4-1-74-05, the ALCSC mentioned that the CAA, which was adopted with the referendum of 14 September 2003, to amend the Estonian Constitution, defines the relations between Estonian law and EU law: the condition of Estonia's EU membership — adherence to the fundamental principles of the Constitution — on the one hand, and the supremacy and in certain cases direct applicability of EU law, on the other. According to CAA § 2, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies, taking account of the rights and obligations arising from the Accession Treaty. With the Accession Treaty, Estonia adopted the *acquis communautaire* under the conditions provided

<sup>24</sup> SCebd 19.04.2005, 3-4-1-1-05. – RT III 2005, 13, 128 (in Estonian). The English text of the decision is available at <http://www.nc.ee/?id=391>.

<sup>25</sup> The Chancellor of Justice is, in his or her activities, an independent official who reviews the legislation of the legislative and executive powers and of local governments for conformity with the Constitution and the laws and who also acts in the capacity of an ombudsman.

<sup>26</sup> The Political Parties Act has been amended by now and it does allow citizens of other EU Member States to belong to Estonian parties. See Erakonnaseaduse § 5 muutmise seadus. – RT I 2006, 52, 384 (in Estonian).

<sup>27</sup> See SCebd 3-4-1-1-05 (Note 24), p. 49.

<sup>28</sup> See critically C. Ginter. Constitutional Review and EC Law in Estonia. – European Law Review (E.L.Rev.) 2006 (31) 6, pp. 912–923.

<sup>29</sup> See SCebd 3-4-1-1-05 (Note 24), p. 49.

<sup>30</sup> See the dissenting opinion of Justice Julia Laffranque (the author of this paper acting in her judicial capacity) to SCebd of 19 April 2005 in matter 4-3-1-1-05, joined by justices Tõnu Anton, Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann, in English available at <http://www.nc.ee/?id=391>. Concerning the dissenting opinion see also C. Ginter (Note 28), p. 912; U. Lõhmus. Euroopa Liidu õigussüsteem ja põhiseaduslikkuse kontroll pärast 1. maid 2004 (European Union Legal System and Constitutional Supervision After 1 May 2004). – Juridica 2006/1, pp. 4 and 5.

in the Accession Treaty. For these reasons, there can be no conflict between Estonia's amended Constitution and primary EU law (the EU Treaty and EC Treaty). The Estonian court cannot doubt in the validity of the treaties on which the EU is based nor the rest of primary EU law.<sup>\*31</sup>

In its decision of 10 May 2006, in matter 3-3-1-66-05, the ALCSC again settled the matter based on the fact that according to the CAA, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies, taking account of the rights and obligations arising from the Accession Treaty, and added that the principle also concerns application of § 113 (taxes) of the Constitution in the context of EU law.<sup>\*32</sup>

### 2.3. Analysis of the group of experts set up by the Constitutional Committee of the Riigikogu

Although in the above case of election coalitions both the Chancellor of Justice, Minister of Justice and the Constitutional Committee of the Riigikogu were ready to apply the Constitution on the basis of the CAA, there was no certainty as to their positions. Achieving such certainty was helped by the opinion of a group of recognised legal experts set up at the Constitutional Committee of the Riigikogu concerning the conformity of the Treaty establishing a Constitution for Europe with the Estonian Constitution, which also analysed the CAA.<sup>\*33</sup> The analysis provided a more thorough overview of the fundamental principles of the Constitution, the supremacy of EU law, etc. Members of the group of experts foresaw certain upcoming problems in connection with Estonia's EU membership in the situation where the CAA has distorted some of the provisions of the Constitution. Owing to the reduced legal clarity, the group of experts took the view that future amendments to the Constitution relating to Estonia's EU membership could ensure a better applicability of the Constitution. The group of experts therefore considered it necessary to analyse any problems that may arise in the future in the application of EU law and the Constitution, and in the interpretation of the text of the Constitution. After that, it should be clarified whether the CAA allows for the application of the Constitution in conjunction with EU law without problems, and whether it is reasonable to continue with the model created with the CAA or whether the text of the Constitution requires amendments arising from EU law, or whether a new Constitution should be drafted.<sup>\*34</sup>

The positions of the group of experts certainly serve as good source material for a better understanding of the relations between the Constitution and EU law, and are valuable commentaries to the CAA.

## 3. Supreme Court's new competence to give opinions

In addition to the aforementioned discussions and the opinion of the group of experts, there is now a legal basis that allows the Supreme Court to analyse, in the course of constitutional review proceedings, the conformity of the Estonian Constitution to EU law, as the constitutional courts of many other Member States do. Namely, the CRPA and the Riigikogu Rules of Procedure Act Amendment Act, which entered into force on 23 December 2005, provides for the preliminary review of Estonian draft laws that are required for meeting the commitments of an EU Member State, in the course of which the Supreme Court has to clarify how to interpret the Constitution in conjunction with EU law, if interpretation of the Constitution is decisive in passing the draft law.<sup>\*35</sup>

It seems, however, that insufficient forethought was given to the extension of the competence of the Supreme Court. It was not preceded by an analysis of, amongst other things, the question of whether and in what form a body that administrates justice can simultaneously give opinions. Unfortunately, the decision was, once again, made in a rush. Without supplying the analysis that was lacking upon the adoption of the CRPA and the Riigikogu Rules of Procedure Act Amendment Act, below is an example of the case-law of the European Court of Human Rights. The European Court of Human Rights found in its judgment of 28 September 1995,

<sup>31</sup> ALCSCr 25.04.2006, 3-3-1-74-05, p. 12. Available at [www.riigikohus.ee](http://www.riigikohus.ee) (21.07.2007) (in Estonian). English summary available in the information system Jurifast on the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, also on the homepage of the Supreme Court <http://www.riigikohus.ee/?id=719>.

<sup>32</sup> ALCSCd 10.05.2006, 3-3-1-66-05, p. 9. Available at [www.riigikohus.ee](http://www.riigikohus.ee) (21.07.2007) (in Estonian).

<sup>33</sup> The positions of the constitutional law analysis working group, which also included renowned Estonian lawyers, were issued at the end of 2005 and are available at [http://www.riigikogu.ee/public/Riigikogu/eps1\\_20051211\\_ee.pdf](http://www.riigikogu.ee/public/Riigikogu/eps1_20051211_ee.pdf) (7.05.2007) (in Estonian).

<sup>34</sup> See *ibid.*, p. 9.

<sup>35</sup> Põhiseaduslikkuse järelevalve kohtumenetluse seaduse ja Riigikogu kodukorra seaduse muutmise seadus. – RT I 2005, 68, 524 (in Estonian).

in the case *Procola versus Luxembourg*<sup>\*36</sup>, that when analysing whether the body in question complies with the principle of impartiality laid down in article 6 of the European Convention on Human Rights (ECHR), regard should be had to the fact that four of the five members sitting on the Judicial Committee of the Luxembourg *Conseil d'État* reviewing the lawfulness of the regulation had previously analysed the same regulation in their advisory capacity. This situation caused the appellant concern that the judges reviewing the case may feel bound by their earlier opinion. The European Court of Human Rights admitted that the concern was justified. Even if the concern was unjustified, it was enough to question the independence of the aforementioned body. The double function of members of the *Conseil d'État* as providers of opinions and administrators of justice touches on ECHR article 6 (1). Motivated by the judgment of the European Court of Human Rights, a separate higher administrative court was set up in Luxembourg in addition to the *Conseil d'État*, so that the former (*Conseil d'État*) could give opinions on the issue of compliance of draft regulations to the laws, and the latter (highest administrative court) would administer justice.<sup>\*37</sup> However, giving opinions is quite a common practice for international courts, including the European Court of Justice.<sup>\*38</sup>

## 4. Opinion of the Supreme Court of 11 May 2006

On 25 January 2006, soon after the Supreme Court's competence was extended, the Riigikogu adopted, with 72 votes in favour, the decision proposed by the Constitutional Committee and the EU Affairs Committee "Asking the opinion of the Supreme Court in matters of interpretation of § 111 of the Constitution in conjunction with the Constitution of the Republic of Estonia Amendment Act and EU law".<sup>\*39</sup> The Constitutional Review Chamber of the Supreme Court had to answer the Riigikogu's specific question of whether the Bank of Estonia could have the sole right to issue Estonian currency upon the introduction of the euro and how the provision of the Constitution setting out such a right should be interpreted in conjunction with the CAA and EU law. The decision of the Riigikogu seems to be motivated by the wish to receive an answer to an unsolved question, all the more so because the situation was aggravated by the European Commission's doubts about the conflict between § 111 of the Estonian Constitution and article 106 of the EC Treaty<sup>\*40</sup>, and this could have been an obstacle to the introduction of the euro in Estonia.<sup>\*41</sup> The direct link between the extension of the Supreme Court's competence and the Riigikogu's question of 25 January 2006 is evidenced by the quick adoption of the legal amendment barely a month before the first question, and the fact that it has so far remained the only request for the Supreme Court's opinion.

In order to answer the Riigikogu's question about the interpretation of § 111 of the Constitution in conjunction with the CAA and EU law, the Supreme Court had to first check if the Riigikogu's request conformed to requirements, and in which cases the Riigikogu can actually ask for the Supreme Court's opinion. In its response, the CRCSC gave further reaching guidance as to the situations in and conditions under which an opinion is justified. The CRCSC noted that in order for the interpretation of the Constitution in conjunction with EU law to be crucial for the adoption of a draft, the draft or its provision must be directly related to the provision or principle cited by the Riigikogu. The interpretation of such provision or principle must not be so blatantly obvious. An opinion is justified only if the meaning of a provision or principle of the Constitution, when interpreted in conjunction with the CAA and EU law, is unclear or arguable and makes the legislative proceeding in the Riigikogu difficult.<sup>\*42</sup> This helps avoid the Riigikogu's abuse of the right to ask for the Supreme Court's opinion.

<sup>36</sup> See European Court of Human Rights, *Procola v. Luxembourg*, judgment of 28 September 1995, No. 14570/89. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=1471248&skin=hudoc-en> (21.07.2007).

<sup>37</sup> For more details on this see also J. Laffranque. *Euroopa põhiseaduse lepingu peied Tallinnas (A Wake For the Treaty Establishing a Constitution For Europe In Tallinn. What Next?)* – *Juridica* 2006/1, pp. 21–23 (in Estonian).

<sup>38</sup> For example, article 300 (6) of the EC Treaty provides that the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the EU Treaties. Although the opinion of the Court of Justice is not in itself binding, if the opinion of the Court of Justice is adverse, the agreement may enter into force only after the EU Treaties have been amended.

<sup>39</sup> Riigikohtu seisukoha taotlemine Eesti Vabariigi põhiseaduse § 111 koostöimes Eesti Vabariigi põhiseaduse täiendamise seaduse ja Euroopa Liidu õigusega tõlgendamise asjus. – *RT I* 2006, 6, 33 (in Estonian).

<sup>40</sup> The opinion of the Commission of the European Communities was in 2005 available at [http://europa.eu.int/comm/economy\\_finance/publications/european\\_economy/convergencereports2004\\_en.htm](http://europa.eu.int/comm/economy_finance/publications/european_economy/convergencereports2004_en.htm) According to the Commission, § 111 of the Constitution is in conflict with EU law; the opinion does not mention the CAA. The European Central Bank (ECB), however, refers in its assessment to both the Constitution and the Third Act, but urges that § 111 should be amended with regard to legal certainty. The ECB's position is available at <http://www.ecb.int/pub/pdf/conrep/cr2004en.pdf> (21.07.2007).

<sup>41</sup> See also J. Laffranque. *Põhiseadus Euroopa Liidus ja meil (The Constitution in the European Union and Estonia)*. – *Eesti Majanduse Teataja* 2005/9, pp. 5–7 (in Estonian).

<sup>42</sup> See opinion of the CRCSC of 11.05.2006, 3-4-1-3-06 (request for the Supreme Court's opinion on interpreting § 111 of the Constitution of the Republic of Estonia in conjunction with the Constitution of the Republic of Estonia Amendment Act and EU law), p. 9. – *RT III* 2006, 19, 176 (in Estonian); the opinion is available in English at: <http://www.nc.ee/?id=377> (21.07.2007).

The Supreme Court's opinion, or the reasoning for the competence to give an opinion, does not clearly answer the question whether the Supreme Court may take a view on amendments to the EU Treaties in the future, should this become necessary. The Constitution and the CAA are not only legal, but also political, historical and cultural documents, which is why it cannot be precluded that as the EU develops, a question may arise about the possible conflict of EU law with the fundamental principles of the Estonian Constitution. To identify the latter, a control mechanism is needed, which an opinion of the Supreme Court might not ensure in full. For example, in France<sup>43</sup> and Spain<sup>44</sup>, the constitutional courts conducted a preliminary review in the form of an analysis of the conformity of the constitutions of their respective countries to the Treaty establishing a Constitution for Europe. The Supreme Court's opinion should have also been asked in Estonia; an opinion by the *ad hoc* group of experts in the Constitutional Committee of the Riigikogu cannot replace the position of a "constitutional court". However, the Riigikogu ratified the Treaty establishing a Constitution for Europe on 9 May 2006, without seeking the Supreme Court's opinion.

In response to the specific question about the euro, the CRCSC stated in its opinion of 11 May 2006, that under the conditions of full membership of the economic and monetary union the Bank of Estonia shall neither have the sole right to issue Estonian currency nor the right to issue the Estonian kroon.

#### 4.1. "Suspension" of the effect of the provisions of the Constitution which are contrary to EU law

Constitutional review institutions are seen as guardians of the state's sovereignty and protectors and developers of constitutional values. This role has become topical especially in the framework of EU integration. Although the European Court of Justice already expressed, quite clearly, its position on the supremacy of European law over national constitutions in the 1970s<sup>45</sup>, the constitutional courts and higher courts of the EU Member States have been rather modest in this issue. Even where they have principally accepted the supremacy of European law, they have not expressed this with regard to their national constitutions.<sup>46</sup> The courts of a majority of the Member States which acceded to the EU on 1 May 2004, have followed a similar approach to avoid conflicts. For example, instead of issues about the relations between domestic and EU law, they have analysed the compliance of domestic law with the Constitution (the Hungarian Constitutional Court).<sup>47</sup> Or, in order to avoid the supremacy of EU law over the constitution, they have proposed constitutional amendments (see, e.g., the Polish Constitutional Court and the Supreme Court of Cyprus in the matter of the European arrest warrant).<sup>48</sup> Nevertheless, the judgments of the competent courts of the new Member States are quite EU-friendly, in general.<sup>49</sup>

It should be noted that, for example, Lithuania has preferred to amend its Constitution to ensure clarity and avoid conflicts. In a similar issue to the one analysed in the Estonian Supreme Court's opinion of 11 May 2006, concerning the wish to become a full member of the monetary union and introduce the euro, Lithuania amended article 125 of its Constitution in April 2006, by deleting the sentence according to which the Bank of Lithuania had the sole right to issue Lithuanian currency and supplementing the paragraph about the legal

<sup>43</sup> Decision of the French Constitutional Council (*Conseil Constitutionnel*) of 19 November 2004, matter No. 2004-505. – DC, JO 24.11.2004, p. 19885. Available at <http://www.conseil-constitutionnel.fr/> (21.07.2007). In Estonian law literature see also R. Laffranque. Kõsimus Euroopa põhiseaduse lepingu kooskõlast Prantsuse põhiseadusega. *Conseil constitutionnel*'i 19. novembri 2004. a otsus (The Issue of the Conformity of the Treaty Establishing a Constitution for Europe with the French Constitution. Decision by the *Conseil constitutionnel* on 19 November 2004). – *Juridica* 2005/1, pp. 13–27 (in Estonian).

<sup>44</sup> Declaration of the Spanish Constitutional Court of 13 December 2004 DTC 1/2004. Available at <http://www.tribunalconstitucional.es/Stc2004/DTC2004-001.htm> (26.09.2005).

<sup>45</sup> Judgment of the European Court of Justice of 17 December 1970, case 11/70 (Internationale Handelsgesellschaft). – Rec. 1970, p. 1125.

<sup>46</sup> About the details of case-law of EU Member States see J. Laffranque (Note 16), pp. 487–524.

<sup>47</sup> For example, as regards the issues of excess stocks the Hungarian Constitutional Court in its decision of 25 May 2004 No. 17/2004 found, unlike the Estonian CRCSC, that the issue lied neither about the conflict between relevant EU law and domestic law nor in the validity or interpretation of EU law, but the compliance of the domestic legislation that was adopted for the implementation of EU regulations to the national constitution (published in Vol 70 of the official publication *Magyar Közlöny* for 2004 and in the official publication of the Constitutional Court *AB Közlöny*: XIII year of issue, Vol 5).

<sup>48</sup> The Polish Constitutional Court found in its judgment of 27 April 2005 in the matter P1/05 that the European arrest warrant was contrary to the Polish Constitution and considered it necessary to apply a transitional period in Poland with respect to the arrest warrant so as to bring the Polish Constitution into conformity with EU law (the English summary of the judgment is available at the website of the Polish Constitutional Court at: [www.tribunal.gov.pl/eng/summaries/documents/P\\_1\\_05\\_GB.pdf](http://www.tribunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf)). The Polish Constitution was amended in the autumn of 2006.

The Supreme Court of Cyprus found in its judgment of 7 November 2005 No. 294/2005 that the domestic law ratifying the European arrest warrant was contrary to the Constitution (the Greek text with an English summary are available as the Council of the European Union document No. 14281/05 of 11 November 2005). Cyprus has also made relevant amendments to its Constitution.

<sup>49</sup> See, e.g., A. Lazowski. Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005. – *European Constitutional Law Review* 2007/3, pp. 148–162, especially p. 150.

bases of the Bank of Lithuania.<sup>\*50</sup> Estonia chose a different path, as the potential conflict in a Supreme Court opinion was overcome with the CAA, and the Constitution was not amended.

Against the background of the above modestness in supremacy questions of constitutional/supreme courts of most Member States, it is remarkable that in its opinion of 11 May 2006, the Estonian CRCSC expressly admitted the supremacy of EU law over the Estonian Constitution. There are no counterparts to this bold expression of EU-fondness in other EU Member States. The behaviour of the CRCSC as the highest court of the Member State and, traditionally, the last resort of sovereignty, demonstrates the unprecedented submissiveness to the EU. For the sake of clarity it should be noted that the supremacy of EU law, as stated by the Supreme Court's opinion of 11 May 2006, is currently laid down only in the Treaty establishing a Constitution for Europe article I-6, which has not entered into force and most likely will not, as the so called Reform Treaty of the EU does not envisage similar statement about the primacy of EU law referring only in a declaration to the relevant case law of the European Court of Justice. As we know, the European Court of Justice has so far admitted the supremacy of EU law of the first pillar (the European Communities) and not EU law as a whole; it is, however, moving toward extending the supremacy to legal acts of the third pillar.<sup>\*51</sup> The Estonian Supreme Court's opinion is also remarkable for the fact that it has not attempted to overcome the conflicts by way of interpretation, not even by application of the Constitution via the CAA (as would have been suggested by the explanatory memorandum to the draft CAA<sup>\*52</sup>, the articles in legal journals which were published at the time of drafting it, the positions of the Chancellor of Justice, Minister of Justice, and the Riigikogu), but instead it "deactivated" the provisions of the Constitution that were contrary to the CAA and EU law. The Supreme Court's opinion does not specify how to ascertain in each separate instance which provisions of the Constitution are "dormant" and are not applicable, or if "sleeping beauty" should wake up (for example, if Estonia withdraws from the EU). The opinion of the CRCSC of 11 May 2006, states as follows: "Thus, the Constitution of the Republic of Estonia must be read together with the Constitution of the Republic of Estonia Amendment Act, applying only the part of the Constitution that is not amended by the CAA. [...] As such, only that part of the Constitution is applicable, which is in conformity with European Union law or which regulates the relationships that are not regulated by European Union law. The effect of those provisions of the Constitution that are not compatible with European Union law and thus inapplicable is suspended. This means that within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with European Union law."<sup>\*53</sup>

## 4.2. Failure to handle the protective clause and fundamental principles of the Constitution Amendment Act

Justices Eerik Kergandberg and Villu Kõve, who presented their dissenting opinions to the CSCRC opinion of 11 May 2006, believed that the CSC did not speak the whole truth, i.e., it spoke about the supremacy of EU law over the Estonian Constitution, but did not specify the limits of the supremacy and failed to interpret and open up the fundamental principles of the Constitution which are stated in the protective clause of the CAA.<sup>\*54</sup> Villu Kõve is of the opinion that the principle of supremacy of EU law over the Estonian legal order has been "overestimated".<sup>\*55</sup> It is difficult not to agree with the opinion of Justice Kõve when we consider the analysis above. However, it should be admitted that non-recognition of the supremacy of EU law over the Constitution is becoming a façade, while the influence of EU law is constantly growing (including via the case-law of the European Court of Justice). This does not preclude, but instead deepens the need for clarifying the conditions and limits of supremacy.

Villu Kõve fails to understand the significance and legal effect of the Supreme Court's opinion.<sup>\*56</sup> The explanatory memorandum to the draft law that expands the competence of the Supreme Court to give opinions states that it is not formally mandatory to the parliament to be guided by the Supreme Court's opinion and that giving

<sup>50</sup> See Valstybes žinos (Lithuanian State Gazette) 2006, No. 48-1701, published on 29 April 2006.

<sup>51</sup> See the judgment of the European Court of Justice of 16 June 2005, C-105/03 (Pupino), (not yet published in the ECR).

<sup>52</sup> The Constitution of the Republic of the Estonia Amendment Act. Explanatory Memorandum (1067 SE, 9th composition of the Riigikogu). Available at <http://web.riigikogu.ee/ems/saros-n/mgetdoc?itemid=021360008&login=proof&password=&system=ems&server=ragne11> (7.05.2007) (in Estonian).

<sup>53</sup> See the second paragraph of section 14 and sections 15–16 of the opinion.

<sup>54</sup> See the dissenting opinion of Eerik Kergandberg and the dissenting opinion of Villu Kõve to the Opinion of the Constitutional Review Chamber of the Supreme Court of 11 May 2006 in matter 3-4-1-3-06. – RT III 2006, 19, 176 (in Estonian). The English text of the dissenting opinions is available at <http://www.nc.ee/?id=663> (21.07.2007).

<sup>55</sup> The dissenting opinion of Villu Kõve (Note 54), p. 3.

<sup>56</sup> *Ibid.*, p. 1.

an opinion does not preclude constitutional review according to the general procedure, i.e., does not limit the competence of the President of the Republic or the Chancellor of Justice.<sup>\*57</sup>

### 4.3. Summarising remarks on the Supreme Court's opinion of 11 May 2006

To sum up the opinion of the Constitutional Review Chamber of the Supreme Court, it may be said that it was more than an answer to the specific question about the sole right to issue the euro. The opinion gave guidance as to when it is possible and necessary to ask for the Supreme Court's opinion, and it was also a 180 degree turn in the formerly modest position of the Supreme Court in issues regarding the relations between Estonian and EU law. Such a position, however, not binding legally, may lead to exaggerated consideration for the principle of supremacy of EU law in Estonian legislative drafting and case-law, since the opinion of the CRCSC did not define the limits of supremacy. However, the Supreme Court will certainly have more opportunities to express its position on EU law in its constitutional review proceedings in the future (including *en banc*).

## 5. Conclusions

Many conclusions may be drawn from the foregoing analysis of the impact of the CAA on the Estonian legal landscape. Firstly, it is salutary that Estonia acceded to the EU, having respect for the principles of the rule of law and democracy and approved the CAA at a referendum, which makes it possible to take into account important principles of EU law. Another positive aspect is that the CAA has found practical application and the Supreme Court has adopted a position, despite its initial cautiousness about the CAA. This practice of application and interpretation will surely be enriched with the opinions of *ad hoc* groups of experts of various constitutional institutions, including the Constitutional Committee of the Riigikogu, commentaries by jurists and dissenting opinions of justices. The group of experts should continue to meet in the future and the opinion of the Supreme Court should be sought in principal issues about the limits of supremacy of EU law over the Estonian Constitution.

Questions have arisen due to the wide degree of interpretation of the CAA, which may also lead to different interpretation of those aspects of the Constitution which do not concern the application of EU law (although the limits of domestic and EU law have become increasingly fuzzy in any case). It is interesting that the problems seem to be optional. For example, unlike many other EU Member States, there has been no dispute in Estonia concerning the compliance of the European arrest warrant with the Constitution.<sup>\*58</sup> Subsection 36 (2) of the Constitution stipulates that an Estonian citizen can be extradited to a foreign state only under the conditions prescribed by an international treaty and pursuant to procedure provided by such treaty. An EU framework agreement, however, cannot be regarded as an international treaty. In this case, the potential conflict was overcome without dispute and with the help of the CAA.<sup>\*59</sup> However, in its question about § 111 of the Constitution, the Riigikogu asked for the opinion of the Supreme Court, which also overcame the problem by interpreting the CAA. Where conflicts of law arise, they need to be solved and this requires mechanisms for their resolution.

The efficiency of constitutional review has already been improved with respect to certain issues. For example, the amendment to the State Liability Act<sup>\*60</sup> supplemented judicial constitutional review with the possibility to decide on the inactivity (failure to issue legislation of general application) of the legislature (see, e.g., CRPA § 2 (1) 1); § 9 (1); § 15 (1) 2'). This amendment was motivated by the concept that a Member State is liable for failure to transpose EU law correctly and in due course.<sup>\*61</sup> The competence of the Supreme Court

<sup>57</sup> 762 SE Põhiseaduslikkuse järelevalve kohtumenetluse seaduse ja Riigikogu kodukorra seaduse muutmise seadus. Seletuskiri (Constitutional Review Proceedings Act and Riigikogu Rules of Procedure Act Amendment Act. Explanatory Memorandum). Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=053000011&login=proov&password=&system=ems&server=ragne11> (11.01.2006) (in Estonian).

<sup>58</sup> For example Poland, Germany, Cyprus, where the issue was the subject of constitutional court/highest court judgments, and France, where the Constitution was amended. About the legitimacy of the European arrest warrant in EU law see the judgment of the European Court of Justice of 3 May 2007, C-303-05 (Advocaten voor de Wereld VZW / Leden van de Ministerraad). – OJ C 140, 23.06.2007, p. 3.

<sup>59</sup> See also V.-M. Rummo. Euroopa vahistamismäärus. Isikute loovutamise uus kord Euroopa Liidus (European Arrest Warrant. A New Procedure in the European Union for the Surrender of Persons). – *Juridica* 2004/8, especially p. 571 (in Estonian).

<sup>60</sup> Riigivastutuse seaduse ja põhiseaduslikkuse järelevalve kohtumenetluse seaduse muutmise seadus (State Liability Act and Constitutional Review Proceedings Act Amendment Act). Passed on 28 June 2004, entered into force on 25 July 2004. – RT I 2004, 56, 405 (in Estonian).

<sup>61</sup> See the explanatory memorandum to the draft State Liability Act and Constitutional Review Proceedings Act Amendment Act 357 SE. Available at <http://web.riigikogu.ee/ems/saros-in/mgetdoc?itemid=041130026&login=proov&password=&system=ems&server=ragne11> (10.05.2007) (in Estonian).

was also expanded by the function of giving opinions. Still, there are unsolved issues; the following three problems, above all, require answers: (1) the possibility and limits of review of compliance with EU law of Estonian legislative provisions within constitutional review proceedings (motivated by the so-called election coalitions II case — SCEbd of 19 April 2005, in matter 3-4-1-1-05, and the appended dissenting opinion); (2) problems arising from Estonian law that has not been applied, is contrary to EU law and remains in force (the lack of a repeal mechanism) (motivated by the so-called excess stocks charge case — ALCSCd of 5 October 2006, in matter 3-3-1-33-06, in which the legislature considered the position of the ALCSC and amended the Estonian law that was contrary to EU law<sup>62</sup>); (3) the possibility and limits of review of compliance of EU law with Estonian law: whether, by whom, how, and when a review can take place of the compliance of primary EU law and especially its (potential) amendments to the fundamental principles of the Estonian Constitution (motivated by opinion 3-4-1-3-06 of the CRCSC of 11 May 2006, and the appended dissenting opinions).

The first question is: where to draw the line between conflicts with the amended Constitution and EU law; when do they overlap and do they always overlap? For example, on 16 June 2006, the Hungarian Constitutional Court dismissed a request to declare domestic legislation to be in contravention of the Constitution (the legislation was also in contravention of EU law), in which the appellant claimed that the Hungarian legislature has been inactive and failed to remove provisions which were contrary to EU law.<sup>63</sup> According to the established practice of the German Constitutional Court, the “EU article” of the German Constitution allows only for the supremacy of European law over domestic law (delegation provision), but does not specify the substance of the supremacy, and the court does not admit (individual) constitutional claims relying on German law being contrary to EU law.<sup>64</sup>

It may also be said for Estonia that equalising a conflict with EU law with a conflict with the Constitution is not the best solution. It may be necessary only in very principal issues (such as the protection of fundamental rights and freedoms insofar as EU law covers this). However, the possibility to rely on a conflict with EU law in any proceedings, if this is relevant and necessary in order to ensure equal protection of the rights of persons in situations of contesting domestic law and EU law, should not be precluded. Otherwise, Estonia would not be complying with its loyalty and co-operation commitment to the EU under article 10 of the EC Treaty. Contesting a conflict with EU law would prevent Estonia from facing legal action in the European Court of Justice for not meeting its membership obligations. Another issue that needs to be solved in this context is the question of whether the Chancellor of Justice should be given the competence to contest Estonian legislation which is contrary to EU law.

A further important problem is that the supremacy of application of EU law may leave the fate of Estonian law, which has not been applied due to a conflict, unresolved, and this in turn may lead to problems of legal clarity and legal certainty. Which law is to be applied when Estonian law, which has already not been applied by, e.g., a court, continues to be formally in force? Specific cases may, of course, be solved based on the supremacy of application. Administrative acts (decisions) relying on domestic law that is contrary to EU law can be revoked by an administrative court.<sup>65</sup> As a minimum, the court should be allowed to declare Estonian law to be contrary to EU law in the decision in the framework of a specific review of provisions. However, it is currently impossible to request a court to repeal a law or regulation that is contrary to EU law. The only hope is that the legislature will make the necessary amendments based on the court’s decision. Unfortunately, experience shows that one cannot always rely on this.<sup>66</sup> Neither is it clear whether a complaint about the legislature’s inactivity is a feasible and efficient legal remedy in such cases. Although the case-law of the European Court of Justice is limited to the supremacy of EU law on application and does not consider a separate mechanism repealing a domestic law contrary to European law necessary<sup>67</sup>, and most Member States have taken the same path, the lack of a requirement in Estonian law under which a request could be submitted for

<sup>62</sup> Nevertheless it is still not certain whether the legislator in making the amendments gave sufficient consideration to EU law, therefore debates on surplus stock have made a reappearance in administrative courts, including the Administrative Law Chamber of the Supreme Court.

<sup>63</sup> Decision of the Hungarian Constitutional Court of 16 June 2006 in matter 1053/E/2005.

<sup>64</sup> For more details of case-law see T. Dünchheim. Die Einwirkungen des Europarechts auf die verwaltungsprozessuale Normabwehr und Normergänzungsklage. Die Öffentliche Verwaltung. Bd. 57. 2004, p. 138 ff.

<sup>65</sup> An example is ALCSCd of 5 October 2006 in matter 3-3-1-33-06, in which the Chamber found that the requirement to apply a coefficient of 1.2 when determining excessive stocks as provided in § 6 (1) of the Excessive Stocks Charge Act cannot be interpreted in line with EU law and did not apply the aforementioned provision of Estonian law due to its conflict with EU law; the court revoked the administrative legislation that had relied on that provision. See especially pp. 31–33 of the decision. – RT III 2006, 35, 301 (in Estonian).

<sup>66</sup> See, e.g., SCEbd of 12 April 2006 in matter 3-3-1-63-05, in which § 7 (3) of the Principles of Ownership Reform Act had to be repealed since the legislature had not done anything to bring the situation into compliance with the Constitution despite SCEbd of 28 October 2002 in matter 3-4-1-5-02, which declare the aforementioned provision to be contrary to the Constitution. – RT III 2006, 13, 123 (in Estonian). In English available at <http://www.nc.ee/?id=678>. About the same issue see the presentation of Märt Rask, Chief Justice of the Supreme Court, at the 2006 Spring Session of the Riigikogu: Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta (Overview of Courts Administration, Administration of Justice, and the Uniform Application of Laws), pp. 18–21. Available at <http://www.nc.ee/?id=667> (10.05.2007) (in Estonian).

<sup>67</sup> See judgment of the European Court of Justice of 22 October 1998 in joined cases C-10/97 to C-22/97 (Ministero delle Finanze v. IN.CO.GE. '90). – ECR 1998 p. I-6307; judgment of 13 March 2007, case C-432 (Unibet) (not yet published in the ECR).

repealing a domestic legal provision which is contrary to EU law, in the same way as constitutional review proceedings can be initiated, may result in a weaker protection of persons' rights under EU law compared to the protection that people have of their rights under domestic law.<sup>\*68</sup>

The previous two questions concerned situations where Estonian law was allegedly contrary to EU law and hence, more or less, directly also to the Constitution. At the same time, our CAA contains a protective clause referring to the fundamental principles of the Constitution and the fact that a situation may arise where EU law is contrary to our legal principles. There is another supposable situation in which there is no conflict with EU law, but there is still a conflict with the Constitution since it may protect certain values more strongly than EU law does.<sup>\*69</sup> For example, regarding the question of whether in the case of a domestic provision which was in line with EU law, it was still possible, as a next step, for an administrative court to institute constitutional review in order to check the compliance of the same provision with the Constitution, the French *Conseil d'État* replied that insofar as the contested government regulation is based on a legitimate EU directive, the French regulation cannot be repealed, since this would essentially invalidate the EU directive, which is not in the competence of a court of a Member State (including the constitutional court).<sup>\*70</sup> As such a situation has not yet arisen in Estonian case-law, it is unclear, regardless of a few theoretical discussions, whether the Supreme Court can also exercise its constitutional review competence with respect to integration law.<sup>\*71</sup>

There is nothing bad or illogical if judicial review needs to be revised based on case-law arising from the CAA. Perhaps a new Constitution will be drafted in the future, but this should not be done before the procedural aspects discussed above have been solved and the possibilities of implementation of the CAA have been exhausted. All the more so because the Treaty establishing a Constitution for Europe in its original form will probably not enter into force<sup>\*72</sup> and calls for a new Estonian Constitution have also subsided in connection with this. In his speech to the Supreme Court, the Chief Justice of the Supreme Court commented on the opinion of the CRCSC of 11 May 2006, as follows: “[...] The Supreme Court did not say that Estonia needs a new Constitution, but drew attention to how complicated and multi-layered our constitutional law system has become. It is apparently a matter of perception when the text of our Constitution loses its simple regulative effect and becomes a record of legal history”.<sup>\*73</sup> Writing a new Constitution may be necessary, first and almost only when the underlying values of the state have changed so much that the existing order of values no longer corresponds to reality.

<sup>68</sup> Uno Lõhmus believes that there is no situation less favourable and that a separate repeal procedure is not necessary. See U. Lõhmus. *Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime* (How Do the Court Systems of Member States Ensure the Efficient Functioning of European Union Law)? – *Juridica* 2007/3, p. 153 (in Estonian). The German jurists Eckhard Pache and Frank Burmeister have a different opinion — they believe that the principles of efficiency of equal treatment mean that a review of provisions should be initiated also where German law is contrary to EU law, and that disputes concerning EU law are not treated equally with domestic disputes if they do not allow for review proceedings. See E. Pache, F. Burmeister. *Gemeinschaftsrecht im verwaltungsgerichtlichen Normenkontrollverfahren*. – *NVwZ* 1996, pp. 979 and 981.

<sup>69</sup> See, e.g., the decision of the German Constitutional Court of 29 May 1974, case 2BvL52/71 (Solange I) (BVerfGE 37, p. 271), the positions of which were later reviewed by the court in its decisions such as 22 October 1986 in case 2BvR 197/83 (Solange II) (BVerfGE 73, p. 339) and 12 October 1993 in cases 2 BvR 2134/92 and 2 BvR 2159/92 (Vertrag von Maastricht) (BVerfGE 89, p. 155).

<sup>70</sup> *Conseil d'État*, 8 February 2007, case No. 287110 (Arcelor). Available at [http://www.conseil-etat.fr/ce/jurisprd/index\\_ac\\_ld0706.shtml](http://www.conseil-etat.fr/ce/jurisprd/index_ac_ld0706.shtml) (10.05.2007).

<sup>71</sup> K. Maimann. *Intergatsiooniõiguse põhiseaduslikkuse kohtulik järelevalve Eestis* (Constitutional Court Review of Integration Law in Estonia). – *Juridica* 2006/6, p. 425 (in Estonian).

<sup>72</sup> See, e.g., the letter of 17 April 2007 by Angela Merkel, Chancellor of Germany, to the 27 EU Member States, proposing to open discussions over the adoption of an amended Constitutional Treaty (however, with as little amendments as possible). Information about this is available at [http://www.europarl.europa.eu/paris/4/uploads/pdf%20notes/note\\_162.pdf](http://www.europarl.europa.eu/paris/4/uploads/pdf%20notes/note_162.pdf) (10.05.2007), and first and foremost, Brussels European Council Presidency Conclusions, 21-22 June 2007, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm) (17.09.2007).

<sup>73</sup> Speech by Chief Justice Märt Rask at the 2006 Spring Session of the Riigikogu: *Ülevaade kohtukorralduse, õigusemõistmise ja seaduste ühetaolise kohaldamise kohta* (Overview of Courts Administration, Administration of Justice, and the Uniform Application of Laws), p. 22. Available at <http://www.nc.ee/?id=667> (10.05.2007) (in Estonian).