The Hellenic Council of State vis-à-vis the European Court of Justice: From voluntary seclusion to inevitable constitutional dialogue

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Introduction

The development of the European Communities and its gradual transformation into a political union presents, according to Professor Kassimatis, strong characteristics of a self-inflicting power accompanied by its institutional collateral, namely the supremacy of the law produced thereof.[1] The member states cannot close their eyes in front of this reality. And, usually, it is the judiciary that has to strike the proper balance.

From the early steps of the insertion of European Union (EU) law in the Hellenic legal order, the Council of State (the Supreme Administrative Court – *Simvoulio Epikratias)* has demonstrated a rather receptive attitude: clearly EU law is deemed to constitute part of the domestic set of rules in its entirety and is, therefore, fully enforceable.[2] Furthermore, the Council has ruled that domestic courts must examine on their own motion the compatibility of domestic law towards the EU law.[3]

The status of the EU law, prior or posterior to the accession of Greece, vis-à-vis the domestic legislation or regulations is barely problematic. This is so because on the one hand the Treaties and the secondary Community legislation, which is prior to the date of accession of Greece to the European Communities, supersedes the ordinary domestic legislation following the fundamental constitutional stipulation of Article 28 para. 1 according to which "the generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law". On the other hand, in the case of the posterior secondary EU law, Article 28 para. 2 is applicable: although it merely acknowledges regulatory powers to international organisations, the stipulation would be meaningless if it was not intimating that also the product of this authorisation, i.e. the regulations produced thereof, was to be mandatory. [4]

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[1] G. Kassimatis, *Towards a new meaning for the State. Modern State and its trespassing* in *Studies II* (A. Sakkoulas Publications, Athens – Komotini, 2000), p. 13 at 49-53.
[2] See CS 815/1984.
[3] See CS 249/97, CS 1273/96, CS 1438/1993.
[4] "Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of

In the light of the above prevalence of EU law, if the domestic legislation is absolutely at odds with an EU provision and cannot be rescued within the boundaries of the permitted judicial interpretation the former provision will not apply.[5] However, the Constitution does not intimate anything concerning the institutional relationship between the national constitution and the EU law in the case of a potential conflict.

1. The jurispudential approach

1.1 The conceptual question

Neither the Council of State nor *Areios Pagos* (the supreme civil and criminal court of the land) have expressly acknowledged the supremacy of EU law, albeit being a standard feature of the case law of the ECJ. [6] By way of contrast both organs have followed a rather reserved attitude and have declared the inviolability of the domestic Constitution by placing emphasis on the unique nature of the amendment proceedings, as specified in the constitutional charter itself, requiring increased majorities and national elections between the Assembly initiating the process of revision and the one eventually fulfilling it.[7]

The basic line of argumentation against the prevalence of EU law derives from a strict literal approach of the Constitution. Indeed, one might reasonably argue that the Hellenic Constitution does not –or, in a more extreme version of this theory, *could* not- contain a clause to the effect that it is self-restraint and open to a self-abolition mechanism. From this viewpoint, it is conceptually unorthodox for the Constitution to prevent the *national* legislature from introducing any ruling in conflict with the provisions of the Constitution, whereas at the same time it allows an *international* organ to trespass the constitutional shell. The hard legal nationalists would find in such a hypothesis a conceptual flaw since the international forum would be institutionally more powerful, although enjoying far less democratic legitimacy and –direct- accountability. The mere constitutional reference of Article 28 para. 2 that international organs may be awarded legislative powers does not necessarily award to the corresponding legislation maximum legal status. The incorporation process and the legislation production are not tantamount to the legal effect produced thereof. These two issues are of distinctive nature and should be treated as such.

Arguments in favour of the EU supremacy clause were difficult to be found within the body of judicial decisions. Only some dissenting opinions seem to

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Parliament shall be necessary to vote the law ratifying the treaty or agreement". See the interpretation of this ruling in CS 5410/1987 and 3312/1989.

[5] CS 1273/1996, CS1438/1993.

[6] See the widely cited cases 6/64, *Costa v. ENEL*, [1964] ECR 585 and 11/70, *Internationale Handelsgesellschaft* (1970) ECR 1125.

[7] Article 110 of the Constitution.

have taken a rather favourable stance. The most notable such approach is to be found in the dissenting opinion of the decision 2809/1997 of the Council of State where it was pointed out that the provisions of Article 28 of the Constitution are essentially of a "quasi amending nature". The "quasi amending nature" was attributed to the fact the procedure described thereof allow the indirect amendment of the Constitution independently of the regular amendment procedure elaborately presented in Article 110 of the Constitution. In order further to substantiate this argumentation, the dissenting judges proceeded to a pragmatic-historical scrutiny. In this view the constitutional legislature of 1975, whereby Article 28 was launched, was fully aware of the fact that the forthcoming accession of Greece, primarily for the shake of which Article 28 was drafted and entered into force, would create potential conflicts, especially in relation to Article 4 para. 4 reserving in principle the right of access to the public sector only for nationals. Given this awareness one may draw the conclusion that the drafters of the Constitution envisaged no conflict since they had presumably in mind the prevalence of EU law. In turn, the dissenting judges concluded that since there was no possibility to interpret the constitutional clause in the light of EU law, the latter should prevail.

The conceptual argument presented above does not of course enjoy an absolute force. The majority of the members of the Council in the same judgment rejected that line of argumentation by stating that if the EU supremacy clause was to be enhanced, the rigidity of the Constitution, considered to be one of its fundamental characteristics, would be circumvented, if not fully frustrated. According to this view, since the accession was not materialized through a constitutional Assembly, there can be no de facto constitutional amendment through a procedure that is not explicitly set out.

1.2 The initial "don't touch approach"

Decisions 3457/1998 of the Plenary and 1440/2000 of the 6th Section gave the Council of State a great opportunity to solve the issue of institutional balance between the EU law and the domestic Constitution. In the two cases, whose facts and judicial reasoning were almost alike, the Council abstained from a clear confirmation of the status of EU law. The facts of the case, which led to decision 1440/2000, were as follows: The applicant was a graduate from the University Grenoble, France *(Pierre Mendes France Grenoble Sciences Sociales),* having been awarded the degree of *'Maitrise en Droit Europeen'*. She applied to the Hellenic authority responsible for the recognition of equivalence of foreign degrees to domestic degrees (Inter-University Center for Recognition of Foreign Degrees – *DIKATSA)* and claimed recognition of her degree as equivalent to the national law degree. The deciding authority ruled that her degree only allowed her entrance into the 5th –of a total of 8- semester of a Law Faculty of a Hellenic University. The reason was that the applicant had

not completed a full 4-year course in France but spent the first 2 years in the Annexes of the Universities of Ruen and Grenoble II established in Athens. The fundamental domestic rule was Article 16 para. 5 of the Constitution, arguably setting out the state monopoly in the field of university education: "Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. These institutions shall operate under the supervision of the State and are entitled to financial assistance from it; they shall operate on the basis of statutorily enacted by-laws". According to the relevant statute,[8] in order for a foreign degree to be held equivalent to a domestic, DIKATSA must render a reasoned opinion as to whether, first, the foreign *university* is of equivalent value on the basis of the quality of the knowledge provided to the students and the quality of the teaching staff and, second, if the foreign *degree* is of equivalent value on the basis of the duration and nature of studies and the examination modules. Furthermore, the law provides that, even if the foreign degree is in principle of equivalent value, nevertheless its extent does not depict the same contents of knowledge, equivalence may be granted after attendance and successful complementary examination on the subjects that have not been taught.

The above normative environment gave rise to the case law of the Council of State suggesting that the establishment of university schools by individuals or private entities is strictly forbidden and upheld DISATSA's refusal to acknoledge the equivalence of degrees obtained after attendance –wholly or in part- in a domestic institution, be that a department or annex of a foreign university operating in the country as a private auxiliary school or a centre of public studies. These institutions operate lawfully but do not tantamount to higher education institutions. The Council considered that such equivalence would substantially result in bypassing the constitutional restriction for the state monopoly on higher education.[9]

The Council could not of course neglect the relevant provisions of EU law since the issue is one clearly having a community dimension and touching upon a variety of fundamental community principles, such as the non-discrimination of European citizens, the freedom of establishment, the freedom of movement etc. The Council made specific reference to several provisions of the EC Treaty, namely Article 48 (new Article 39) setting out the free movement of workers within the Union, Article 52 (new Article 43) allowing the freedom of establishment of nationals of a member state in the territory of another member state also through agencies, branches or subsidiaries and Article 126 (new Article 149) according to which "the Community shall contribute to the development of quality education by encouraging co-operation between member states and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the member states for the content of teaching and the

[8] Article 4 para. 7 and 8 of Law 741/1977, as later amended.
[9] See CS (Plenary) 2274/1990.

organisation of education systems and their cultural and linguistic diversity". However, the most material piece of EU Law was considered Directive 89/48 concerning a general system of recognition of higher education degrees certifying professional training of a minimum of 3 years. This directive aiming, according to its preamble, to strengthen the right of European citizens to use their professional knowledge in any member state and to hold this knowledge wherever they desire, sets out in detail the qualifications for the recognition of university degrees originated from the European universities without making any distinction as to the place the studies were conducted or any other formal qualification.

Had the Council followed the relevant Directive, it would have no other option but to uphold the legality of all lawful EU degrees irrespective of the place they were obtained, which was for that matter an irrelevant consideration. Given that the Directive clearly qualified in the facts of the tried case, a conflict with the national Constitution was bound to happen. This is particularly true if one takes into account the rigidity of the Hellenic Constitution in relation to the state monopoly in higher education which, in turn, implies that no judicial interpretation seemed prima facie to be able to combine the conflicting provisions so as to allow –even creative- constitutional interpretation without departing from the scope of the EU secondary legislation. Accordingly, a reasonable approach would suggest that the Council was bound to deal directly with the fundamental question of the status of the Constitution in relation to EU law. This could happen either by deciding ad hoc or by referring the issue by means of a reference to the ECJ for a preliminary ruling according to Article 234 of the EC Treaty. In the facts of the case, the latter option appeared more reasonable since the issue contained indeed crucial questions on the validity and the scope of EU law but involved the danger that a very delicate matter concerning the status and enforceability of the sources of national law would be left to supranational hands. If this option had been taken up, the Council would essentially have committed itself to adhere by the ruling of the ECJ without a possibility to reserve the last saying for itself. Given that at an ECJ level the rule is that EU law prevails over all national form of law the dangers were even greater.

The Council took the most unexpected road, both from a procedural and from a substantive point of view. It essentially subjected the contents of the Directive to a control of conformity with the Treaties. First of all, it assumed that Article 126 places emphasis on the autonomy of the member states in drawing their respective educational policies. By having recourse both to a literal and to a teleological interpretation the a narrow majority of the Council ruled the following:

"According to the *clear* meaning of Article 126, the organisation of the educational system, including the higher education establishments, are left to the member states, consciously recognising that the contents of teaching and

the organisation of the education system are exempted from the powers of the Community and remain within the competence of the member states might cause difficulties in the implementation of the rights of free movement of people, capitals and services; this is so because the maintenance of cultural and linguistic diversity of the members states referred to in Article 126 has been deemed by the Treaty as an achievement of high importance… The contribution of the education is necessary for the maintenance of national identity and the linguistic and generally cultural inheritance of any nation… Therefore it is clear that the issue of the contents of the teaching and the organisation of the education system, especially in the field of higher education, in the territory of every member state as well as the correlating issue of the recognition of the relevant diplomas and degrees as equivalent to their national counterparts and the prevention of by-passes lies with the national legislature…".[10]

The establishment of a very hard version of the principle of educational autonomy of the member states stemming from the Treaties then led the Council to exercise a secondary control with relation to the contents of the Directive. The hierarchy of norms as existing in the community legal order evidently required that the secondary legislation was in conformity with the Treaties which are the fundamental statutes of the EU legal landscape. If a piece of secondary legislation cannot be interpreted so as to be in terms with the Treaties and is eventually in unqualified conflict with them, it should be set aside and held inactive. This classical admittance pressed the Council to enter into the deep waters of a constitutional-type control of the Directive:

"Provisions of secondary Community law of an inferior status should be interpreted in the light of Article 126 of the Treaty. Besides no stipulation of Directive 89/48… intimates that this directive refers to Article 126 of the Treaty and especially in issues of organisation of the higher education… ".

After this admission, the Council concluded that the national authority had faithfully applied the legislation and its decision was upheld without making a preliminary reference to the ECJ.

1.2 The new inclination for ECJ involvement

The "EU law –tight" mechanism established by the Council of State seems to have suffered a bitter crevice with the latest decisions 3977/2003 and 3995/2003 of the 4th Section, both published on December 30th, 2003. The facts of the cases, but mostly the legal issues at stake, were broadly the same. In the former case, the applicant, a mechanical engineer having a degree from Germany, was refused entry to the relevant Hellenic professional Union, which was a precondition by law to exercise his profession, although he had already been registered to the equivalent Union in Germany and was a

[10] Emphasis added.

practitioner in this country. In the latter case, the applicant was an occupational therapist, who, after having succeeded in the state exams of the acknowledged School of Occupational Therapists in Stuttgart and received a professional license, was neglected acknowledgement of her professional title, thus being prevented from practicing her profession. In both cases the reasons for neglecting the applicants' claims were based on the assumption that their academic qualifications obtained in Germany were not equivalent to the education diplomas awarded in Greece and required for registration in the relevant professional categories.

The applicable EU legislation was that of Directive 89/48 (as combined with Directive 92/51 in case 3995/2003, both originated from the Council of the EU. The former Directive was applicable in the case of the university degrees whereas the latter, aiming at broadening the scope of Directive 89/48, covered all non-university education after high school. In fact the first question raised before the Council in case 3995/2003 was the enforceability of Directive 92/51 given that the applicants' claims for recognition were submitted after the deadline set out by the Directive itself for its incorporation into the domestic legal order and before the introduction of a national regulation to that effect.[11] In the light of the contents of the Directive, the Council concluded that it produced direct effect towards the citizens even before its incorporation in the domestic order since they contained no reservations and they were adequately clear. This was so because the scope of the Directive was explicitly specified through an Annex of schools of professional education.[12] The Directive set out a fluctuating level of member states' discretion to accept applications for recognition and entry into a professional Union. Thus, there were cases where the states were obliged to allow access to a profession for EU citizens who obtained their qualifications in another member-state, cases exempted from the above principle and the cases where the member states might require the applicant further qualifications, namely professional experience or professional practice for adaptation or success in prescribed adequacy tests.[13] According to the majority ruling, the clarity of the specific legislation in question was not hampered by this discretion because it was substantively curbed and it would be irrational for a state to frustrate the citizens rights by invoking a discretion that would exist if the state had duly incorporated the Directive into the domestic law. The clarity of the Directive was not affected either by its provision that the member states ought to specify within the prescribed harmonization period the competent authorities to receive and process the relevant applications by the citizens.[14] On this issue, the majority of the Council held that unambiguous provisions of the Directive may be independently invoked by the aggrieved citizens irrespective of other stipulations that are not adequately defined and, thus,

[11] Presidential Decree 231/1998.
[12] Articles 1 and 2 of Directive 92/51 in combination with Annex C.
[13] Articles 3-9 of Directive 92/51.
[14] Article 13 par. 1 of Directive 92/51.

the citizen may have recourse to the state authority that would be competent to deal with his/her claim before the harmonization with EU law. In the light of the above, the Council, following the long-standing case law of the ECJ on direct effect of EU Directives, allowed the citizens alleging violation of their community rights stemming from and adequately clear provision to invoke the relevant secondary law.[15] A dissenting opinion of the Council, however, viewed that the Directive could not produce direct effect before its incorporation into the domestic legal order because it called for a wide regulatory intervention of the member states in relation to the specifics of the Directive, and especially the establishment of the competent authorities.

The majority of the Council arrived at the conclusion that the national authorities gave no adequate reasons to justify the refusal to accept the applicants' requests. According to this view the authority ought to have assessed the requests on the basis of the applicable EU law and awarded the professional license if the relevant statutory criteria were met. Otherwise, it should have refused access to the professional Union by giving conclusive justification. At any rate, the authority should not have required the applicants to have academic recognition for their degrees for this requirement does not stem from Directive 92/51. By way of contrast, the minority of the Council, accepted the legal foundation of the authority's refusal on the ground that at the time of these refusals, the EU Law stipulations were not adequately defined.

The Council went on to assess the functioning of the performance of the national authority (Academic Equivalence Centre) in the light of the ECJ case law according to which the member states must take into account all degrees or certificates awarded to a citizen by another member state for the purpose of exercising a certain professional activity and evaluate them vis-à-vis the abilities certified by these documents and the knowledge and skill required by the national legislation for the same type of degree. The conclusion of the Council was that the authority's competence was restricted only to the evaluation of the academic equivalence of degrees and in no case of the professional equivalence of the academic degree submitted by the applicant.

Despite its firm position on the clarity of EU Directives, the majority of the Council decided to address a preliminary ruling to the ECJ according to Article 234 para. 3 of the Treaty asking whether the above mentioned provisions were expressed in an adequately clear way so as to be invokable by citizens requiring national authorities access to a specific profession before the harmonization of the domestic legislation. The Council went on to address a second question in the case that the response of the ECJ on the first question was negative. The second question was whether the national authority

[15] ECJ 8/81 *Becker* [1982] Rec. 53, ECJ 103/88 *Fratelli Constanzo* [1989] Rec. 1839, ECJ C-188/89 *Foster* [1990] Rec. I-3313, ECJ C-193/91 *Mohsche* [1993] Rec. I-2615, ECJ C-134/99 *IGI* [2000] Rec. I-7717, ECJ C-441/99 *Gharehveran* [2001] Rec. I-7687.

entrusted with the recognition of professional equivalence of EU citizens might lawfully require at a prior stage the recognition of his/her academic qualifications by another national authority set up for that particular purpose or it should proceed the applications on its own by comparing the competences certified by the academic degree to those of the member state and decide accordingly.

2. *The critical legal scenery*

2.1 The procedural and substantive issue

As becomes apparent, the first set of decisions of the Council of State took a legal view based on the EU law but without having any reference to the ECJ which is *par excellence* the forum interpreting the corresponding set of rules. Since the case was one where it seemed impossible to integrate the two regulations –national provisions against EU law- in a rescue operation, the Council had no alternative but to decide on the merits of the confrontation or to come up with a truly innovative mechanism. And so it did. It abandoned essentially the domestic regulation and engaged itself almost exclusively with the legality of the EU Directive. This attitude presents strong procedural anomaly, which in fact render these decisions very distinctive –if not unique- from the set of jurisprudence of domestic courts in Europe. This is so for three reasons. First, although the nature of the cases decided was admittedly relevant to EU law, there was no reference whatsoever to the interpretation given by the ECJ in the particular matters. Second, although the case was calling for a reference to the ECJ for a preliminary ruling, the majority of the Council patently rejected this option.[16] In this way the opinion rendered by the applicant and supported by the dissenting judges was not embraced, although the Council of State, as a court of last instance, had an obligation in a case of doubt as to the meaning of EU law to refer it the ECJ.[17] Third, the Council proceeded to an unprecedented control equivalent to constitutional review within the hierarchy of norms of EU law. Admittedly, all domestic courts have the institutional competence to interpret national law, including EU law that has legitimately become part of national law. This is a reasonable approach allowing domestic courts to interpret national law in its totality including judicial mechanisms such as the interpretation of a domestic rule in

[16] "Secondary Community law should be interpreted in the light of the above considerations deriving without any reasonable doubt from the provisions of the Treaties…. Given this, it is *clear* in the majority's view that there is need to refer a preliminary question to the ECJ…" (para. 16, CS 3457/1998). Emphasis added.

[17] The use of the preliminary reference procedure by the Hellenic courts is marginal. In the first two years after the accession of Greece to the Communities and despite the incorporation of a large bulk of European regulation into domestic law, the domestic courts made no reference to the ECJ. In 10 years between 1987 and 1996, the Hellenic courts made as many as 22 genuine preliminary references. Only 4 of them were addressed by the Council of State and none from Areios Pagos. Greece ranked at the bottom, just before Portugal, in the relevant list for this period.

the light of EU law. This interactive approach is particularly akin in cases where there is seemingly a conflict between the two sources of law that can nevertheless be bridged. However, this global interpretation has limits. Apart from the evident fact that for reasons of uniformity the rulings of the ECJ in the facts of each case must be a relevant consideration, domestic courts are not institutionally and methodologically equipped to decide on the legality of an inferior norm against a superior norm of an international legal system. It is true that secondary community legislation must abide by the Treaties, which constitute, in terms of judicial control, the equivalent of national constitutions. Accordingly, the domestic court exercised a constitutional-type control not for the set of rules produced by the national legislative organs but for an international regulation deriving from supranational decision-making authorities. This attitude clearly causes problems. If any domestic court had de facto the power to take over an internal control of EU law, thus being able to set aside the Community regulations of an inferior status, the whole system of EU law would be jeopardized since any domestic judiciary would be able to develop an absolutely autonomous stance. Apart from the different levels of protection that might be introduced in such a hypothesis, a serious conceptual issue is raised. Internal hierarchy of norms, and its main judicial companion, i.e. the constitutional review, can only be exercised by the courts within this very landscape.[18] This is a condition of effectiveness of a multi-level system of law making and a prerequisite for social piece and equality.[19]

The recent decisions of the Council of State present a much more conceptually articulate rationale. There was at an initial stage the reaffirmation that this was an issue relevant to EU law and should be treated accordingly with particular attention to the ECJ's case law on the issue. And, indeed, this happened. The decisions are very rich in citations of the jurisprudence of the Court of Luxembourg, which offered on the face of the cases strong, if not conclusive, argumentation. The reference for a preliminary ruling intimated the Council's recognition that when a matter admittedly belongs to the area of interest of EU law it must be the ECJ to articulate an authoritative word.

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[18] Dissenting opinion of Judge Sakellariou in CE 3457.1998 (para. 16): "Independently of the consequences conveyed for the member states in the case of non-implementation of Community law, since the exclusive competence uniformly to apply community law in all and each one of the member states belongs to the ECJ, it is incompatible to the Treaty if national courts do not address preliminary questions to the ECJ in cases like the one pending in which, according to the case law of the ECJ, the legal relationship is determined by Community law. Finally in the facts of the case if a preliminary reference to the ECJ is not made, the fundamental right to a fair trial is violated since that would prohibit the individual to have access to the competent court for the interpretation of Community law, i.e. the ECJ which is the natural judge for the judgment on the issue to be decided…".

[19] It is remarkable that decision 3457/98 of the Plenary of the Council of State was taken after reference from the 6th Section of the Council with decision 2809/97, where the judges held that there was a case of addressing a preliminary question to the ECJ. Due to its significance, the case was referred to the Plenary, which overturned the original ruling.

Furthermore, the Council completely subverted the rationale of its prior "seclusion attitude". The second question addressed to the ECJ also involves an inevitable assessment of the secondary EU law against the Treaties and a combined interpretation of the two set of rules. The question itself explicitly asks whether a national authority, in the absence of a harmonizing legislation for Directive 89/48, could require prior academic equivalence *in the light of Articles 39 and 43* of the EC Treaty. Assessment of the relevant value of EU law provisions and the compatibility of secondary legislation with the Treaties, should in the view of the recent case law of the Council stay with the appropriate judicial forum, i.e. the ECJ.

The new stance of the Council of State seems to have been inspired to some extent by the dissenting view in decision 3457/1998, which, unlike the majority ruling greatly cast light to the case law of the ECJ in the relevant domain. It is remarkable that this decision includes a very analytical citation of the dissenting rationale, which is not a very typical feature of the decision drafting of the Council given that, in the main, decisions are rather laconic and elliptical.[20] The methodological steps that were followed seem faithfully to adhere to the requirements of rational deductive reasoning: professional education is protected, equal opportunity of access to professional education is a prerequisite of professional education, access to professional education is protected.

When comparing the two sets of decisions, one cannot avoid identifying a jurisprudential paradox. Until now, the vulnerability of domestic courts, not only in Greece but also elsewhere, to use the yardstick of ECJ was based predominantly on the notion of "clear acts" *(actes claires)*, according to which the meaning of EU law was unambiguous and, therefore, there was no need to turn to the ECJ. Decision 3457/1998 was taken by a majority of 17 against 12 members of the Council. The majority in this case repeatedly emphasized upon the conclusiveness of the argumentation presented therein as well as the clarity of the letter of the Treaty and of the relevant Directives.[21] It is not immediately apparent how a decision taken by a rather narrow margin and with a very strong and well-substantiated dissenting opinion could qualify as a "clear act".[22] One would reasonably assume that the mere fact that the Council was divided on the issue, should immediately disqualify the majority

[20] Ironically, in this decision the majority ruling covers merely 2,5 pages as opposed to a full 8-page view of the dissenting judiciary.

[21] Para. 16 of the decision: "provisions of Article 126 *[of the EC Treaty]* according to the clear wording entrust the member states to organize their educational system…", "provisions of secondary community law, being of inferior status, ought to be interpreted in the light of the above views which derive beyond any reasonable doubt from the Treaty and especially Article 126", "given these it is clear that there is no case for a preliminary ruling…". However, all these statements refer to a very short and, presumably unconvincing argumentation.

[22] Also see CS 4398/95.

view from being classified as clear.[23] The recent set of decisions seems to embrace this approach. Although the crucial legal issues were according to the majority of the Council clear and unambiguous, still the fact that the decisions were not unanimous (both of them taken on a 5-2 majority of the Section) seemingly prompted the Council to address the preliminary questions.

2.2 The jurisprudential shift in context

The first reasonable observation in relation to the change of judicial attitude has to do with the scope of the two sets of decisions. Indeed, these are not identical. The first set had to do directly with the issue of academic equivalence, whereas the second only with the right of citizens to access a profession. However, the difference is not to be over-estimated. Even in the recent decisions the issue of academic equivalence appears strongly and is beyond any doubt a crucial relevant consideration. The question as to whether the academic qualifications should be taken into account when assessing applications for entry into a professional union is at the core of the judicial reasoning and, to my mind, reflects the major issue at the level of constitutional balance. The strong tension between the national Constitution and the EU law arises mostly in the context of Article 16 para. 5. The decision of the ECJ on the preliminary reference addressed by the Council of State will exercise a great influence upon the structure and institutional balance of the norms.

The issue of non-state universities has probed into the heart of the public debate in the last few years in Greece. The motion launched at the European Parliament in 2003 by a Greek member on the issue of the acknowledgment of braches of EU universities operating in Greece, not as such but merely as independent schools at non-university level, the inclusion of the issue in the political agendas of both major parties before the 2004 parliamentary elections, the increasing public awareness on the issue as a result of the great number of independent colleges but also of the great number of Greek students studying at a university level abroad have set the discussion on fire. Besides, the original vulnerability of the Council of State to deal with this issue was not inexplicable if one takes into account that even the constitutional legislature of 2001 –institutionally enjoying the highest degree of democratic legitimacy- refused to amend the constitutional provisions that might be considered to be contrary to EU law such as the public monopoly on higher education and the access to public service. These amendments, which

[23] This argumentation was expressly set out by a member of the Council, which considered reference to the ECJ as mandatory for the Council on the facts of the case and can by all means be substantiated with reference to the ECJ's case law: "In the opinion of Judge A. Rantos, reference to the ECJ is in this case mandatory… merely because there is a significant dissenting opinion of a great number of judges in relation to the need to address a preliminary ruling which proves that the issue of community law interpretation in question was not absolutely clear and free of doubts…" (Para. 16).

would have arguably eased the anxiety between the Constitution and EU law, were not in the agenda of the majority of Parliament. However, it is noteworthy that the 2001 constitutional revision added to the crucial Article 28 an interpretative clause reading that this Article "constitutes the foundation for the participation of the Country in the European integration process". Although this declaratory and emphatic affirmation was set, presumably, to prevent potential reservations as to the future political developments at an EU level that might otherwise raise constitutional doubts, it could provide fertile arguments in favour of the superiority of EU law, considered as institutional prerequisite for the European integration. At any rate, after this interpretative clause Article 28 ought to receive a strong pro-European interpretation. The reporters of the opposition were prompt to express scepticism and reservations in such a potential. Clearly the very delicate issue of the nature of university education in Greece currently goes through a transition period at the moment and it seems that the ECJ might perform a significant part in accelerating changes in that respect. In that sense, the Hellenic Council of State threw the ECJ into the arena of public and constitutional discourse.

Furthermore, higher education is not any more the only major pointed tip of the spear in the relationship between the Constitution and EU law. The 2001 constitutional revision not only abstained from bringing Article 16 para. 5 fully aligned with EU law but added a new provision that will surely cause more anxiety to an already fragile rapport. Thus, Article 14 para. 9 of the Constitution essentially restricts multi-ownership in the media enterprise and prevent media owners and related persons or affiliated companies to take part in public procurement contracts.[24] The compatibility of this new clause to Directives 93/37, 93/36 and 92/50 is surely debateable in the sense that they impose restrictions upon the award of public contracts that are not included in the exclusive list of requirements set out by this regulatory framework of EU law. The Council of State has already been in orbit to refer this issue as

[24] "The ownership status, the financial condition and the financing means of information media should be disclosed, as specified by law. The measures and restrictions necessary for fully ensuring transparency and plurality in information shall be specified by law. Concentration of the control of more than information media of the same type or of different types is prohibited. More specifically, concentration of more than one electronic information media of the same type is prohibited, as specified by law. The capacity of owner, partner, main shareholder or management executive of an information media enterprise is incompatible with the capacity of owner, partner, main shareholder or management executive of an enterprise that undertakes towards the Public Administration or towards a legal entity of the wider public sector to carry out works or supplies or to provide services. The prohibition of the previous section also applies to all types of intercalated persons, such as spouses, relatives, financially dependent persons or companies. A law shall set out the specific regulations, the sanctions which may be carried to the point of revoking the license of a radio or television station and to the point of prohibiting conclusion of or annulling the relevant contract, as well as the means of control and the guarantees for deterring infringements of the previous sections".

well to the Court of Luxembourg.[25] The outcome of the court's deliberation might also be of great institutional impact in Greece when, additionally, taking into account the constitutional qualification set out by Article 110 para. 6 that revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.

Concluding remark

The scope of the ancient reserved case law of the Council of State involving bypasses of direct confrontation between national Constitution and the EU law seems to have been abandoned by the recent developments. The Council seems now to decline judicial vehicles tending to avoid dealing directly with issues that would certainly connote serious political and legal implications in the country. One might reasonably expect a foreseeable institutional tension between the two respective legal orders, which might, in turn, raise questions of broader nature concerning the institutional balance within the EU during a period in which institutional changes in Europe are rapid and not always predictable. But this is the price a multi-level system of governance ought to pay at some point of development. In that respect, clear solutions might be painful but, eventually, relieving.[26] And, although, the tensions between the Hellenic Constitution and the EU law have so far been avoided, we enter a phase where a conflict might be inevitable. The wisdom of Professor Kassimatis suggesting strong and centralized constitutional adjudication for the country as a powerful filter against violations of the constitutional validity stemming from the EU legal order becomes all more contemporary and important.[27]

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[25] In 4 cases (Registration. Nr. ----) before the 4th section of the Council of State, that have already been tried and decisions are currently pending, the Reporter Judge has suggested a reference for a preliminary ruling to the ECJ for a legislative clause materializing the spirit of Article 14 para. 9 of the Constitution. The question relates to the compatibility of Law -------- 3021/2002 determining that before signing a public contract every contractor needs to produce a certificate issued by the National Radiotelevision Commission and affirming that the contractor does not fall in any of the forbidden categories of Article 14 para. 9. If the reference is made, the ECJ will be prompted to decide not only on the requirement for an additional certificate but, necessarily, on the compatibility of the Constitution itself to the relevant EU law.

[26] The principle of subsidiarity, in the conceptual development of which professor Kassimatis has greatly contributed well before it becomes a standard point of reference of the EU structure, could probably be revisited in the light of political and constitutional balance within the Union, see G. Kassimatis, *About the Principle of the Subsidiarity of the State* (Athens, 1974).

[27] G. Kassimatis, *Constitutional Justice* in *Studies IV* (A. Sakkoulas Publications, Athens – Komotini, 2000), p. 137 at 265-6.