Bachelor Essay

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Mutually Assured Destruction inevitable? – The Relationship between the ECJ and the German FCC

A study of the development of the strategic relationship between the German Federal Constitutional Court and the European Court of Justice in the light of the latter's fundamental rights law, which is conducted by the methods of Game Theory.

I. General Introduction

There exists a wide-ranging variety of judicial systems in the world,[1] but mostly common to them is the fact that they are headed by one (or several) supreme court(s) as the final instance by whose decisions all other inferior courts are bound. In general, the final instance is empowered to exercise the so-called constitutional review by which it may set aside or annul any legal measure that is contrary to constitutional law, be it in a centralised or decentralised constitutional review system.[2] However, this structure becomes more complicated as the overall system, within which the courts are situated, becomes more complicated. This is particularly true for a system as complicated as the European Union with its complex founding treaties and the European Court of Justice (hereinafter: ECJ) as the last

[1] Martin Shapiro, 'Courts – A comparative and political Analysis' (University of Chicago Press, 1986).
[2] A. W. Heringa and Philipp Kiiver, 'Constitutions compared: An Introduction to Comparative Constitutional Law' (Intersentia, 2007), pp.95-115.

instance of the judiciary for their legal interpretation. Not only legal scholars and jurists expressed their resentment,[3] when the European Union expanded and the ECJ stated the unconditional supremacy of Community law over national law: various national courts began to resist insisting on the possession of the ultimate power to decide on their national (constitutional) laws,[4] as it is provided in their constitutions. This study has the aim to examine the relationship between the ECJ and the German Federal Constitutional Court or *Bundesverfassungsgericht* (hereinafter: FCC), the latter serving as an example for the European national courts. The reasons to select the FCC are two-fold: firstly, the German constitutional theory is known for its strict commitment to the idea of constitutional law as a determinate body of rules and principles.[5] Secondly, since its foundation, the internationally highly regarded FCC[6] has established itself as a forum for 'sophisticated and thorough discussion of constitutional ideas'.[7] Furthermore, an effective and adequate protection of fundamental rights at Community level comparable to the German Basic Law's standards was the FCC's initial condition not to set aside any secondary Community law, as will be seen, the focus lies on the development of the relationship between the two courts in the light of this evolving protection. From early on, namely, the FCC made clear that it would not hesitate to challenge the supremacy of Community law, unless there was an adequate protection of

[3] Particularly, Roman Herzog, former President of the FCC, turned out to be one of the main critics of the current EU structure: Roman Herzog und Lüder Gerken, 'Stoppt den Europäischen Gerichtshof!', (2008) Frankfurter Allgemeine Zeitung; and Roman Herzog, Frits Boltkestein and Lüder Gerken, 'Die EU schadet der Europa-Idee', (2010) Frankfurter Allgemeine Zeitung.
[4] Paul Craig, 'The ECJ, National Courts and the Supremacy of Community Law', http://www.ecln.net/rome2002/craig.pdf, last access: 11.07.2010.
[5] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 260.
[6] S. Peers et alia, 'The European Charter of fundamental rights' (Hart Publishing 2004), p. xxiv.
[7] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 260.

fundamental rights at Community level provided for the actual exercise thereof. However, this certainly would have a harsh impact on the legal cohesion, which is existentially important to the Community order: if one constitutional or supreme court began to set aside Community law in its territory, certainly others would follow it.[8] This logic was compared drastically by Joseph Weiler to the concept of 'mutually assured destruction' (or MAD),[9] i.e. the doctrine of Cold War strategists according to whom a first nuclear strike provoking the full-scale use of nuclear weapons by two opposing sides would inevitably result in the destruction of both the attacker and the defender.[10] This logic, according to realist thinkers, would prevent the use of the first strike at all.

The examination of the developing relationship will be exercised by the means of the interdisciplinary method of Game Theory. The study begins with a short introduction to the structure and tasks of the two courts followed by the development of their case law and their changing attitudes towards each other, respectively. Hereafter, the main part follows, which begins with a short introduction to the concept of Game Theory, by whose methods the study aims to analyse the motives behind the changing standpoints of the two courts. The study's results are summarised in the conclusion. The conclusion is accompanied by a potential future outlook of the courts' relationship on the basis of the findings gained through the analysis. The all-dominant issue hence is: Is the relationship between the

[8] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p. 445; and Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.
[9] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p. 445.
[10] Henry D. Sokolski, 'Getting MAD: Nuclear Mutual Assured Destruction, its Origins and Practice', Strategic Studies Institute, http://www.strategicstudiesinstitute.army.mil/pdffiles/pub585.pdf, last access: 11.07.2010.

two courts destined to be one of threat and 'mutually assured destruction' or would it even be possible to embark on an avenue of cooperation and 'mutually assured trust' for now and for the future?

1.) Introduction to the two Courts

i. The German Federal Constitutional Court

In accordance with Article 93 of the Basic Law, the Federal Constitutional Court of Germany situated in Karlsruhe constitutes the highest guardian of the German constitution.[11] Since its foundation, the FCC has to a large extent contributed to the establishment and development of Germany's free democratic basic order – which is particularly true in respect of fundamental rights[12] – usually thanks to constitutional complaints, i.e. 'a challenge to executive, judicial or legislative action by an individual claiming the infringement of his constitutional rights', which build the majority of cases before the FCC.[13] Internationally, it is considered to be the most powerful court within a sovereign state[14] and owes its loyalty solely to the German constitution:[15] it is strictly autonomous and independent vis-à-vis all other constitutional organs (*Bundestag*, *Bundesrat*, Federal Government and

[11] Jutta Limbach, 'Das Bundesverfassunsgericht' (Beck Verlag, 2001), 19; and The official Website of the Federal Constitutional Court, www.bundesverfassungsgericht.de, last access: 03.07.2010.
[12] The official Website of the Federal Constitutional Court, www.bundesverfassungsgericht.de, last access: 03.07.2010.
[13] David P. Currie, 'The Constitution of the Federal Republic of Germany' (University of Chicago Press, 1994), p.27.
[14] Jutta Limbach, 'Das Bundesverfassungsgericht' (Beck Verlag, 2001), 16; and David Parma, 'Das Bundesverfassungsgericht: Entstehung, Organisation, Aufgaben und Beispiele aus der Rechtssprechung' (GRIN Verlag, 2008), p.17.
[15] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p. 414.

Federal President).[16] Furthermore, all other courts are required to construe and adhere to the Basic Law, but only the FCC is competent to reject statutes in the case of a violation of the Basic Law.[17] Thus, the competence of constitutional review is centralised in the instance of the FCC:[18] if other courts consider a statute to be determinative of the case unconstitutional, in accordance to Art. 100 (1), they are bound to refer the issue to the FCC.[19] Foundation, tasks and composition are regulated in Arts. 92-94 of the Basic Law. Founded in 1951 by a separate degree,[20] the tribunal is held entirely separate from the ordinary courts, and its sole function is to interpret and apply the constitution.[21] Of great importance, furthermore, is the Court's power to judge upon controversies between organs of government with respect to their relative rights and powers, which places the FCC very close to the centre of political action: it may define the boundaries between executive and legislative authority ('*Organstreite'*), between federal and state competence ('*Bund-Länder Streitigkeiten'*) and between the competences of the several states vis-à-vis each other ('*föderalistische Streitigkeiten'*).[22] In spite of not constituting a political organ, it may exercise *de facto* political power, e.g. by declaring statutes to be

[16] Jutta Limbach, 'Das Bundesverfassungsgericht' (Beck Verlag, 2001), p.19.
[17] David P. Currie, ‚The Constitution of the Federal Republic of Germany' (University of Chicago Press, 1994), p.27.
[18] Jutta Limbach, 'Das Bundesverfassunsgericht' (Beck Verlag, 2001), p.17.
[19] David P. Currie, ‚The Constitution of the Federal Republic of Germany' (University of Chicago Press, 1994), p.27.
[20] Gesetz über das Bundesverfassungsgericht (abbreviated: BVerfGG), http://www.gesetze-im-internet.de/bundesrecht/bverfgg/gesamt.pdf, last access: 11.07.2010.
[21] David P. Currie, ‚The Constitution of the Federal Republic of Germany' (University of Chicago Press, 1994), p.27.
[22] David P. Currie, 'The Constitution of the Federal Republic of Germany' (University of Chicago Press, 1994), p.28.

unconstitutional;[23] hence, the FCC's actions have direct and indirect impact on politics.[24]

ii. The European Court of Justice

Founded as the final arbiter and interpreter of the Treaties and based in Luxembourg, the ECJ gradually developed principles of a constitutional nature as part of Community law.[25] The old Article 220 of the Treaty on the European Community (TEC) has been determinative in shaping the ECJ's sphere of influence:[26] 'the Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed'. Hence, its primary task is to examine the legality of European Union measures and to ensure the uniform application and interpretation of Community law.[27] Being the highest court to which disputes on Community law may be referred, all national courts must adhere to its decisions.[28] In accordance to Community law, it is the ECJ, and solely the ECJ, which possesses the power to invalidate a Community measure.[29] On this basis, the Court has extended review to include bodies, which have not previously been listed *expressis verbis* under its rule, and measures, which were not stated in the Treaty.[30] However, its

[23] Website of the German Federal Constitutional Court, www.bundesverfassungsgericht.de, last access: 03.07.2010 .
[24] Jutta Limbach, 'Das Bundesverfassungsgericht' (Beck Verlag, 2001), p.18.
[25] P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), p.72.
[26] P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), p.72.
[27] Website of the European Court of Justice, http://curia.europa.eu/jcms/jcms/Jo2_7024/, last access: 03.07.2010.
[28] Susan Senior Nello, 'The European Union – Economics, Policies and History' (McGraw-Hill Education, 2005), p.53.
[29] Case 314/85, Foto Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199.
[30] P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), p.72.

power is restricted by limits on its jurisdiction and rules on *locus standi*.[31] As the 'watchdog' of the Treaty,[32] it is the ECJ's task to judge upon the limits of Community competence as against the Member States.[33] During its existence, the Court has altogether pursued a policy of legal integration, being sometimes more, sometimes less activist, by enhancing the effectiveness of Community law and by promoting its integration into national legal systems.[34] In 1964, the ECJ established the principle of supremacy of European Community law over national law of the Member States in its famous landmark case *Costa v. ENEL*[35], in which a 'new legal order' was considered to be capable of superseding the national legal orders[36] [37] Thereafter, the ECJ made it clear that the national courts hold the authority and obligation to set aside any conflicting national provision of the Member States in favour of Community law.[38] The individual supreme

[31] D. Chalmers et al., 'European Union Law', (Cambridge University Press, 2007), p.120.
[32] Gráinne de Búrca and Joseph H. H. Weiler, 'The European Court of Justice' (Oxford University Press, 2001), p.14.
[33] P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), p.72.
[34] P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), p.75.
[35] Case 6/64, *Costa v. ENEL* [1964] ECR 585.
[36] The ECJ utilised this wording as to legitimate the conclusion that the European Community was different from other international treaties representing an order *sui generis* – J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37; P. Craig and G. de Burca, 'EU Law – Text, Cases, and Materials' (Oxford University Press, 2008), 274; P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 257-9; and Matthias Kumm, 'Who is the final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', (1999) Common Market Law Review 36, p.356.
[37] Incidentally, legal scholars regard this notion as being neglected by the FCC in its reasoning, regarding the FCC's doctrine and reasoning to focus too narrowly on state-centrism and the nation state. - Jörg Philipp Terhechte, 'Bundesverfassungsgericht und Zukunft der EU', http://www.springerlink.com/content/pw57553007203213/, last access: 09.07.2010.
[38] Case 11/ 70, *Internationale Handelsgesellschaft* [1970] ECR 1125 (in this case the ECJ held that the wording 'any' includes also constitutional law, which is contrary to

courts of the Member States, however, did not accept the entire scope of Community law's supremacy, as the ECJ had envisaged it.[39] Particularly the German *Bundesverfassungsgericht* with its high and well elaborated standards on the protection of the fundamental rights anchored in the German *Grundgesetz* (Basic Law)[40] and its high reputation across Europe[41] refused to accept the entire and unconditional supremacy of the European Court of Justice by making it conditional to an effective and durable protection of fundamental rights at European level comparable to the Basic Law's standards.[42]

In summary, one may define the approach of the ECJ as 'monist': the European Court alone possesses the power to review and annul secondary Community law on any grounds, whereas the Member States may not challenge any Community measure by invoking their constitutional provisions in order to set these aside.[43] By contrast, the FCC defends a 'dualist approach': if it considers it necessary, it will examine and scrutinise alongside the ECJ, and in the case it violates the Basic Law's standards, set aside any secondary Community law in Germany.[44] One easily recognises a clash between the 'monist approach' of the ECJ and the 'dualist approach' of the FCC and their respective spheres of claimed competence. Both

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Community law) and Case 35/76, *Simmenthal SpA* v. *Amministrazione delle Finanze dello Stato* [1976] ECR 1871.

[39] Paul Craig, 'The ECJ, National Courts and the Supremacy of Community Law', http://www.ecln.net/rome2002/craig.pdf, last access: 11.07.2010.

[40] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 260.

[41] S. Peers et alia, *The European Charter of fundamental rights* (Hart Publishing 2004), p. xxiv.

[42] This formula was established in the so-called case Solange I, BVerfGE 37, 271.

[43] Matthias Kumm, 'Who is the final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', (1999) Common Market Law Review 36, p.354-6.

[44] Matthias Kumm, 'Who is the final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice', (1999) Common Market Law Review 36, p.362.

courts' angles will be further elucidated in the following by means of explaining their case law.

II. The Standpoints of the two Courts and the Development of their Case Law

1.) The Standpoint of the Federal Constitutional Court and its Case Law

Very soon after the establishment of Community law supremacy by the ECJ, the FCC as one of the first national constitutional courts made it clear that this far reaching claim would not remain without limits: the German court would reserve the ultimate right to review Community law with regard to the Community law's compatibility with fundamental rights.[45] Based on the reasoning of German constitutional law and based on the assumption that its authority flows from, and that its loyalty flows solely to the Basic Law,[46] the FCC reached the following legal conclusions: In its so-called *Solange I* decision 1974, by taking an extreme position, the FCC clarified that German courts were to apply Community law and thus recognise the supremacy thereof only 'so long as'[47] the German courts scrutinised and approved its compatibility with the standards of fundamental rights protection of the Basic Law.[48] The applicability of secondary Community law in Germany was subject to an unrestricted judicial review by the FCC on fundamental rights and if need be subsequent and complementary to one exercised by the ECJ. From early on thus, the FCC reserved for itself a 'complementary scrutiny' of Community acts.[49] Dissatisfied with the degree

[45] D. Scheuing, 'The Approach to European Law in German Jurisprudence' (2004) 5 German Law Journal 6, p.704.
[46] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p.414.
[47] In German: 'solange'.
[48] BVerfGE 37, 271.
[49] By which, however, to this date no single Community act was set aside – see: D. Scheuing, 'The Approach to European Law in German Jurisprudence' (2004) 5 German Law Journal 6, p.708.

of protection at Community level, the Court declared the verdict to remain effective 'so long as the integration process has not progressed so far that the Community law also receives a catalogue of fundamental rights..., which is adequate in comparison with the catalogue of fundamental rights contained in the *Grundgesetz'*.[50] In case of conflict, the FCC would not hesitate to set aside secondary Community law. However, more than a decade later, in 1986, the FCC took a turn in its second judgment *Solange II*,[51] in which it declared that in the meantime the measure of protection of fundamental rights was guaranteed to a satisfying degree due to the development of fundamental rights by the ECJ's case law and that it hence would not any longer control the compatibility of Community law with fundamental rights contained in the Basic Law, 'so long as the European Communities, and in particular the case law of the Court of Justice of the European Communities, generally ensure an effective protection of fundamental rights against the sovereign powers of the Communities'. What mattered to the FCC was thus the consistent long-term protection when it insisted on its *caveat* to subject the implementation of Community to further observance of the German courts: Community law was applicable within Germany so long as the FCC remained satisfied that this protection remained guaranteed effectively in the long run to the extent of the protection provided in the Basic Law. Accordingly, this meant that, only in case of an overall decline of the demanded protection, would the FCC intervene:[52] it made reference to the overall and durable guarantee of protection rather than to an assessment of individual pieces of secondary law on its conformity with the fundamental rights protection of the Basic

[50] BVerfGE 37, 271.
[51] BVerfGE 73, 339.
[52] T. Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung* (Springer Verlag 2003), p.638.

Law.[53] [54] Court referrals under Art. 100 (1) of the Basic Law on issues of fundamental rights and constitutional complaints, which aim to scrutinise secondary Community law based on fundamental rights contained in the Basic Law, would thus be regarded as inadmissible *ab initio*, if they would not show the general decrease below the necessary level of the European fundamental rights protection.[55] It appeared that the FCC eventually had accepted the protection of fundamental rights provided for at Community level as being sufficient and that it would merely uphold its claim to judicial review in theory.[56] An assessment of secondary law on its compatibility with the Basic Law by German courts therefore seemed to be debarred, since the FCC did not appear to depart from its *Solange II* decision.[57] However, the Basic Law remained the ultimate criterion to determine the applicability of Community law in Germany and hence the FCC confirmed its position to be the last instance to interpret and judge upon it.[58] In its *Maastricht decision* of 1993, the FCC re-activated its claim to constitute the ultimate bearer of responsibility in terms of the protection of fundamental rights in Germany.[59] The FCC reaffirmed the additional condition of

[53] T. Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung* (Springer Verlag 2003), p.638.
[54] *De facto*, this results not in the derogation of the rights of the Basic Law in case they collide with secondary Community law, but in the precedence of application of Community law in Germany, so long as the demanded standard of protection is secured in the long run – See: T. Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung* (Springer Verlag 2003), p.687.
[55] Frank Hoffmeister, 'Case Law – National Courts: German Bundesverfassunsgericht: Alcan Decision of 17 February 2000; Consitutional Review of EC Regulation on Bananas, Decision of 7 June 2000' (2001) 38 Common Market Law Review, p.795.
[56] D. Scheuing, 'The Approach to European Law in German Jurisprudence' (2004) 5 German Law Journal 6, p.708.
[57] E. Brödermann et alia, 'Europäisches Gemeinschaftsrecht und Internationales Privatrecht' (Mohr Siebeck Verlag 1994), p.269.
[58] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p.262.
[59] BVerfGE 89, 155.

admissibility stated in *Solange II* for claimants bearing the burden of proof to show a general decline of fundamental rights protection at Community level.[60] Furthermore, it offered a little bit more guidance of what is meant by the 'general level of protection' that has to be guaranteed: there may be no intrusions on the '*abstrakter Wesensgehalt'* of the fundamental rights, i.e. the content of a fundamental right that defines the boundaries not to be transgressed by public authority.[61] Aside from the issue of fundamental rights protection, the FCC was by then concerned with the issues of a potential democratic deficit within the European Union and of acts of Community institutions (including the ECJ) being *ultra vires*, i.e. transgressing the competences explicitly allocated to the respective Community institution through the Treaties.[62] Here, the German Constitutional Court transcended the traditional confines of domestic constitutional discourse and stipulated wide-ranging thoughts on legitimacy and democracy in the Community.[63] [64] In its *Banana decision* in 2000,[65] which concerned the alleged violation of the Basic Law by a Community Regulation, the FCC further clarified that the 'reserve control' by the FCC would be activated not in the light of a single concrete case, but in the light

[60] Frank Hoffmeister, 'Case Law – National Courts: German Bundesverfassunsgericht: Alcan Decision of 17 February 2000; Consitutional Review of EC Regulation on Bananas, Decision of 7 June 2000' (2001) 38 Common Market Law Review, p.795

[61] Jürgen Bröhmer, 'Das Bundesverfassungsgericht und sein Verhältnis zum Gerichtshof der Europäischen Gemeinschaften', http://archiv.jura.uni-saarland.de/projekte/Bibliothek/text.php?id=34; last access: 08.07.2010.

[62] BVerfGE 89, 155.
In its Maastricht decision, the FCC had to assess the democratic legitimation of the European Union and whether its competences went beyond that what was originally intended to confer by the Member States in terms of sovereignty – see: P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 263.

[63] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p. 260.

[64] Attention is paid to both issues, democracy and legitimacy, only insofar as they are relevant for answering the question of this study, i.e. insofar as they are relevant for explaining the relationship between the courts.

[65] BVerfGE 102, 147.

of a longer development revealing essential structural deficits in the protection,[66] which would presuppose in practice a 'general and essential' disregard of fundamental rights by the Community.[67] This clarified and presumably even more restrictive approach requires the claimant in practice to show a detailed analysis of ECJ fundamental rights case law including an exact reference to the relevant pages quoting ECJ decisions.[68] For the referring court, this means to assess the legal development of Community fundamental rights law including ECJ case law since 1986 as a whole and to undertake an exhaustive comparison of national and Community law in this area.[69] What is more, already in the *Maastricht decision*, the German court had opted for a kind of co-operational status or approach of 'co-operative and equal nature'[70] towards the ECJ, based on the by then revised Article 23 of the Basic Law[71] and which was reaffirmed by the FCC in the *Banana decision*:[72] [73] the FCC conceded to share with the ECJ the task to guarantee

[66] Frank Hoffmeister, 'Case Law – National Courts: German Bundesverfassunsgericht: Alcan Decision of 17 February 2000; Consitutional Review of EC Regulation on Bananas, Decision of 7 June 2000' (2001) 38 Common Market Law Review, p.797

[67] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.98.

[68] Frank Hoffmeister, 'Case Law – National Courts: German Bundesverfassunsgericht: Alcan Decision of 17 February 2000; Consitutional Review of EC Regulation on Bananas, Decision of 7 June 2000' (2001) 38 Common Market Law Review, p.797

[69] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.104.

[70] [Author unknown], 'Federal Constitutional Court Concedes the Applicability of European Community Law in the Banana Case' (2000) 1 German Law Journal, http://www.germanlawjournal.com/article.php?id=9, last access: 01.08.2010.

[71] After the ratification of the Treaty of the European Union, Art. 24 of the Basic Law was amended and replaced by the new Art. 23: 'For the realization of a unified Europe, the Federal Republic of Germany cooperates in the development of the European Union which upholds democratic, social and federal principles, the rule of law, and the principle of subsidiarity and which guarantees the protection of basic rights in a way which is basically comparable to this Basic Law. For this, the Federation may by legislation with consent of the Bundesrat transfer sovereign powers'. – Translation from: P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36Journal of Common Market Studies, p.262.

[72] BVerfGE 102, 147.

[73] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.100; and

the effective protection of fundamental rights of German citizens[74], whilst it reaffirmed at the same time its limited acceptance of EC law supremacy.[75] The German court seemed to reserve the permanent, although substantially reduced supervision over the ECJ with regard to the protection of fundamental rights.[76] In the so-called *Lisbon decision* of June 2009, when the FCC had to judge on Germany's accession to the Lisbon Treaty,[77] it repeated once again the '*Solange II*-formula' and acknowledged the compatibility of the entire Treaty including its Protocols and Declarations with the German Basic Law.[78] While making several references to the doctrine of *Solange II*, the FCC added neither any novelty nor any new aspect with regard to the protection of fundamental rights in the European Union.[79] In principle, the *Lisbon decision* may be regarded as a balancing act with the aim to placate internal German critics, on the one hand, and not to threaten the overall process of European integration on the other.[80] In a decision of the year 2010, the FCC concretised the *Lisbon decision* and delivered an ECJ-friendly decision in terms of the latter's judicial

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R. de Lange, 'Het Bundesverfassungsgericht over het Verdrag van Lissabon', (2010) Ars Aequi Januari, p.27.

[74] BVerfGE 89, 155.

[75] Paul Craig, '*The ECJ, National Courts and the Supremacy of Community Law*', www.ecln.net/rome2002/craig.pdf, last access: 19.05.2009.

[76] D. Scheuing, 'The Approach to European Law in German Jurisprudence' (2004) 5 German Law Journal 6, p.708.

[77] BVerfGE 123, 267.

[78] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), pp.161, 163-5; and
R. de Lange, 'Het Bundesverfassungsgericht over het Verdrag van Lissabon', (2010) Ars Aequi Januari, p.30.

[79] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.170.

[80] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.164.

competences.[81] Having outlined the FCC's standpoint, the ECJ's standpoint and its case law will be explained in the following.

2.) The Standpoint of the European Court of Justice and its Case Law

In order to be able to assess and evaluate the FCC's position towards the ECJ and its emphasis on the issue of fundamental rights protection as the condition for the recognition of Community supremacy, one is required to analysis how the ECJ in practice handles the development and consolidation of that protection. In the following, the standpoint of the ECJ will be elucidated and explained. This will be done stepwise, in order to comprehend the process of the development of fundamental rights protection by the European Court more easily. Behind the overall development, the different steps of the 'three Ds' are cognisable: namely, the periods of disregard, development and densification. These will be examined in turn.

i. Period of Disregard

At the beginning of the European Community, provisions on fundamental rights in the founding Treaties were absent, since their content and intention were but concerning economic objectives of narrow scope, while issues going beyond economic matters were to be disregarded.[82] This is why one may denominate this period the period of disregard. At that moment, only the four fundamental freedoms of the European Community were present,

[81] Since the decision was published a few days before this study was finished, only the file number (rather than the reference number) of the decision could be found: 2 BvR 2661/06.
[82] N. Neuwahl et alia, '*The European Union and Human Rights*', (Martinus Nijhoff Publishers, 1995), p.2.

which were, at the time, distinguished from the fundamental rights:[83] the right to free movement of products, services, capital and persons.[84] Only later, they were elevated by the ECJ as to receive the status of fundamental rights, too, for which the famous *Bosman ruling*[85] is one example.[86] An explanation for the absence of an early fundamental rights protection on European level by the ECJ may be connected with the political setbacks on attempts to enhance the European Community on matters exceeding the purely economic integration.[87] Another reason for the disregard concerning fundamental rights by the ECJ could be the fact that the ECJ initially was scarcely confronted with any cases on social issues.[88] Moreover, the European Court appeared to rely on the protection of fundamental rights provided by international treaties and the national constitutions.[89] For these reasons, during the mid-1960s the ECJ refused to concern itself with any responsibility of the other Community institutions or of itself for the protection and non-violation of fundamental rights and ignored the issue of a European fundamental rights protection altogether by taking an utterly fending attitude.[90] Originally, the ECJ declared it had no competence on this

[83] Hermann-Josef Blanke, 'Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg' in: Hermann Josef Blanke and Stelio Mangiameli, 'Governing Europe under a Constitution' (Springer Verlag, 2006), p.269.
[84] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union', (Peter Lang Verlag, 1994), p.41.
[85] Case 415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman* [1995] ECR I-4921.
[86] Hermann-Josef Blanke, 'Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg' in: Hermann Josef Blanke and Stelio Mangiameli, 'Governing Europe under a Constitution' (Springer Verlag, 2006), p.269.
[87] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union', (Peter Lang Verlag, 1994), p.42.
[88] Ulrich Haltern, 'Europarecht: Dogmatik im Kontext' (Mohr Siebeck Verlag, 2007), p.509.
[89] Ulrich Haltern, 'Europarecht: Dogmatik im Kontext' (Mohr Siebeck Verlag, 2007), p.509.
[90] E.g. Case 1/58, *Stork v. High Authority*, [1959] ECR 17; Case 18/57,*Nold v. High Authority*, [1957] ECR 121. Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union', (Peter Lang Verlag, 1994), p.49; and Sebastian Winkler, 'Der Beitritt

field, since it was not its task to be concerned with national constitutional law,[91] whereas later it considered the invocation of fundamental rights not to be a reason to amplify the grounds for legal standing before the ECJ.[92] Furthermore, it considered fundamental rights to be adequately protected by the Council of Europe and the ECHR.[93] Thus, in the cases of *Stork*[94], *Ruhrkohle*[95], and *Acciaeria e tubificio di Brescia*[96], the ECJ refused to recognise the relevance of a Community's fundamental rights protection not willing to guarantee it.[97]

ii. Period of Development

The second period may be denominated the period of development, since the ECJ's attitude changed fundamentally with the establishment of direct effect and supremacy of EC law by the Court's landmark cases of *Van Gend en Loos*[98] and *Costa v. ENEL*[99] in 1963 and 1964: the reliance on national constitutional provisions for the safeguarding of the overall protection of

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der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention' (Nomos Verlag, 2000), p.24.

[91] Case 1/58, *Stork v. High Authority*, [1959] ECR 17; Case 18/57, *Nold v. High Authority*, [1957] ECR 121.
Rengeling et alia, '*Grundrechte in der Europäischen Union – Charta der Grundrechte und Allgemeine Rechtsgrundsätze*', (Carl Heymanns Verlag, 2004), p.2.

[92] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union', (Peter Lang Verlag, 1994), p.49.

[93] Luzius Wildhaber, 'European Union, European Convention on Human Rights and Human Rights Protection in Europe'; speech held at: International Symposium on EU-Integration and Guarantee of Human Rights, Session I, Ritsumeikan University, Kyoto, 2008, http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr26/Luzius%20Wildhaber%20International.pdf, last access: 10.07.2010.

[94] Case 1/58, *Stork v. High Authority*, [1959] ECR 17.

[95] Cases 36-38/59 and 40/59 *Präsident Ruhrkohlen Verkaufsgesellschaft v. High Authority* [1960] ECR 423, 444.

[96] Case 31/59, *Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community*.

[97] Sebastian Winkler, 'Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention' (Nomos Verlag, 2000), p.24.

[98] Case 26/62, *Van Gend en Loos* [1963] ECR 1.

[99] Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585.

fundamental rights was no longer sufficient, since any EC law might have taken precedence over them,[100] which would mean to create a substantial *lacuna* of protection,[101] whose negative implications for the citizens of the Community could not be ignored. This may have served as the initial trigger for a fundamental change in the ECJ's attitude[102] and towards the end of the 1960s, the Court began to mention the observance of fundamental principles of the law of procedure by admonishing staff of Community institutions in *Van Eick*.[103] However, it was not until the *Stauder* judgment that the ECJ stated that 'human rights enshrined in the general principles of Community law' were to be 'protected by the Court' in an *obiter dictum*.[104] Moreover, if two conflicting legitimate interpretations of Community law provisions were to be found, the one which does not violate fundamental rights would take precedence over the violating one.[105] This decision would serve in the future as the basis for the development and consolidation of fundamental rights protection in the EU.[106] That said, fundamental rights still lived a dire existence of a second-order status, while possessing still no organic status which could serve as a breeding ground for the control of actions exercised by Community authorities and for judicial review by the ECJ.[107] They were saved from their orphanhood through the judgment of *International Trade Association* in 1970, when the ECJ took by then full responsibility for the protection of fundamental rights and bestowed upon them the role of

[100] Case 11/ 70, *International Trade Association* [1970] ECR 1125 and Case 35/76, *Simmenthal SpA* v. *Amministrazione delle Finanze dello Stato* [1976] ECR 1871.
[101] D. Chalmers et al., '*European Union Law*', (Cambridge University Press, 2007), p.233.
[102] Vaughne Miller, 'Human Rights in the EU: the Charter of Fundamental Rights', http://www.parliament.uk/documents/commons/lib/research/rp2000/rp00-032.pdf, last access: 10.07.2010.
[103] Case 35/67, *Van Eick v. Commission* [1968] ECR 329.
[104] Case 29/69, *Stauder v. Stadt Ulm* [1969] ECR 419.
[105] Case 29/69, *Stauder v. Stadt Ulm* [1969] ECR 419.
[106] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union' (Peter Lang Verlag, 1994), p.51.
[107] D. Chalmers et al., '*European Union Law*', (Cambridge University Press, 2007), p.234.

forming an integral part of Community law: from now on, any act by a Community institution violating these 'general principles' was to be considered illegal under EC law.[108] By declaring general principles were to be based on the common constitutional traditions of the European Member States as a primary source,[109] the ECJ made the congruency of the Community's legal order and the Member States' constitutional norms imperative to the development of a Community standard of fundamental rights.[110] The so-called common constitutional traditions of the European Member States thus formed the first source of the Community's general principles,[111] which would serve as the framework for the formulation of the fundamental rights protection. Four years later in 1974, the Court listed international human rights treaties, to which Member States are (founding) parties, as another source of the general principles in *Nold*.[112] The most prominent and important one is the ECHR for the first time referred to in *Rutili* in 1975.[113] Besides this, the *Nold* case is important for another reason: here, the ECJ affirmed to set aside any Community legislation which infringes fundamental rights protected in the constitutions of the Member States.[114] In the decision of *Hauer* in 1979, the ECJ explicitly referred to the ECHR for the determination and interpretation of the Community's protection of fundamental rights.[115] In 1978, 1988, and 1989, the Court

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[108] Case 11/ 70, *International Trade Association* [1970] ECR 1125.
[109] Rengeling et alia, '*Grundrechte in der Europäischen Union – Charta der Grundrechte und Allgemeine Rechtsgrundsätze*', (Carl Heymanns Verlag, 2004), p.3.
N. Neuwahl et alia, '*The European Union and Human Rights*', (Martinus Nijhoff Publishers, 1995), 7.
[110] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union' (Peter Lang Verlag, 1994), p.51.
[111] Ellen Chwolik-Lanfermann, 'Grundrechtsschutz in der Europäischen Union' (Peter Lang Verlag, 1994), p.51.
[112] Case 4/73 J. *Nold v. Commission [*1974] ECR 491.
[113] Case 36/75 *Rutili v. Ministre de l'Intérieur* [1975] ECR 1219.
[114] N. Neuwahl et alia, '*The European Union and Human Rights*' (Martinus Nijhoff Publishers, 1995), p.7.
[115] Case 44/79 *Hauer v. Land Rheinland Pfalz* [1979] ECR 3727.

referred to the European Social Charter, to the Community Charter of Fundamental Social Rights, and to the International Covenant on Civil and Political Rights respectively.[116] What is more, in the case *Wachauf v. Germany* of 1989 the ECJ's concern to protect fundamental rights shifted from the validity of Community provisions to the validity of implementation thereof by the Member States.[117] This meant a further expansion on the protection at Community level as the ECJ's observance expanded from Community institutions to the field of Member States' very legislation.[118] After *Nold*, the ECJ maintained referring frequently to the ECHR and other human rights sources in international law to which Member States are signatories.[119] In the period of development, there are scarcely any decisions of the ECJ, which recognise and establish fundamental rights. Two exceptions thereto, however, are the recognition of the right to equal treatment in *Klöckner-Werke AG*[120] of 1962 and the right to freedom of trade in *International Trade Association* of 1970, which was cited above.[121] With the cases of *Stauder*, *International Trade Association*, *Nold*, *Rutili*, and *Hauer* as a 'set of tools', the ECJ was of the opinion to have paved the way for a comprehensive and exhausting protection of fundamental rights without being required to add any further source to the general principles, which could serve as the means to further enhance the protection.[122]

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[116] Case 149/77 *Defrenne II* [1978] ECR 1365, Case 24/86 *Blaizot v. Belgium* [1988] ECR 379, Case 374/87 *Orkem v. Commission* [1989] ECR 3283.
[117] Case C-5/88, *Wachauf v. Federal Republic of Germany* [1989] ECR 2609.
[118] N. Neuwahl et alia, *The European Union and Human Rights* (Martinus Nijhoff Publishers 1995), p.9.
[119] N. Neuwahl et alia, '*The European Union and Human Rights*', (Martinus Nijhoff Publishers, 1995), p.8.
[120] Case 20/61, Klöckner-Werke AG [1962] ECR 653.
[121] Case 11/70, International Trade Association [1970] ECR 1125.
[122] Sebastian Winkler, 'Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention' (Nomos Verlag, 2000), p.26.

iii. Period of Densification

The third period is a period of densification, since the ECJ further enhanced the protection of fundamental rights by its case law[123] and thus consolidated it by several landmark cases on particular fundamental rights. Its task was to 'create' fundamental rights by defining and delineating the extent and scope to which Community law would guarantee the protection of the respective rights individually.[124] From a contemporary general examination of its case law, a comprehensive and 'almost complete' list of fundamental rights has been developed.[125] Although overlapping with the 'construction' of this pivotal structure of fundamental rights protection by the ECJ, the main bulk of case law recognising fundamental rights at Community level was heralded yet thereafter, namely in the middle of the 70s and in the 80s In 1974, the ECJ recognised in *Casagrande*[126] the fundamental right *per se*, which later found access in the European Charter of Fundamental Rights:[127] the right to human dignity. In the same year, the Court gave green light to the recognition of the freedom of association in *Gewerkschaftsbund, Massa et al.*[128] Two years later, in 1976, the ECJ established two new rights: the right of non-discrimination in *Defrenne v. Sabena*[129] and the not less important liberty right to freedom of religion and confession in *Prais.*[130]

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[123] Klaus Stern, 'From the European Convention on Human Rights to the European Charter of Fundamental Rights: The prospects for the protection of human rights in Europe' in: Hermann Josef Blanke and Stelio Mangiameli, 'Governing Europe under a Constitution' (Springer Verlag, 2006), p.175.
[124] Ulrich Haltern, 'Europarecht: Dogmatik im Kontext' (Mohr Siebeck Verlag, 2007), p.509.
[125] Hermann-Josef Blanke, 'Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg' in: Hermann Josef Blanke and Stelio Mangiameli, 'Governing Europe under a Constitution' (Springer Verlag, 2006), p.269.
[126] Case 9/74, *Casagrande* [1974] ECR 773.
[127] Comment of the Convention for the Charter of Fundamental Rights for the European Union, 2004 C 310/425.
[128] Case 18/74, *Gewerkschaftsbund, Massa et al.* [1974] ECR 917, 925.
[129] Case 149/77, *Defrenne II* [1978] ECR 1365.
[130] Case 130/75, *Vivien Prais v. Council* [1976] ECR 1589.

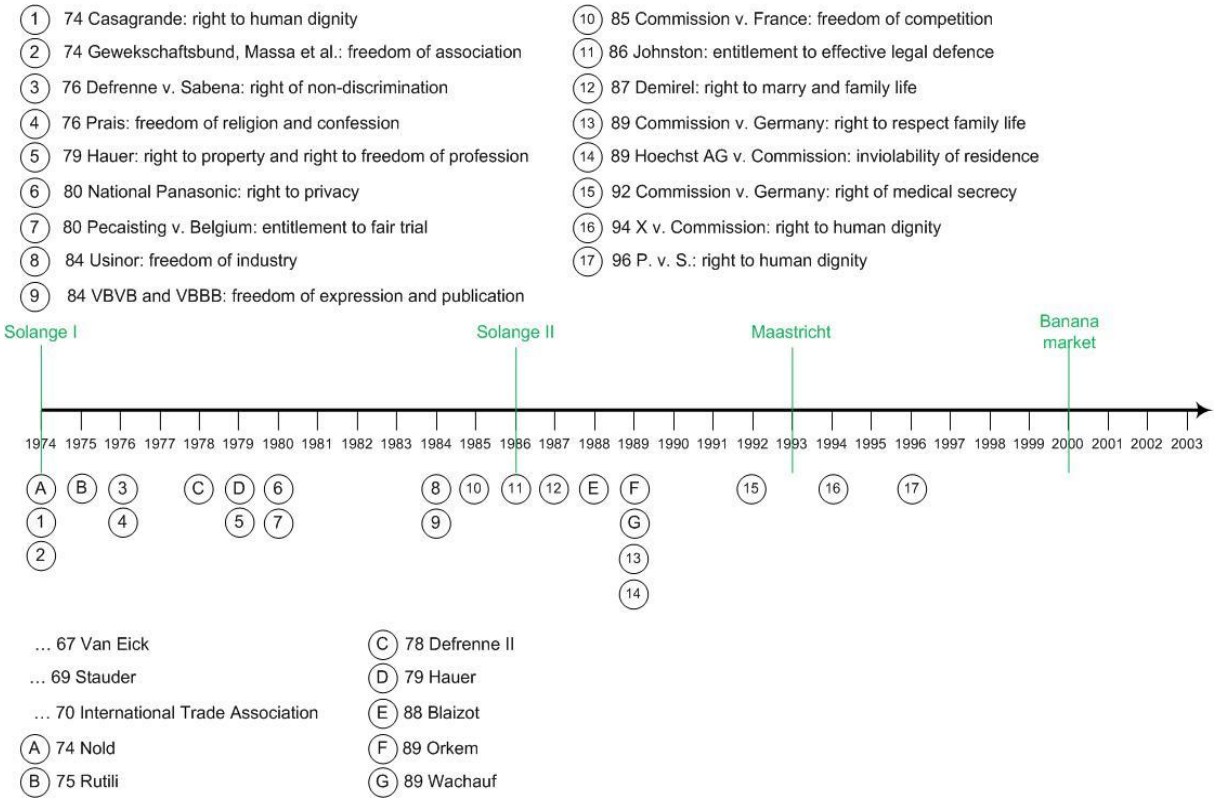
With regard to economic rights, the Court decided in 1979 on the right to property and the right to freedom of profession in *Hauer*.[131] The 80s began with the recognition of the right to privacy in 1980 in the case of *National Panasonic*[132] and the entitlement to a fair trial in *Pecastaing v. Belgium*.[133] Four years later the economic right of freedom of industry[134] and the liberty right of freedom of expression and publication[135] were added. In 1985, the freedom of competition[136] was recognised and one year later, the entitlement to effective legal defence followed.[137] Thereafter, the protection has been further strengthened significantly:[138] in *Demirel*[139] of 1987, the Court established the right to marry and family life. In 1989, the ECJ established the right to respect for family life in *Commission v. Germany*[140] and the right of the inviolability of residence in *Hoechst AG v. Commission*.[141] Hence, the Court judged on the right to private life in a bunch of cases in the late 80s and early 90s, and finally, in 1992, the Court decided on the right of medical secrecy in *Commission v. Federal Republic of Germany*.[142] Strikingly, the ECJ vastly enhanced the protection of fundamental rights by its case law in the 80s and early 90s, whereas it was rather tacit and cautious in the rest of the 90s (except for two decisions on the right of human dignity

[131] Case 44/79, *Hauer v. Rheinland -Pfalz* [1979] ECR 3727, 3745.
[132] Case 136/79, *National. Panasonic (UK) Ltd v Commission* [1980] ECR 2033, 2056 et seq.
[133] Case 98/79, *Pecastaing v. Belgium* [1980] ECR 691…787.
[134] Case 87/83, *Usinor v. Commission*, [1984] ECR 4177.
[135] Joined Cases 43/82 and 63/82, *VBVB and VBBB*, [1984] ECR 19, ... 62.
[136] Case 290/83, *Commission v. France* (Credit Agricole) [1985] ECR 439.
[137] Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and.
[138] Steve J. Boom, 'The European Union after the Maastricht Decision: Will Germany be the "Virginia of Europe"?', (1995) The American Journal of Comparative Law 43, p.181.
[139] Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.
[140] Case 249/86, *Commission v. Germany* [1989] ECR 1263.
[141] Joined Cases 48/87 and 227/88, *Hoechst AG v. Commission* [1989] ECR 2919.
[142] Case 62/90. *Commission v. Federal Republic of Germany* [1992] ECR 1-2575.

in 1994 and 1996).[143] Starting in the year 2000, the ECJ continued deciding more actively on fundamental rights, in particular on the right to private life in several cases.[144] The period of densification reached eventually its height with the incorporation of the European Charter of Fundamental Rights into the Lisbon Treaty as a comprehensive fundamental rights catalogue that contributes to the visibility, transparency and legal certainty of the overall fundamental rights protection in the EU.[145]

[143] Case 404/92, *X v. Commission* [1994] ECR 1-4737 and Case 13/94, *P v. S* [1996] ECR I-2143.
[144] For instance, Case 235/99, *The Queen v. SoSHD* [2001] ECR 36 and Case 60/00, *Mary Carpenter v. SoSHD* [2002] ECR I-6279.
[145] Pascal Hector, 'Die Charta der Grundrechte der Europäischen Union', in: Jürgen Böhmer, 'Der Grundrechtsschutz in Europa' (Nomos Verlag, 2002), p.181.

The development of the case law by both the ECJ (the capital letters represent the case law decided during period of development, whereas the numbers represent the case law decided during the period of densification) and the FCC (green) may be seen below. The timetable clearly indicates the ECJ's activist years prior and subsequent to the FCC's decisions:[146]



Having outlined and explained the case law and hence the stances of the courts towards each other, the reader will now be introduced into the methodology and terminology of the interdisciplinary concept of Game Theory, whose means will be of help for explaining the development of the courts' relationship and the reasons for its possible changes therein.

[146] Please note that the ECJ's case law following the FCC's Banana market decision unfortunately could not be regarded on the timeline due to the lack of space.

III. Playing the Game

1.) Introduction to Game Theory and its Terms

Myerson defines Game Theory in general as 'the study of mathematical models of conflict and cooperation between intelligent rational decision-makers'.[147] The origins of game theory lay in the field of mathematics[148] described in the now classical book 'Theory of Games and Economic Behaviour' by von Neumann and Morgenstern.[149] Game theorists attempt to comprehend conflicts and cooperation by means of quantitative models and hypothetical examples.[150] The theory is concerned hence with analysing conflicts of interest, in which 'an individual is in a situation from which one of several possible outcomes will result and with respect to which he has certain personal preferences'.[151] It is based on the assumption that individuals act rationally and reason strategically, i.e. that an actor is 'aware of his alternatives, forms expectations about any unknowns, has clear preferences, and chooses his actions deliberately after some process of optimization'.[152] However, the individual is not in full control of the situation and its variables, since this is 'in the hand of several individuals who, like him, have preferences among the possible outcomes, but who in

[147] Roger B. Myerson, 'Game Theory: Analysis of Conflict' (Harvard University Press), p.1.
[148] University of Canterbury, 'History of Game Theory', http://www.econ.canterbury.ac.nz/personal_pages/paul_walker/gt/hist.htm, last access: 05.07.2010.
[149] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), p.2.
[150] Roger B. Myerson, 'Game Theory: Analysis of Conflict' (Harvard University Press, 1997), p.2
[151] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), p.1.
[152] Martin J. Osborne and Ariel Rubinstein, 'A Course in Game Theory' (MIT Press, 1994), pp.1,4.

general do not agree in their preferences'.[153] Generally, when a person acts, the result is a cross-effect of his actions, i.e. what one does has an effect on the outcome for another person.[154] If the participants' mutual awareness of this cross-effect is given, moreover, the interaction is denominated a strategic game.[155] In contrast to interactions between mutually aware players, one speaks of mere decisions when each person may choose without concern for reaction or response from others.[156] What is more, unless there are two or more persons and a sequence of moves engaged by them, one cannot define it as a game.[157] Two categories of games are to be distinguished: sequential and simultaneous game, which require different types of interactive thinking. With sequential moves, each player is concerned with thinking of the opponent's reaction to his actions, whereas with simultaneous moves, one has to figure out what the opponent is going to do at the very same moment.[158] In sequential or extensive games, the game is divided into stages, which means that the players may consider their strategy not only at the beginning of the game, but whenever they have to make a decision during a certain stage in the course of time.[159] In addition, one distinguishes between games of total conflict (also called zero-sum games) and games with some commonality.[160] Players in zero-sum games are denominated 'strict adversaries' of each other having 'strictly opposing'

[153] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), p.1.
[154] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.18.
[155] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.18.
[156] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.18.
[157] L. C. Thomas, 'Games, Theory and Applications' (Dover Publications, 1986), p.18.
[158] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.20.
[159] Martin J. Osborne and Ariel Rubinstein, 'A Course in Game Theory' (MIT Press, 1994), p.3.
[160] Also called 'strictly competitive' and 'non-strictly competitive games'; in: R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover Publications Inc., 1989), p.59; and Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.20.

preference patterns for the outcomes of the game:[161] one's gain is the other's loss.[162] On the other side of the scale the (two-person) cooperative game is located, in which all players are completely informed about the moves of the others and the agreements made are binding and thus enforceable by the rules of the game.[163] Games can moreover be classified by whether they are played just once or repeatedly (see extensive games) with ongoing relationships.[164] Finally, there are games in which the players are fully informed of the opponent's intentions and hence of his moves to make at every point in the game; and there are games, in which this is not the case, i.e. there exists uncertainty and the players do not know all the information that is imperative to the choice to make.[165] The latter are called situations of imperfect, incomplete or, better, asymmetric information.[166] In order to gain more clarity, the most relevant terms and background assumptions are defined *in breve* in the following. 'Strategies' means simply the choices available to the players and their plan of action as the game progresses.[167] Strategies in extensive games are thus any rule, which determines a move at every possible stage in the game.[168] 'Payoffs' are regarded as the complete numerical scale 'with which to compare all logically conceivable outcomes of the game, corresponding to each available combination of choices of strategies by all the players'.[169] As indicated above, Game Theory is based

[161] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), p.59.
[162] Roger B. Myerson, 'Game Theory: Analysis of Conflict' (Harvard University Press, 1997), p.123.
[163] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), pp.114-5.
[164] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.22.
[165] Martin J. Osborne and Ariel Rubinstein, 'A Course in Game Theory' (MIT Press, 1994), p.3.
[166] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.23.
[167] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.27.
[168] Roger B. Myerson, 'Game Theory: Analysis of Conflict' (Harvard University Press, 1997), p.44.
[169] Avinash Dixit and Susan Skeath, 'Games of Strategy' (Norton & Company, 2004), p.28.

on ‘rationality’: it assumes that the players are ‘perfect calculators and flawless followers of their best strategies’, i.e. ‘each player possesses a consistent set of rankings over all the logically possible outcomes and calculates the strategy that best serves these interests’.[170] Rationality contains hence two essential elements: complete knowledge of one’s own interests and flawless calculation of what actions will best serve those interests.[171] Finally, when rational players’ strategies interact, which means that each player utilises the best response as strategy to the opponent’s strategy, one speaks of an ‘equilibrium’, which will serve as a useful descriptive tool and organising concept for the following analysis.[172] Thus, the term ‘equilibrium strategies’ means the strategies utilised by the players in order to maximise their individual payoffs.[173] Finally, another feature of repeated games present sanctions and credible threats thereof: a strategic actor may exercise these in order to influence the opponent’s future moves.[174]

The methodology and terminology of Game Theory in mind, one may now begin to convey the theory into practice by explaining the development of the relationship of the two courts:

For clarity’s sake, the abstraction is maintained as simple as possible. The interaction between the two courts at stake is regarded as a sequential strategic game, which is played repeatedly over a long period of time with ongoing relationships, since the courts are aware of the fact that they

[170] Avinash Dixit and Susan Skeath, ‘Games of Strategy’ (Norton & Company, 2004), p.30.
[171] Avinash Dixit and Susan Skeath, ‘Games of Strategy’ (Norton & Company, 2004), p.30.
[172] Avinash Dixit and Susan Skeath, ‘Games of Strategy’ (Norton & Company, 2004), p.33.
[173] Eric Rasmusen, ‘Games and Information: An Introduction to Game Theory’ (Blackwell Publishers, 2006), p.23.
[174] Martin J. Osborne and Ariel Rubinstein, ‘A Course in Game Theory’ (MIT Press, 1994), p.155, 156.

interact with each other over a long period of time and not merely once. The stages of the repeated game are mentioned respectively. Since there exist several commonalities and overlapping interests of the courts – not least the overall European integration[175] – the two courts' interests are not analysed by the standards of a zero-sum game, but by those of a game with some commonalities, in which both strategic actors may choose to cooperate. One might even tend to speak of a two person cooperative game as the game progresses, if there was no final claim of reserve control by the FCC and if there were binding agreements concluded by the parties.[176] Moreover, the actors are considered to be fully informed of the intentions and actions of the respective opponent, to the extent to which the judgments and the reasoning behind are known to the parties. While the two courts are regarded as strategic actors with some commonalities, they both possess different objectives, too: the FCC has the aim to uphold the Basic law and its effective fundamental rights protection, by remaining the last instance in German territory to judge thereupon. In contrast, the ECJ has the aim to supervise the recognition and application of Community law by the Member States as the 'watchdog of the Treaties' as the last instance to judge upon Community law and upon its effective enforcement and recognition in the Member States. Hence, one may speak of a 'natural rivalry' of the two courts,[177] which may emerge not least when conflicts between German constitutional and Community principles appear. Thereby, the FCC has the choice to assert more or less restrictions on the recognition of supremacy of Community law in Germany as its strategy and response to the ECJ's moves. In turn, the ECJ may opt to be more or less activist with regard to

[175] See Article 23 of the Basic Law, by which Germany is committed to collaborate for and in a unified Europe

[176] R. Duncan Luce and Howard Raiffa, 'Games and Decisions – Introduction and Critical Survey' (Dover, 1990), p.114.

[177] Joachim Wieland, 'Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht' (1994) European Journal of International Law 5, p.6.

the development and consolidation of the fundamental rights protection by its case law. As will be shown in the following, this antagonistic relationship has changed with the developing protection of fundamental rights through the ECJ's responses to the decisions of the FCC.

Having taken these considerations as a point of departure and having outlined the aims and initial relationship between the courts, one may now explain the development of the very relationship of the two courts by starting the game – is it indeed a game, which is at the end of the day destined to boil down to mutually assured destruction?

2.) The Evolution of the Game

Since there was scarcely any protection of fundamental rights at the European level in the beginning due to the ECJ's disregard of fundamental rights protection at Community level, as its first move, the FCC could take a very extreme position vis-à-vis the ECJ and the supremacy of Community law in *Solange I* by starting the confrontation with a threat to sanction: the FCC would namely subject secondary Community law to its review on the compatibility with the German Basic Law and its fundamental rights standards and would not hesitate to set it aside in case of conflict. Thereby, the FCC's demand for the Community (and indirectly for the ECJ) was to guarantee fundamental rights through a catalogue comparable to the Basic Law; if unsatisfied, the FCC pledged to declare any secondary Community law to be inapplicable in Germany. It was the ECJ's turn to give a response to *Solange I* with an own strategy in order to protect and safeguard the recognition of Community law supremacy within the entire Community.

Therefore, as a response to the FCC's move,[178] the ECJ obviously made a choice in terms of strategy and began to develop gradually a proper structure for the protection of fundamental rights at Community level by its case law recognising increasingly more sources as forming part of the general principles of Community law. As it was outlined above in the period of development, the European Court kept on developing and enhancing the protection of fundamental rights and showed its commitment to fulfil the FCC's demand, thus creating a durable reputation of credibility. Thereby, it may be argued that the ECJ hoped to reach a high future payoff in terms of receiving more control over Community supremacy, as it calculated that the FCC would then further ease its restrictions and conditions to the recognition of the supremacy. This explains why the FCC indeed took a major turn in *Solange II*, which heralded the second stage of the game: the FCC decided to reverse the burden of proof and hence that the claimants had to show the 'general decline' of the Community's fundamental rights protection, while basically regarding the latter as sufficiently effective compared to the Basic Law's one. Obviously, the newly build structure of fundamental rights protection for the Community was regarded by the FCC as to adequately compensate the absence of a written catalogue. Furthermore, it appeared to trust the ECJ in guaranteeing the future protection to a sufficient degree, since it possessed enough confidence in the reputation the European Court had created; thus, the FCC promised to exercise self-restraint as the result of the perceived general compliance of Community law to the German constitution's standards of fundamental rights.[179] What is more, it eased its reservation to Community law

[178] Vaughne Miller, 'Human Rights in the EU: the Charter of Fundamental Rights', http://www.parliament.uk/documents/commons/lib/research/rp2000/rp00-032.pdf, last access: 10.07.2010.
[179] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p.262.

supremacy in a practical way, as the hurdle for complaints was increased: complaints had to include a thorough and comprehensive analysis of Community law evidencing accurately any violations in order to avoid being inadmissible *ab initio*. Albeit the FCC adjusted its strategy in the direction of cooperation, this nevertheless should be taken with a generous pinch of salt: the FCC still did not issue an overall *carte blanche* to the ECJ, since the Basic Law remained the ultimate criterion on Community law's applicability.[180] Thus, the FCC confirmed its position towards the supremacy of Community law and the European Court and retained the possibility to sanction and threat the ECJ in the future by possible decisions to set secondary Community measures aside. At the same time, the ECJ maintained its strategy of further development, since it consolidated the protection by recognising increasingly more crucial fundamental rights in its case law throughout the 80s.[181] This lent weight to its credibility and it thus fostered its reputation by reaffirming its pledge to expand the fundamental rights protection in a reliable manner. Therefore – aside from the fact that the FCC asserted new restrictions with regard to democracy and *ultra vires*[182] – in its *Maastricht decision*, the German Court did not add any new demands for the protection of fundamental rights, but instead it followed the strategy it had embarked on in *Solange II* without exploring any other avenues. What is more, the FCC emphasised decidedly its understanding of a co-operational relationship between itself and the ECJ: it would comprehend the relationship not as one of suspicion and antagonism, but as one of goodwill and collaboration. According to legal scholars, the development of the cooperative relationship between the two courts is not

[180] P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 Journal of Common Market Studies, p.262.
[181] Hermann-Josef Blanke, 'Protection of Fundamental Rights afforded by the European Court of Justice in Luxembourg' in: Hermann Josef Blanke and Stelio Mangiameli, 'Governing Europe under a Constitution', (Springer Verlag, 2006), p.269.
[182] BVerfGE 89, 155.

meant to be a hierarchical but an equal one with the focus on the collaboration for the promotion of the European Union seen from the FCC's perspective.[183] Obviously, it appeared to the two courts that by means of cooperation they could receive the highest payoffs, what may in fact be regarded as the equilibrium in this game: the adjustment of their strategies to cooperate and collaborate implies firstly, to gain the best payoff results for both in terms of their aim to enhance European integration, and secondly, to ban the threat of a mutually assured destruction, whilst they were able to retain their influence at the same time. The German court conceived that its threat to review and possibly set aside Community law was as a useful servant to achieve its aims in the beginning, but that it would be an even more dangerous master if put into practice. By no later than the *Banana decision* had been issued, legal scholars began to consider the FCC's power of review reduced to such an extensive degree as to speak of a 'symbolic political significance' – presumably the German court's very intention.[184] According to them, in the absence of proposing any alternative concept available, the FCC's moves in the past have proved that it does not really have the intention to exercise its power of review.[185] This may be explained by the fact that the German court is aware of the implications of a 'mutually assured destruction':[186] as it was previously indicated, the FCC obviously is anxious to avoid the consequences of a domestic declaration of non-applicability of Community legal acts, which would indeed have a harsh impact on the legal cohesion existentially important to the Community

[183] Jürgen Bröhmer, 'Das Bundesverfassungsgericht und sein Verhältnis zum Gerichtshof der Europäischen Gemeinschaften', http://archiv.jura.uni-saarland.de/projekte/Bibliothek/text.php?id=34; last access: 08.07.2010.
[184] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.
[185] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.
[186] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p.411.

order – if one constitutional or supreme court began to set aside Community law in its territory, certainly others would follow it.[187] Thus, the FCC emphasised the significance of cooperation and reduced its power of review to a mere political symbol.[188] It followed this line of strategy and reaffirmed its demand vis-à-vis claimants as to evidence accurately the 'general decline' of the protection of fundamental rights and even further increased this hurdle, albeit slightly: as a precondition for intervention by the FCC, there would have to be the violation of the vague notion of the overall '*abstrakter Wesensgehalt'* of the fundamental rights, by which it confined its own boundaries of action a bit more. Strikingly, in the years after the *Maastricht decision*, the ECJ did not decide on very many substantial fundamental rights (see timeline) and, therefore, did not add much to the Community's fundamental rights protection either. Nevertheless, the FCC responded by lessening again the restrictions to the recognition of Community law supremacy in the *Banana decision*, since it made a possible review exercised by itself even less likely: it refined the hurdle for complainants as to require evidence that the longer development of the protection revealed structural deficits by an assessment of the ECJ's case law since *Solange I* plus an exhaustive comparison of national and Community law in this legal area. It may be argued, by then, that the ECJ had collected sufficient reputation for safeguarding fundamental rights and for fulfilling the demands of the German court in the past so that the FCC retained its strategy of easing its rhetoric and requirements having in mind to continue gaining higher payoffs thereby. But still, the FCC retained its claim to have the last say in Germany. That the ECJ's reputation was in fact

[187] J. H. H. Weiler and Ulrich R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', (1996) Harvard International Law Journal 37, p.445; and Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.

[188] Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.

credible may be deduced from the following activist years of fundamental rights development after the FCC had judged on the *Banana decision*, which further consolidated the protection in the Community. As a response in the final stage, the German FCC opted not to add any new demands or restrictions on the recognition of supremacy in the light of fundamental rights protection in the *Lisbon decision* 2009, but shifted the emphasis of its demands to the issues of democratic deficit and *ultra vires* actions,[189] as it was already the case in the *Maastricht decision*. Importantly, the FCC once more did not challenge a Community measure, in this case the Lisbon Treaty, but accepted it altogether.[190] On top of this, in its decision of 2010, the FCC refused to dispute a decision of the ECJ[191] and conceded to the European Court a wide discretion in terms of the latter's jurisdictional competence.[192]

[189] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.170.
[190] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), pp.161, 163-5; and
R. de Lange, 'Het Bundesverfassungsgericht over het Verdrag van Lissabon', (2010) Ars Aequi Januari, p.30.
[191] The so-called Mangold decision: C 144/04, Mangold v. Helm [2005] ECR 3695.
[192] Since the decision was published a few days before this study was finished, only the file number (rather than the reference number) of the decision could be found: 2 BvR 2661/06.

IV. Conclusion

Having analysed the role of the two courts and their case law, an analysis of their behaviour on the basis of the Game Theory was conducted. In its summary, one easily recognises the different stages of the relationship as follows. Initially, the FCC expressed its uttermost concern on the protection of fundamental rights directly attacking the supremacy of Community law as its first move: it would be willing to review any Community law and, in the very case of a conflict with German constitutional law, to set it aside without batting an eye – which was meant by Jopseph Weiler as the threat of mutually assured destruction. However, with the ECJ's strategy of forthcoming case law, the FCC began to adjust its strategy and hence its stance towards the European Court and the supremacy of Community law: it increasingly augmented the restrictions on its power to review by reversing the burden of proof, introducing the formulas of 'general decline' and '*abstrakter Wesensgehalt*', and by rejecting more than once claims of conflicting Community law vis-à-vis the German constitution. Yet, it retained its ultimate power of review as a political symbol. The analysis of the courts' behaviour on the basis of Game Theory evidences a striking turnaround from direct rivalry to a mode of cooperation as the equilibrium of the *modus vivendi*, through which mutually assured destruction was banned and higher payoffs could be achieved.

There remain several possibilities of how the future relationship between the courts could evolve: Firstly, the FCC could in fact declare a secondary Community legal order to be in conflict with the German constitution and hence inapplicable in Germany as the worst scenario of mutually assured destruction. Secondly, the FCC could decide to refer a potential case to the ECJ for a preliminary ruling on the question whether a certain secondary Community law measure violates German constitutional law, which might

be based on Article 4 (2) of the European Treaty on the respect of the national identities by the European Union.[193] Thirdly and connected to the two preceding eventualities, the FCC could declare a secondary Community measure inapplicable in Germany after a referral for a preliminary ruling to the ECJ, which, according to scholars, might have been the intention of the German judges in the *Lisbon decision*.[194] Fourthly and finally, the FCC could state a conflict between a certain secondary Community law and the core of the Basic Law, and it may impose the German government the duty to strive for an amendment of the legal act by the competent EU organ, or, as *ultima ratio*, to start Germany's procedure of withdrawal from the European Union in accordance with Article 50 of the European Treaty.[195]

In principle, as it was indicated previously with regard to the *Lisbon decision*, the FCC's moves may be regarded altogether as a balancing act with the aim to placate internal German critics and eurosceptics, on the one hand, while not threatening the overall process of European integration in general and the gainful cooperation with the ECJ in particular on the other hand.[196] As a point of departure for avoiding an impasse with regard to a future outlook of the relationship between the courts in the long term, it ought to be the task of academic efforts and future case law of the FCC to develop an alternative approach, which would enable the German court to exercise a certain degree of review over the ECJ, while not endangering the

[193] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.174.
[194] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.175.
[195] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.175.
[196] Jacques Ziller, 'Zur Europafreundlichkeit des deutschen Bundesverfassungsgerichtes. Eine ausländische Bewertung des Urteils des Bundesverfassungsgerichtes zur Ratifikation des Vertrages von Lissabon' (Springer-Verlag, 2010), p.164.

legal cohesion of the Community order by declaring Community law inapplicable domestically.[197] Yet, as for now and certainly for the future in the medium-term, the relationship may be characterised as follows: so long as the FCC and the ECJ keep their 'mutually assured trust', they will ensure an effective protection of fundamental rights by collaboration and the legal cohesion of the project European Union alongside. The method of Game Theory has evidenced that the two courts are keen to uphold their higher payoffs through cooperation and it may be doubted that one of the two seriously wages to threat this cooperative relationship elaborated over the decades. Rather, it appears that the risk of mutually assured destruction is debarred and that the relationship of the two courts has evolved into a reliable one of mutually assured trust, on which both may rely and work on in the future.

[197] One proposal put forward by legal scholars includes a system of vertical 'checks and balances' compelling institutions at each level to 'rational and richly justified ('deliberative') decision making', while emergency conflicts of European and national constitutional issues would be resolved by a procedure of mediation, as it is common practice in international law, through a neutral body set up by the Community and the Member States and harmonised to its system. - Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's Banana Decision' (2001) 1 European Law Journal 7, p.106.

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