Luxembourg

The Constitution of Luxembourg in the Context of EU and International Law as 'Higher Law'

Jörg Gerkrath*

1 Constitutional amendments regarding EU membership

1.1 Constitutional culture

1.1.1 The Constitution of Luxembourg (Constitution) falls within the category of constitutions tending to be more 'evolutionary' in nature.[1] Although it is clearly part of the positive law in force, it is at the same time considered rather a historic and political document than a truly normative one. It has developed over the last 200 years in response to political change and historic events. The country, of which its international status as a Grand Duchy, independence and current borders were established by international agreements (Final Act of the Vienna Conference in 1815 and the Treaties of London of 1839 and 1867), suffered through a little over 50 years of constitutional instability before it settled, in 1868, into its current Constitution. Although it has been revised 34 times between 1919 and 2009, Luxembourg's Constitution is thus one of Europe's oldest written constitutions remaining in force.[2] Many of its provisions even date back to Luxembourg's first liberal constitution of 1848, which itself was greatly inspired by the Belgian Constitution of 1831. Its style and wording are thus typical of a 19th century document.

Consequently there is quite a difference between the written document and the 'living constitution', for instance regarding the relations between the main political organs of the state. A constitutional court with limited powers was established only in 1997. It does not have the power to invalidate legislative acts, which can only be submitted to it by ordinary courts through a preliminary ruling procedure.

Luxembourg has embarked on a process of modernising its Constitution more generally. A proposal to amend the Constitution deposited with the *Chambre des Députés* (the unicameral Parliament of Luxembourg, hereinafter *Chambre*) on 21 April 2009 (hereinafter 2009 Revision Proposal)[3] is expected to be finalised and submitted to referendum in early 2018. This revision will result in a widely amended and restated Constitution, to be adopted in accordance with the current revision procedure, continuing Luxembourg's evolutionary tradition. At the time of writing (February 2016), the Revision Proposal is still being discussed within the Parliamentary Committee on Institutions and Constitutional Amendment, in the form of a revised working draft prefiguring the future Constitution of 2018 (hereinafter Working Draft).

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* The author is Professor of European Law at the University of Luxembourg.
e-mail: jorg.gerkrath@uni.lu
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All websites accessed 27 February 2015.

[1] The text of the Luxembourgish Constitution in French can be accessed here:
http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/constitution_gdl.pdf

[2] For further developments see: Gerkrath and Thill 2014; and Gerkrath 2012.

[3] *Proposition de révision portant modification et nouvel ordonnancement de la Constitution* of 21 April 2009, doc. parl. No. 6030. Cf. Gerkrath 2013, pp. 449–459.

Due to its historical relationships with the Netherlands and Belgium, Luxembourg's constitutional tradition has been strongly influenced by the constitutional traditions of these countries. The first advisory opinion of the *Conseil d'État* (State Council with advisory powers, also highest administrative court until 1996) on the 2009 Revision Proposal makes frequent reference to the Belgian and Dutch Constitutions.[4]

1.1.2 The role of the Constitution has never been subject to extensive theoretical debate in Luxembourg. In a very pragmatic manner, the long-standing leading handbook on the Constitution describes its objective as 'to determine the constitutional basis of the state, to guarantee the rights and freedoms of the citizens and to organise the public powers'.[5] Divided into 13 chapters and 125 articles, dedicated mostly to institutional and organisational aspects, the Constitution does not include a preamble, which could provide information about its leading rationale. Compared to other constitutions, the part on fundamental rights appears to be neglected, whereas the rules on the functioning of the state and on the exercise of the powers by the institutions are developed in greater detail. The Constitution of the Grand Duchy does not contain a special chapter on international relations; neither does it contain any provision on EU membership.

Luxembourg's Constitution establishes the principles on which the state is based, regulates the powers of state organs and guarantees fundamental rights. With respect to the sovereignty and organisation of Luxembourg, the Constitution makes it clear that the Grand Duchy is a democratic, free, independent and indivisible state headed by a constitutional monarch and governed by a system of parliamentary democracy. Sovereignty resides in the Nation but is exercised by the Grand Duke in accordance with the Constitution and national law (Art. 32(1).

The Constitution specifically mentions the executive, legislative and judicial branches of Luxembourg's system of government, as well as the *Conseil d'Etat,* the main advisory organ*,* which understands its proper role as 'guardian of the Constitution'[6] and exercises a moderating function within the parliamentary procedure similar to that of a second chamber.

Although not specifically mentioned in the Constitution, the rule of law is undoubtedly present in Luxembourg's constitutional system (see more in Sect 2.1.3). However, any perceived lack in the current Constitution is expected to be rectified in the restated Constitution, as the second unnumbered paragraph of Art. 2 of the 2015 Working Draft includes an express recognition that Luxembourg is founded on the principle of the rule of law and on respect for human rights.[7]

1.2 The amendment of the Constitution in relation to the European Union

1.2.1 With regard to EC/EU membership, Luxembourg has pursued a strategy of minimal adjustments. The Grand Duchy ratified the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and the Treaty instituting the European Defence Community (EDC Treaty) in absence of any constitutional provision on the transfer or delegation of powers to international organisations. Contrary to the opinion of the Government, which thought that the Constitution implicitly allowed such a transfer, the *Conseil d'État* assumed that the Constitution did not. Regarding at least the ECSC Treaty, the *Conseil d'État* believed

[4] Opinion *Conseil d'Etat* 6 June 2012, No. 48.433, doc. parl. No. 6030/06.
[5] See Majerus 1983, p. 42.
[6] http://www.conseil-etat.public.lu/fr/historique/index.html.
[7] In absence of any official English version, all translations of the original French legal and constitutional texts and judgments are those of the author.

that ratification was possible on the basis of customary constitutional law, without however indicating the exact origin and content of these customary rules. It must be inferred that it had in mind the prior participation of Luxembourg in the *Zollverein*, the German Confederation and the Benelux Union, which had also occurred in the absence of any written constitutional clause.

For reasons of expediency, the *Conseil d'État* did not oppose the legislature's approval of both treaties, but urged an immediate constitutional amendment to correct the perceived lacuna. Although the *Chambre* approved the ECSC Treaty on 23 June 1952 and the EDC Treaty on 24 April 1954, respectively, it took another two years for the necessary constitutional amendments to be adopted.

Thus, on 25 October 1956, the Constitution was amended to add Art. 49*bis,* which allows for 'the exercise of powers reserved by the Constitution to the legislative, executive, and judiciary branches to be temporarily vested, by treaty, in institutions of international law'. Simultaneously, Art. 37 was modified to require such treaties to be approved by a law meeting the voting requirements established for a constitutional amendment in Art. 114. The regrettable wording of Art. 49bis, allowing only 'temporary' transfer of competences, is to be modified in the course of the current revision procedure. In the past this provision has always been construed very widely and has not hampered any ratification of subsequent EC/EU founding, revision or enlargement treaties. A proposal made in 2009 to introduce an entire new chapter on the European Union was ultimately withdrawn without debate.

Only two subsequent constitutional amendments have been adopted, in 1994 and 1999, to address Luxembourg's obligations under the EU treaties. Nothing in the amendments refers explicitly to the EC, the EU or to European integration.

First, at the moment the Maastricht Treaty was signed and ratified, the Constitution explicitly reserved voting rights or candidature in national and municipal elections for Luxembourgers (Arts. 9 and 107). However, Art. 114 – on constitutional revision – required dissolution of the *Chambre* in order to amend the Constitution. As voting rights for EU citizens were not considered to be self-executing but requiring the adoption of secondary EU legislation and in order not to slow down the ratification of the Maastricht Treaty, the *Conseil d'État* opined that an immediate constitutional amendment was not obligatory. Thereafter, over the next two years, discussion revolved around the compatibility of the Constitution with the Maastricht Treaty and the adequacy of the Art. 114 amendment procedure with regard to European integration. Without modifying Art. 114 at that stage, Arts. 9 and 107 were finally amended by a revision Act of 23 December 1994, permitting the law to confer by exemption the right to exercise political rights on non-Luxembourg nationals.

Secondly, the Constitution initially reserved access to public employment to Luxembourg citizens (Art. 10bis(2), formerly Art. 11(2)). In the aftermath of a judgment of the European Court of Justice (ECJ) from 2 July 1996,[8] the Constitution had to be revised.

Following its previous and invariable case law since 1980, the ECJ indeed held that the general prohibition for non-Luxembourgers to work in the public service exceeded the limits of the exception provided for in Art. 48(4) EC. In not complying with its obligation 'to open the areas in question to nationals of other Member States by restricting application of the nationality condition to only those posts which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities', Luxembourg failed to fulfil its obligations under the Treaty.

In reaction to a draft revision, the *Conseil d'État* did not agree in the first place that a revision was necessary because the Constitution did not formally restrict the access of non-

[8] Case C-473/93 *Commission v Luxembourg* [1996] ECR I-03207.

Luxembourgers to employment in the public service and, hence, would not contradict Art. 48(4) of the (Maastricht) Treaty.

However, in the context of the delivery of its opinion on the bill opening the public service to EU-citizens, the *Conseil d'État* accepted the argument that this proposal would require the revision of Art. 10bis(2) (formerly Art. 11(2)). As a result, Art. 11(2) was then revised in April 1999, stating that the law determines the eligibility of non-Luxembourgers for public employment.[9]

1.2.2 Until 2003, under the original rigid amendment procedure (Art. 114), there were three major constraints to amending the Constitution. First, the requirement to dissolve the *Chambre* after the vote of a declaration to amend nominated provisions of the Constitution and to re-elect the *Chambre*, which then had the power to amend these provisions. Secondly, the assent of the Grand Duke (even though this became a formality after 1919) and, thirdly, a positive vote from two-thirds out of a quorum of three-quarters of the 60 Members of Parliament (MPs) being present. This, in practice, set the required majority at 30 out of at least 45 members present. Consequently, the main constraint was not this so-called 'double qualified majority', but the preceding phases of the declaration to amend, i.e. the dissolution and re-election of the *Chambre*.

The rigidity of the initial procedure was considered to hamper the desired general overhaul of the Constitution as well as quick adaptations to EU requirements. All of the above-mentioned EU-related amendments were however adopted successfully – although sometimes with some delay – under the initial procedure.

In the context of the 1994 revision, regarding the voting rights of EU citizens, there was a rather heated discussion of the need to change the single constitutional amendment procedure in favour of a so-called 'dual' procedure. An attempt had been made to modify the constitutional amendment procedure to provide for two alternative constitutional amendment procedures: a less rigorous (and faster) procedure for amendments needed to ensure conformity with treaty obligations and a more rigorous (and somewhat slower) procedure for all other constitutional amendments. The *Conseil d'État* opposed the creation of such a dual system, preferring to retain a single procedure. The 2003 amendment conserved the single process but shortened the time needed to complete the process, by discarding the requirement for dissolution of the *Chambre* between the first and second votes on a constitutional amendment.

Today any revision thus requires two consecutive votes of the *Chambre* by a majority of at least two-thirds of its members. Voting by proxy is not permitted. There must be an interval of at least three months between the two votes. If within two months of the first vote more than one quarter of the 60 members of the *Chambre* or 25,000 voters submit a petition, the text adopted at first reading is put to a referendum. In this case there is no second reading in the *Chambre*, and the revision is passed if it receives a majority of valid votes. As any revision of the Constitution takes the form of a law, the bills and proposals for constitutional reform follow the normal legislative procedure, unless otherwise specified.

Article 114(2) requires a majority of two-thirds of the members of the *Chambre*, without providing a quorum, but also without permitting proxy voting. Thus, the qualified majority required for the adoption of revision Acts was extended to two-thirds of all members of the House, in total 40 members. This is still a relatively high majority, maintaining the solemnity of constitutional revision and, thus, the rigidity of the Constitution. In practice, most revision Acts are adopted unanimously. Note that since the 2003 amendment, the *Chambre* is clearly

[9] The effective opening of Luxembourg's public service results from the Law of 18 December 2009 and a Grand Duchy Regulation of 12 May 2010 which lists the employment positions that 'involve direct or indirect participation in the exercise of public power' and which are, therefore, reserved for nationals.

the sole holder of revision power. The ability to submit a text adopted on first reading to a referendum is to be regarded as a safeguard in this regard and has not yet been used.

In practice, the formal distinction between constitutional amendment Acts and ordinary legislative acts is blurred by the existence of specific acts, which can only be adopted in accordance with the special majority requirement of Art. 114(2). The Constitution provides for four such cases: ratification of treaties transferring sovereign competences (Art. 37 in combination with Art. 49bis); declaration of war (Art. 37); determination of the number of MPs to be elected in each district (Art. 51); and a nationality condition for mayors and their deputies (Art. 107).

1.2.3 As mentioned in Sect. 1.2.1, the two EU-related amendments adopted in 1994 and 1999 aimed to eradicate explicit conflicts between the wording of the Constitution and the requirements of EU law. Both can be considered as minor amendments, as they simply allowed the legislator to provide for the necessary adaptations allowing nationals of other Member States to exercise rights stemming from EU law in Luxembourg.

No obstacles other than the requirements of the amendment procedure have been encountered, and no external advice from legal scholars or experts has been sought.

1.2.4 Constitutionalising Luxembourg's EU membership has been put on the agenda by the opinion of the *Conseil d'État* of June 2012 on the pending constitutional amendment proposal from April 2009. Although the Grand Duchy is one of the founding states of the European Union, its present Constitution does not contain any reference to this membership or to its constitutional foundations and implications.

A previous parliamentary proposal made by an MP in 2009 to introduce a completely new chapter on the European Union has never been discussed in substance. It was withdrawn from the registry of the *Chambre* without explanation when the Committee on Institutions and Constitutional Amendment started working on the more general proposal of restatement of the Constitution in November 2009.

In its opinion of June 2012, the *Conseil d'État* recommends constitutionalising Luxembourg's participation in the process of European integration via a new Art. 5. Furthermore, the *Conseil d'État* suggests further insertions: a reference to the voting rights of European citizens, an adoption of the ECJ's formula with respect to access to public employment, and codification of the Grand Duke's power to adopt regulations in order to assure compliance with the legal instruments adopted by the European Union, rather than proceeding by parliamentary statute. As previously mentioned, the 2009 Revision Proposal has yet to come to fruition, but a version thereof is expected to be approved sometime in 2016 or 2017.

The Working Draft as it stands in February 2015 contains a total of five proposals for EU-related amendments. The new Art. 5 reads: 'The Grand-Duchy of Luxembourg participates in European integration. The exercise of powers of the state may be transferred to the European Union and to international institutions by an Act of Parliament adopted by qualified majority.' Article 10, on the political rights of Luxembourg citizens, would be supplemented by a second paragraph stating: 'The law organises the exercise of political rights by citizens of the European Union.' Article 11 contains a reference to the ECJ's well-established case law regarding access to public employment. It provides that: 'The law determines access to public employment. It may reserve for Luxembourgers public employment including direct or indirect participation in the exercise of public authority and in the functions having as their object the safeguard of the general interests of the state.' Article 49(3) allows the Grand Duke to 'adopt the necessary regulations for application of the legal acts of the European Union'. Finally, Arts. 90 and 98 provide for the *ex ante* control (through consultative opinions of the

Conseil d'État) and *ex post* review (by binding decisions of the courts) of Acts of Parliament and regulations with regard to 'higher law', namely the Constitution, international treaties, EU legislation and the general principles of law. According to Art. 98, '[t]he courts shall apply Acts and regulations only in so far as they conform to the norms of higher law'.

1.3 Conceptualising sovereignty and the limits to the transfer of powers

1.3.1 Since its amendment in 1956, the Constitution authorises the temporary transfer of the exercise of legislative, executive and judicial powers to institutions established under international law (Art. 49bis). The ratification of such treaties needs to be approved by the *Chambre* following the special two-thirds majority requirement applicable to constitutional amendments (Art. 37).

The Constitution does not contain any explicit rule on the legal value of international or European Law within the domestic legal order. Nonetheless, according to well-settled case law and the position of the *Conseil d'État* as well as Luxembourgish scholars, self-executing international treaties enjoy full primacy with regard to the provisions of internal law, including the Constitution itself.[10]

The case law on this point was developed from the early 1950s when first the *Cour de cassation* (the highest civil court) and subsequently the *Conseil d'État* (as the former highest administrative court) reversed the previous position that judicial control of the compliance of Acts of Parliament with international treaties was not possible because of the principle of separation of powers.[11]

According to the reference decision of the *Conseil d'État* in 1951, 'an international treaty incorporated into domestic law by a law of approval is law of superior essence having a higher origin than the will of an internal organ. It follows that in the case of conflict between the provisions of an international treaty and those of a subsequent national law, international law must prevail over national law'.[12]

The wording of this decision is clearly very wide, as the judgment states without distinction that an international norm prevails over the will of any internal organ. It will be noted, however, that in 1956 the *Chambre* expressly rejected a governmental constitutional amendment bill, which provided that '[t]he rules of international law are part of the national legal order. They supersede all other law and national provisions'. According to this draft, primacy would have encompassed constitutional provisions.

The *Conseil d'État*, however, implicitly accepted such a general primacy in an opinion of 26 May 1992 on the draft Act Approving the EU Treaty. Indeed, it considered that

> it should be borne in mind that under the rule of the hierarchy of legal norms, international law takes precedence before national law and, in the case of conflict, the courts shall dismiss domestic law in favour of the Treaty. As it is important to avoid a contradiction between national law and international law, the *Conseil d'État* insists that the related constitutional amendment take place within due time to prevent such a situation of incompatibility.

In the case of conflict of an international or European engagement with the Constitution or legislative acts, national standards should be subject to a constitutional revision or amendment before the international commitment is approved by the competent national

[10] Kinsch 2010, p. 399.
[11] *Cour de cassation, arrêts des 8 juin 1950*, Pasicrisie lux. 15, p. 41, et 14 juillet 1954, *Chambre des métiers c. Pagani,* Pasicrisie lux. 16, p. 151; JT 1954, p. 694, note Pescatore 1962.
[12] *Conseil d'Etat*, (*Comité du contentieux*), 28 *juillet* 1951, *Dieudonné c/ Administration des contributions*, Pas. lux. t. XV, p. 263.

authorities. Once approved, the respective international norms enjoy, in the pure monistic tradition, full primacy over rules of domestic law, even of constitutional value.[13]

This rule also applies to the secondary legislation of the European Union.[14] All (civil and administrative) courts have accepted the full supremacy and direct effect of EU law in the very terms of the ECJ's case law, to which they regularly refer.

Acts of the *Chambre* approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95*ter*(2)). In Luxembourg, this is considered as a consequence of the primacy of international treaties. In effect this means that cases such as *Lisbon* and *ESM* in Germany cannot arise in Luxembourg. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's competence. Until now, no such Act has however been submitted to the Constitutional Court as a preliminary question by an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing secondary EU legislation.

1.3.2 Luxembourg's Constitution has never been based on a conception of absolute sovereignty. In the absence of any clause on the transfer or delegation of sovereignty, the *Conseil d'État* stated already in 1952 that 'a state may and must renounce certain parts of its sovereignty if the public good, the ultimate purpose of the state's organisation, requires it'.[15] As the Constitutional Court may not review the constitutionality of Acts approving international treaties, there is no pertinent case law from this court.

One of the particular characteristics of Luxembourg's domestic legal order lies in the fact that its very existence results from international law. Established as an independent state by the Final Act of the Congress of Vienna of 9 June 1815, the Grand Duchy's independence was confirmed by the Treaties of London of 19 April 1839 and 11 May 1867. Therefore, far from constituting a threat to national sovereignty, international law is understood in Luxembourg as a 'vital guarantee of the existence and survival of the state'.[16] Moreover, Luxembourg's courts have had no difficulty in recognising the pre-eminence of international law and the primacy of EU law, including in respect of a constitutional provision.[17] This state of affairs also explains why it was not considered necessary to write a provision into the Constitution that would more explicitly authorise transfers of competences to the Union.

In Luxembourg, the Constitution long ago ceased to be the only supreme law. At the time of ratification of the Maastricht Treaty, some criticised the 'suspension' of the Constitution which occurred, in that ratification of the Treaty took place before the constitutional amendment giving citizens of the Union the right to vote in municipal elections.[18] There is now a consensus about the existence of a set of norms ranked as supra-legislative and designated by the term 'higher law', comprising the Constitution, international law and the general principles of law. It is within the remit of the *Conseil d'État* to monitor the compliance of draft bills and draft regulations with these rules of higher law. The amended Act of 12 July 1996, reforming the *Conseil d'État*, states in its Art. 2(2) that '[i]f it considers a draft bill to be contrary to the Constitution, to international agreements and treaties, or to

[13] *Cour d'appel, arrêt du 13 novembre 2001*, No. 396/01 V, *Annales du droit luxembourgeois*, 2002, éd. Bruylant, p. 456. *Cour supérieure de justice (assemblée générale), arrêt du 5 décembre 2002, No. 337/02, Annales du droit luxembourgeois*, 2003, éd. Bruylant, p. 683.
[14] Conseil d'Etat, 21 novembre 1984, Pasicrisie lux. 26, p. 174.
[15] Opinion on the Ratification of the ECSC Treaty, doc. parl. No. 395/2, p. 3.
[16] Cf. Wiveness 2002, p. 267 et seq..
[17] Cf. Pescatore 1962, p. 97 et seq., Wiveness 2002 p. 21, Kinsch 2010, p. 399.
[18] Cf. Bonn 1992.

the general principles of law, the *Conseil d'État* shall state this in its Opinion. It shall do the same, if it considers a draft regulation to be contrary to a rule of higher law'.

1.3.3 There are no limits *ratione materiae* with regard to the extent to which powers can be transferred to the EU, as there are no such limits to constitutional amendments in general. Neither the text of the Constitution nor case law nor constitutional commentary refer to such limits under Luxembourgish law.

The Grand Duchy is an 'independent' state (Art. 1). The same statement appeared in the previous constitutional texts of 1848 and 1856. These earlier constitutions, however, very clearly put this independence into perspective by going on to declare that Luxembourg was 'part of the German Confederation'. The 1856 text went even further by stating that the Grand Duchy 'participates in the rights and obligations arising from the Federal Constitution. These rights and these obligations cannot be derogated by the internal legislation of the country'.

Be it a matter of the past within the German Confederation or of the present within European integration, the constitutional proclamation of independence has never stopped the Grand Duchy from participating in integration exercises with a constitutional dimension. Moreover, at no time has the preservation of the independence of the state ever been seriously discussed as a possible limit to Luxembourg's participation in the European integration process.[19]

Its successive incorporation in the German Confederation (1815–1866), the '*Zollverein*' (1842–1918), the Belgo-Luxembourg Economic Union (from 1921) and the Benelux Union (from 1944) have, on the contrary, enabled Luxembourg to acquire indispensable experience for being prepared for the legal implications of its membership of the European Communities and Union.

The unfortunate wording of Art. 49*bis* allowing transfers of such powers to international institutions only temporarily has been interpreted very widely and has not in practice prevented any transfer of competencies to the EC or the EU, which are known to be based on treaties concluded for unlimited duration.

Article 5 of the pending Working Draft will thus remove this inconsistency, stating: 'The exercise of state powers can be transferred to the European Union and international institutions by a law adopted by qualified majority.'

1.3.4 The Constitution is silent about its status as supreme law in the national legal system. The Constitutional Court can be asked through preliminary questions from the ordinary courts to review the constitutionality of legislative acts (Art. 95ter). However, its judgments have only declaratory value. An Act declared contrary to an article of the Constitution will have to be set aside by the ordinary court that raised the question and all other courts that intervene in the same case. It will, however, remain in force unless the *Chambre* adopts an Act to modify or abrogate it. In practice, the *Chambre* has decided in several such cases to amend the Constitution in order to abolish the inconsistency, rather than to modify the legislative act. Finally, as a consequence of the supremacy of the Constitution, none of its provisions may be suspended (Art. 113).

Legislative acts approving international treaties are explicitly excluded from the competence of the Constitutional Court (Art. 95ter (2)). This is understood in Luxembourg as a consequence of the primacy of international law.

More than an EU-friendly interpretation, the Luxembourgish courts have adopted an attitude of deference towards international law in general and EU law in particular, often

[19] Cf. Wiveness 2002, p. 267 et seq.

echoing the case law of the ECJ word for word. Indeed, since the 1950s they have confirmed that international treaties enjoy primacy over domestic law because they are considered as higher law in essence.

1.4 Democratic control

1.4.1 Luxembourg's Constitution does not contain specific amendments concerning the rules governing the participation of the *Chambre* in EU affairs. Although Prime Minister Juncker suggested such an amendment in the course of the ratification procedure of the Lisbon Treaty in 2009, the *Chambre* did not accept his proposal. It allegedly feared that it was not sufficiently staffed to face this responsibility.

Thus it is a simple 'Memorandum on Cooperation between the *Chambre* and the Government of the Grand Duchy of Luxembourg in the Field of EU Policy', which is annexed to the rules of procedure of the *Chambre,* that governs the rights and duties of both institutions in this respect.[20] Introduced on 7 May 2009, this memorandum contains in particular rules on the right of the *Chambre* to be informed on issues of European policy.

The Lisbon Treaty recognises the right of national parliaments to contribute actively to the good functioning of the Union (Art. 12 TEU). From the review of official documents of the European institutions to the transposition of directives into national law, the action of the *Chambre* in the political sphere of the European Union is thus manifold.

National parliaments are indeed involved by monitoring the activity of their respective national governments on the European level. In the Grand Duchy of Luxembourg, a parliamentary committee invites the ministers to its sessions before and after Council meetings.

The *Chambre* contributes to the monitoring of respect of the subsidiarity principle laid down in the Treaty of Lisbon.[21] Beyond these two main powers, the *Chambre* participates in inter-parliamentary cooperation within the Union. Inter-parliamentary meetings are held mainly within the framework of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) and the Conference of Presidents of Parliaments of the European Union. Information on the analysis of EU documents is transmitted between national parliaments through the platform for EU Interparliamentary Exchange (IPEX) database.

The control exercised by the *Chambre* over the Government in the field of European affairs appears altogether rather modest compared to practices in other Member States. There are no elements of this control that merit recommendation more widely as a best practice.

1.4.2 Direct democracy only plays a limited role in Luxembourg's parliamentary system. Introduced in 1919 for legislative matters (Art. 51(7)) and in 2003 for constitutional amendments (Art. 114), referendums have only been organised three times: in 1919 on the dynastic question and on economic union to be concluded with France or Belgium; in 1937 on a bill allowing dissolution of the Communist party; and in 2005 on the Treaty establishing a Constitution for Europe. An Act of 4 February 2005 lays down the more detailed rules on the organisation of referendums.[22]

The very first referendum on constitutional amendment will most likely be organised in early 2018 on the currently pending Revision Proposal. On 7 June 2015, three questions

[20] *Aide-mémoire sur la coopération entre la Chambre des députés et le Gouvernement du Grand-Duché de Luxembourg en matière de politique européenne*.
[21] See Gennart 2013.
[22] *Loi du 4 février 2005 relative au referendum au niveau national*, Memorial A, n° 27 of 3 March 2005, p. 548.

regarding the debated elements of the future Constitution have been put to a consultative referendum. One question related to granting voting rights to foreign residents in national elections. The two others were on reducing the minimum age of voting and limiting the duration of ministerial mandates. All three proposals have been rejected.

The only referendum related to EU matters was held on 10 July 2005 on the ratification of the Treaty establishing a Constitution for Europe.[23] As a result, 56.52% of the voters said 'Yes'. Luxembourg is indeed regarded as one of the EU's most enthusiastic Member States, and most prominent political figures supported the Constitution for Europe, with both the governing coalition and the main opposition parties campaigning for a 'Yes' vote. On 28 June 2005, the *Chambre* had already approved the ratification of the treaty at its first reading. The poll was consultative in nature, but Parliament agreed to abide by the people's majority vote. The then Prime Minister Jean-Claude Juncker said he would resign if the referendum resulted in a 'No' vote.

In connection with this referendum, the question arose whether EU citizens other than Luxembourgish citizens should be allowed to vote, which was finally decided in the negative.[24] The statement of reasons of the Act on the basis of which the referendum was organised does not refer to any specific rationale as to the constitutional procedure chosen to approve the Treaty establishing a Constitution for Europe. However, the draft Act concerning this referendum notes that:

> While the referendum is, from the legal point of view, of advisory character, the legislature will nevertheless feel politically bound by the popular verdict. Therefore, it is necessary to measure the challenges raised by the consultation to be held on 10 July 2005. Due to the exceptional nature of referendums in our history, the results will leave a lasting imprint on the political life of our country.

1.5 The reasons for, and the role of, EU-amendments

1.5.1 As mentioned above (Sect. 1.2.1), EU-related amendments have been limited to the strictly necessary in order to overcome constitutional provisions that had become contrary to EU law achievements: namely the right of workers from other Member States to have access to employment (Art. 45 TFEU) and the right of citizens of the EU to vote and to stand as a candidate in European Parliament and municipal elections.

1.5.2 The absence of EU-amendments is characteristic for such a very small Member State, founded by international treaties and in which integration into the EU is perceived as a question of national interest.

The rigidity of the initial constitutional revision procedure certainly dissuaded Luxembourg from passing constitutional amendments that were not considered absolutely necessary. Twice, in the 1950s and in the 1990s, Luxembourg tolerated what were most likely unconstitutional treaty ratifications in order not to slow down the entry into effect of the ECSC and Maastricht treaties. A prior constitutional amendment would indeed have required the dissolution and re-election of the *Chambre*.

Luxembourg's constitutional culture, which may be summarised as pragmatic and somewhat deferent to international and European law, also explains to some extent the sentiment that EU-related amendments are superfluous. In addition, the level of public

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[23] *La loi du 14 avril 2005 portant organisation d'un referendum national sur Traité établissant une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004*. For discussion concerning this referendum see Dumont et al. 2012.

[24] P. 3 of the *Projet de loi portant organisation d'un référendum national sur le Traité établissant une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004*, parl. doc. No. 5443.

support for the EU has always been one of the highest throughout the Union and is shared by all political parties in Parliament. European integration has never been conceptualised in Luxembourg as a threat to constitutional rules, principles or values. Thus, only constitutional rules that have become explicitly contrary to requirements of EU law have been amended.

In the past, several scholars have underlined the fact that the current Constitution has to some extent become obsolete and urgently needs to be adapted in order to eradicate all the 'fictions' stemming from a wide difference between the old written document and the current constitutional practice.[25] It was not, however, until the advisory opinion of the *Conseil d'État* of June 2012 on the pending Revision Proposal that the introduction of EU related amendments were put on the agenda. The initial revision proposal as tabled in April 2009 by the Committee on Institutions and Constitutional Amendment only addressed internal constitutional issues.

Concerns with regard to 'waning constitutionalism' that have indeed been expressed in Luxembourg were in fact never linked to missing EU clauses but to the growing difference between the text and practice of the Constitution. As direct effect and primacy of EU law have never been put into question in the Grand Duchy, it was rather argued that the introduction of specific constitutional clauses with regard to the EU was unnecessary.

1.5.3 Within the EU, the far-reaching exercise of powers at supranational level requires a set of constitutional rules ensuring that these powers are exercised according to shared constitutional values and in the respect of a common standard of fundamental rights. This set of rules can only result from 'European constitutional law' understood here as a combination of the Member States' national constitutions, the 'EU constitution', the ECHR and the Charter of Fundamental Rights of the EU. The harmonious coexistence of these different legal sources and their complementary relation needs to be organised by clauses of reciprocal reference and mutual respect. In this understanding, 'Europe clauses' in the national constitutions have an important role to play, as it is shown for instance by Art. 23 of the German Basic Law. It is important to amend the national constitution in order to contribute to ensuring that the exercise of delegated powers on the Union level observes the same standards as exercise on the national level. Amendments should at least include a general clause on membership within the EU, a clause on the transfer of powers and its limits and a clause on the participation of the national parliament in EU affairs.

Luxembourg's experience as one of the founding members shows, however, that it is also possible to participate successfully in the process of European integration for more than sixty years without any amendment of the Constitution referring explicitly to the EU or EU law and on the foundation of a constitutional provision that allows only temporary delegation of powers to international institutions. The absence of a Europe clause has never been considered as a lacuna endangering constitutional values or fundamental rights standards. The intended amendments within the current revision procedure are rather seen as a commitment to European integration and an overdue adaptation of the Constitution to the legal reality.

2 Constitutional rights, the rule of law and EU law

2.1 The position of constitutional rights and the rule of law in the Constitution

2.1.1 The Constitution contains Chapter II 'On public freedoms and fundamental rights' (Arts. 9 to 31). This chapter has been construed progressively through different constitutional

[25] See the explanatory memorandum to the 2009 amendment proposal, doc. parl. 6030/01 and the included references.

amendments. It is relatively brief and combines different types of safeguards (acquisition of citizenship, human rights, political rights, economic and social rights) without, however, embracing a clear structure. Some widely recognised principles such as a general prohibition of discrimination or a general requirement of fair trial are missing. On the whole, compared to other domestic constitutional or international documents dealing with fundamental rights, Chapter II of the Luxembourgish Constitution appears fragmentary.

The general principles referred to above are not expressed as such, although the principle of legal certainty transpires through several specific constitutional safeguards such as the right to a judge, the principle *nulla poena sine lege* and the prohibition of unlawful expropriation. Moreover, the principle of proportionality is anchored in the current draft of the 2009 Revision Proposal as one of the parameters to be taken into account when restrictions to fundamental freedoms are envisaged.[26]

The 2009 Revision Proposal appears more ambitious, as it introduces a wider range of safeguards and their better organisation. Having said that, while the suggested changes to the organisation have been inspired by the Charter of the Fundamental Rights of the European Union[27] (Charter), this draft has been already criticised because some safeguards that are typically anchored in international human rights instruments are missing.[28]

The most relevant fundamental rights and public freedoms are discussed in Sects. 2.3–2.5.

The judicial enforcement of the constitutional safeguards is primarily a matter for the domestic ordinary courts, as opposed to the Constitutional Court, the competence[29] (and history[30]) of which are rather limited compared to other European constitutional courts. It can only review Acts of Parliament upon a preliminary request made, in a given proceeding, by an ordinary court. Private parties are not allowed to file individual complaints. Moreover, the Constitutional Court has not been endowed with the competence to assess the relation between the Constitution and international law, including such instruments as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In this respect also it was for the ordinary courts to set the standard, which they did when the *Cour d'appel* (Court of Appeal) confirmed that the ECHR takes precedence over domestic rules, including the Constitution.[31]

Within its limited scope of action, the Constitutional Court has 'progressively' interpreted Art. 14 of the Constitution in particular[32] and extended the narrowly drafted principle of equality beyond the text of the Constitution: while the text of the Constitution reserves this principle for Luxembourgish citizens only, the Constitutional Court has extended it to

[26] See above Sect. 2.1.2.

[27] See the explanatory memorandum to the initial draft of the Constitution revision: 'For Chapter 2 on civil liberties and fundamental rights, the Commission on Institutions and Constitutional Revision proposes a new structure arranged like the Charter of Fundamental Rights of the European Union, around the terms dignity, equality and freedom. The guarantees in the social and economic field as well as in the environment, and the rights that citizens can claim when facing the public administration are organized under the terms solidarity and citizenship'. Doc. parl. No. 6030, p. 6.

[28] See Spielmann 2011, p. 582, referring to the opinion of the *Commission européenne pour la démocratie par le droit (Commission de Venise*), opinion No. 544/2009, CDL-AD(2009)059.

[29] See Gerkrath 2008, p. 9.

[30] The Luxembourgish Constitutional Court started its work in 1998, and as of February 2015 has issued 116 judgments.

[31] CSJ (appel corr.), 13 November 2001, No. 396/01, see Friden and Kinsch 2001. On the relation between the Luxembourgish Constitutional Court and the ECHR, see Ravarani 2001, pp. 37–42.

[32] Spielmann 2011, p. 578 and p. 583. For the interpretation of Art. 14 of the Constitution, see judgments of the Constitutional Court, No. 12/02 of 22 March 2002, Mém. A - 40 of 12 April 2002, p. 672; (on this judgment see Braum 2008, p. 77); No. 23/04 and 24/04 of 3 December 2004, Mém. A - 201 of 23 December 2004, p. 2960; No. 41/07, 42/07 and 43/07 of 14 December 2007, Mém. A - 1 of 11 January 2008, pp. 2–8.

foreigners,[33] holding that the principle of equality 'is applicable to each individual concerned by Luxembourgish law, if rights or personality are concerned'.[34] On the other hand, commentators have noted the restrictive approach embraced by the same Constitutional Court in respect of citizenship (*nationalité*). According to some, this case law is at odds with the approach embraced by the European Court of Human Rights (ECtHR).[35]

As the constitutional restatement intends to abolish the existing Constitutional Court, it will be up to a new supreme court to ultimately decide on the conformity of Acts of Parliament with the Constitution and international treaties. Provisions that are declared contrary to the Constitution or international treaties would then become invalid after the publication of the judgment (Art. 98(2)). The main reason for abolishing the Constitutional Court seems to be the wish to unify the judicial system under one Supreme Court and the resulting possibility for that court to merge review of conformity with international treaties and review of conformity with the Constitution.

2.1.2 The Constitution does not foresee a provision equivalent to Art. 31(3) of the Polish Constitution. However, the latest Constitutional Working Draft contains a new disposition which reads as follows:

> Any limitation on the exercise of fundamental rights, civil liberties and the rights of the person subject to legal proceedings as provided for by the Constitution must respect their essential content. In accordance with the principle of proportionality, limitations may be made only if they are necessary in a democratic society, and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others.

Concerning limitations to the principle of equality (Art. 10bis) by legislative acts, the Constitutional Court has developed a specific doctrine. According to its jurisprudence, legislative acts may submit certain categories of persons to different legal regimes as far as this difference proceeds from objective disparities, is rationally justified, adequate and proportionate to its aim. This formulation will be codified within Art. 16 of the Constitutional Working Draft.

2.1.3 The concept of the rule of law does not appear as such in the text of the Constitution. As noted above, the Constitution nevertheless contains specific expressions of the principle of legality, such as safeguards in the context of criminal proceedings (Arts. 12 to 14), and the prohibition of expropriation without statutory basis, fair compensation and for reasons other than for a public cause (Art. 16).

The notion of the rule of law (*État de droit*) appears in the current Working Draft which foresees the following new wording of Art. 2 of the Constitution: '[Luxembourg] is based on the principles of the rule of law and respect for human rights.'[36]

Article 13 of the Constitution guarantees the right of a person not to be reassigned, against the person's will, to a court other than that designated by law. Article 86 of the Constitution spells out another aspect of the regular administration of justice by foreseeing that no court can be established otherwise than by law, and by prohibiting the establishment of extraordinary courts.

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[33] *Cour constitutionnelle*, 13 November 1998, No. 2/98.

[34] See also the judgment of the Appeal Court (4th ch.) of 6 November 2013: '[T]he constitutional principle of equality is applicable to all individuals affected by Luxembourgish law, and violation of this principle can be raised by a foreigner.' For a comment see Kinsch 2014, pp. 84–85.

[35] Spielmann 2011, p. 585.

[36] See in this respect Ergec 2009, pp. 180–184.

As regards the enforcement of constitutionally guaranteed rights, it should be noted that private parties do not have direct access to the Constitutional Court. However, the ordinary courts have the possibility to seize the Constitutional Court with a preliminary ruling request concerning the constitutionality of an Act to be applied in the pending proceedings. More specifically, when a party raises a question as to the conformity of a law with the Constitution before a court, the latter has to seize the Constitutional Court unless it considers that a decision on such a question is not necessary, the question is unfounded or that the Constitutional Court has already ruled on it.[37]

Also, '[c]ourts and tribunals may apply general and local decisions and regulations only in so far as these comply with the laws' (Art. 95). The notion of 'laws' has been given a broad meaning, encompassing also the domestic Constitution and international treaties.[38] In this way, the ordinary courts can reach out to the constitutional safeguards as well as to international safeguards related to fundamental rights, with the latter taking precedence over the former.

The rule that only published laws can be valid is anchored in the Constitution: 'Any law, order or regulation of general or municipal administration is not binding until it has been published in the form determined by law' (Art. 112). Further details on the requirement of publication of laws are provided in Sect. 2.5.

The principles of legal certainty and non-retroactivity, and the principle of *nulla poena sine lege* are anchored in Arts. 12 and 14 of the Constitution. However, these provisions do not explicitly contain some of the specific aspects of these principles mentioned above, such as the applicability of these principles to administrative matters or a general prohibition of retroactivity.

2.2 The balancing of fundamental rights and economic freedoms in EU law

2.2.1 The balancing of fundamental rights with economic free movement rights has not raised any constitutional issues in Luxembourg to date. No relevant case law has been developed on this question before or after the ECJ's judgments in *Schmidberger* and *Omega*.[39] In the Expert's view, the domestic courts would give precedence to free movement rights guaranteed by the EU treaties over fundamental rights enshrined in the Constitution unless consistent interpretation were possible.

2.3 Constitutional rights, the European Arrest Warrant and EU criminal law

2.3.1 The EAW and the presumption of innocence

2.3.1.1 The European Arrest Warrant Framework Decision[40] (EAWFD) was introduced in Luxembourg by virtue of the *Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre États membres de l'Union européenne* (Act of 17 March 2004), published in Mémorial A n° 39 of 22 March 2004, and modified later with the *Loi du 3 août 2011* (the Act of 3 August 2011).

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[37] See Article 95ter of the Luxembourgish Constitution and Act dated 27 July 1997 *portant organisation de la Cour Constitutionnelle* (creating the Constitutional Court).
[38] *Cour adm*. 8 December 2011, No. 28818 C.
[39] Case C-112/00 *Schmidberger* [2003] ECR I-05659 and Case C-36/02 *Omega* [2004] ECR I-09609.
[40] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

The *Conseil d'État* is considered to be the 'Guardian of the Constitution' with an advisory function to control *a priori* all proposals and bills referred to it by the Grand Duke and the Government. As an advisory organ, the *Conseil d'État* was called to give its Opinion regarding the compatibility of the EAWFD bill with the 'norms of higher law', that is, the Constitution, international treaties and the general principles of law.[41]

No specific references or concerns regarding the principle of the presumption of innocence are found in the Opinion. Neither have the national courts had the opportunity to address this principle in the context of the European Arrest Warrant (EAW). According to the legal commentary, the principle of the presumption of innocence constitutes a general principle of Luxembourgish law, which draws its content from Art. 6(2) ECHR and Art. 14(2) of the International Covenant on Civil and Political Rights.[42]

There is considerable discussion in the Opinion on the nature of the legal instrument (a framework decision) which was selected to address and regulate, on the EU level, an issue closely linked to the exercise of state sovereignty. Specifically, the *Conseil d'État* considered whether the EAWFD would affect Luxembourg's international obligations under other international treaties on extradition. After examining the relevant provisions, the *Conseil d'État* concluded that there is no incompatibility between them and the EAWFD.[43]

According to the *Conseil d'État*, the EAWFD does not raise any difficulties in Luxembourg's constitutional order, because the Framework Decision was adopted by unanimity and had no binding effect until it was transposed into national law.[44] The legal instrument of the EAWFD is justified for a number of reasons: it is of a general nature and does not seek to introduce a specific procedure for prosecuting certain forms of criminality; the objective of creating a European area of justice imposes the obligation to reduce obstacles to cooperation on criminal investigations or the enforcement of penalties between the judicial authorities of Member States as much as possible. Even though the EAWFD may resemble a EU directive, it still constitutes an instrument of intergovernmental cooperation.

The *Conseil d'État* has emphasised the traditional character of extradition requests between sovereign states and underscored the special interest that a country of the size of Luxembourg has in the issue of extradition. It is not surprising that extradition was the subject of an early domestic Act incorporating the provisions of international treaties on extradition. Luxembourg was among the states to sign and ratify the European Convention on Extradition of 13 December 1957, and the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962.

Following this tradition, the *Conseil d'État* is of the view that the simplification of the rules and procedures on the extradition mechanism is compatible with the efforts on the European level to intensify the collaboration between Member States. The *Conseil d'État* recognises, however, that the EAWFD has caused a rupture between the extradition law based on international conventions and the new European area of justice.[45] It is no longer the executive organs that decide whether it is appropriate to grant an extradition request, but the judicial authorities that decide to extradite a person by applying a European arrest warrant. The Government, through the Ministry of Justice, intervenes only when there is a conflict between a European arrest warrant and a request for extradition by a third state.

The relevant constitutional provisions are the following: 'No one may be prosecuted except in the cases specified by the law and according to the prescribed procedure. No one may be arrested or detained except in the cases specified by the law and according to the

[41] Opinion *Conseil d'État* of 19 December 2003, doc. parl. No. 5104/1.
[42] Penning 2013, p. 103.
[43] Opinion No. 5104/1, n. 41, p. 3
[44] Ibid.
[45] Ibid., p. 2

prescribed procedure. Every person must be informed without delay of the means of legal recourse they have at their disposal to recover their freedom' (Art. 12). 'No one may be deprived against his will of the judge that the law assigns to him' (Art. 13). 'No penalty may be established or applied except by virtue of the law' (Art 14).

According to the 2009 Revision Proposal, the new relevant provisions introduce some minor additional safeguards to the aforementioned articles. According to Arts. 18, 19 and 20 of the new draft, no one may be prosecuted, arrested or deprived of his liberty except in the cases provided by law and in the form prescribed. No one can be arrested except by a reasoned order of a court, which must be served at the time of the arrest or at the latest within 24 hours. Everyone shall be informed promptly of the reasons for his arrest or deprivation of liberty, the charges against him and the legal remedies available to regain their freedom. Everyone has the right to have his case brought before a court established by law. No penalty may be established or applied except by virtue of the law.

Finally, it is worth mentioning that the Act of 17 March 2004, which transposed the EAWFD in Luxembourg, provides in Art. 18 that if the issuing authorities intend to prosecute the surrendered person for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, they are obliged to submit a request for consent to the Luxembourgish authorities. Consequently, Luxembourg preserved its entitlement to the 'speciality' rule referred to in Art. 27, and no consent on behalf of Luxembourg can be presumed if the surrendered person is prosecuted (or sentenced or detained) for an offence other than the offence providing grounds for the EAW.

2.3.1.2 Because of the general character of the crimes listed in the EAWFD, the *Conseil d'État*, quoting the example of the Belgian legislator, proposed in its Opinion that the judicial authorities in Luxembourg, upon receiving a European arrest warrant, should exercise a judicial review in order to assess whether the facts of the case fall within the definition of the crimes listed in the EAWFD.

However, the Legal Committee of the Parliament decided not to follow the suggestion of the *Conseil d'État*.[46] The reasoning was that such a judicial review, provided in law, might be interpreted by the courts as a thorough and substantial judicial review of an extradition request.[47] According to the Committee's reasoning, even if the law does not expressly provide for a judicial review, the judicial authorities in Luxembourg would still exercise some kind of judicial review. The exercise of such judicial review would not provoke any difficulties, because the general concepts of the crimes listed in the EAWFD are already recognised and have a common connotation in Luxembourgish law. The Parliamentary Committee underlined that in any case, the judicial authorities in Luxembourg would still have the possibility to submit a request for a preliminary ruling to the Court of Justice of the EU, in case of difficulties in interpretation.

Article 7 of the Act of 17 March 2004 provides for the procedure for execution of an EAW. When the requested person is arrested, the executing judicial authority shall inform the person of the European arrest warrant and of its contents, of the possibility of consenting to surrender to the issuing judicial authority and also of his or her right to be assisted by legal counsel and by an interpreter, if necessary. Within 24 hours of his or her arrest, the requested person is brought before a judge, who controls the person's identity. A hearing takes place on the issue of detention, where the judge takes into consideration both the facts mentioned in the EAW and the person's statements. The requested person may at any time submit a request for his or her release to the *Chambre du Conseil du tribunal d'arrondissement.* The latter

[46] *Rapport no 5104/4 de la Commission Juridique de la Chambre des Députés* of 3 March 2004, hereinafter the 'Report'.
[47] Ibid., p. 7.

shall order his or her release only if the procedure of arrest has been irregular, and this irregularity has brought about a grave violation of his or her human rights, or if there are safeguards from which the requested person will not benefit if surrendered to the issuing state.

According to the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), the role of the executing judicial authorities is not to deliver a judgment on the innocence of the requested person, but to apply the Act of 17 March 2004 and review whether all the legal requirements have been met for his or her surrender after the issue of an EAW.[48] The review does not constitute a review of evidence but a review of the legal conditions for the applicability of the law.

According to research conducted by the Service of Legal Documentation of the *Parquet General* (Public Prosecutor's Office) in Luxembourg, as at 26 January 2015 there have been five cases brought before the *Tribunal d' Arrondissement de Luxembourg* (District Court) regarding extradition requests in the context of the EAWFD. None of them have involved a claim of innocence by the arrested person.

There was one case in which the *Procureur General d'État* (Attorney General of the State), by virtue of Art. 5(6) of the Act of 17 March 2004, refused to extradite a person who was born in Luxembourg because execution of the sentence in Luxembourg was deemed more appropriate given the person's links to Luxembourg.[49] In another case, the arrested person resorted to the Luxembourghish court claiming health reasons in order to avoid extradition to another Member State. The claim was not accepted by the court, as health reasons do not constitute a legal obstacle to extradition under the EAWFD regime.[50]

2.3.2 Nullum crimen, nulla poena sine lege

2.3.2.1 In its Opinion on the bill transposing the EAWFD in Luxembourg, the *Conseil d'État* clearly stated that the abolition of the rule of double criminality in the context of the EAWFD would not affect the principle of legality of crimes. According to the Opinion, even if the act committed within the territory of the issuing state may not constitute a criminal offence in the state being asked to execute the extradition, the criminal prosecution of the perpetrator does not violate the principle of *nullum crimen sine lege* (or the principle of *nulla poena sine lege* in the case of a European arrest warrant for enforcement of a custodial sentence), because of the principle of territoriality of criminal law. The reasoning is that the person concerned, when committing the act, was on the territory of the issuing state and was required to respect the laws of that state, even if they differ from those of the state of execution of the European arrest warrant.[51] However, in its conclusion, the *Conseil d'État* expressed some reservations with regards to the crimes listed in the EAWFD in a generic way, as such a general list may contribute to legal uncertainty.

The Legal Committee of the Parliament provided a detailed analysis on the rule of double criminality in the context of the EAWFD. According to the Report, the text of the Framework Decision is a compromise between two different approaches: the first approach calls for a mechanism of mutual recognition of all the judgments in criminal matters rendered by the Member States' judicial authorities; the second approach focuses on the prior harmonisation of criminal law at the EU level before the systematic recognition of the decisions of the

[48] Interview with the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), Jeannot Nies, conducted on 27 February 2015.
[49] No. Judoc: 99864977, *Tribunal d'Arrondissement de Luxembourg*, 109/19.01.2007.
[50] No. Judoc: 99864974, *Tribunal d'Arrondissement de Luxembourg*, 2369/12.12.2006.
[51] Opinion No. 5104/1, n. 41, p. 4.

Member States. The mutual recognition of judicial decisions without prior harmonisation of the relevant criminal legislation presupposes abandonment of the rule of double criminality.

The Parliamentary Committee recalled that the principle of double criminality does not require the elements of a particular offence to be the same in the two states concerned or to fall under the same qualification. In order to reconcile the conflicting positions of individual Member States, some of which are in favour of the complete abolition of the principle of double criminality while others seek to maintain what they consider as an elementary procedural guarantee, the EAWFD maintains the rule of double criminality except in the case of 32 offences set out in a generic list. According to the Report, the rule of double criminality is not abolished between Member States, except for with regard to offences that are considered to be particularly serious. The system in place is a 'variable geometry system'.[52]

There is no case law dealing with the principle of legality of crimes or the abolition of the rule of double criminality in the context of the EAWFD. The relevant constitutional provision is Art. 14, which has been transposed *mutatis mutandis* in Art. 20 of the new draft Constitution: 'No penalty may be established or applied except by virtue of the law.'

2.3.3 Fair trial and in absentia *judgments*

2.3.3.1 No constitutional issues regarding *in absentia* judgments have been raised. National courts have not had the opportunity to revisit the standard of protection for *in absentia* judgments in the context of the EAWFD.

The right to have access to the courts is provided in Art. 13 of the Constitution and in the new Art. 19 of the draft Constitution. The national courts have not dealt with the protection of this right to date. According to legal commentary in Luxembourg, the national courts would likely apply Art. 6 ECHR as such, and not the general principles of EU law regarding the protection of this right.[53]

Article 19 of the Act of 17 March 2004 provides that where the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives adequate assurance that the person who is the subject of the European arrest warrant will have an opportunity to apply for a retrial of the case in the issuing Member State, and to be present at the hearing. The *Conseil d'État* did not have any observations regarding this provision that transposes Art. 5 (1) of the EAWFD.

2.3.4 The right to a fair trial – practical challenges regarding a trial abroad

2.3.4.1 The issue of surrender of nationals was raised both in the discussions of the *Conseil d'État* and of the Legal Committee of the Parliament in the process of adopting the Act of 17 March 2004. Luxembourg had made a reservation to the European Convention on Extradition of 13 December 1957, stating that there would be no extradition of Luxembourg citizens (and residents with strong links to Luxembourg) to other states. Article 7(1) of the Act of 20 June 2001 on extradition incorporates this reservation by stating that Luxembourg shall not extradite Luxembourg nationals. In the context of the EAWFD, the *Conseil d'État* pondered on whether such a rule is out of date, and underlined the political reluctance to abandon this

[52] Report No. 5104/4, n. 46, p. 3
[53] Wiveness 2000.

rule. Both the *Conseil d'État* and the Legal Committee of the Parliament have recognised that the obligation to extradite nationals constitutes a necessary step for the creation of the European area of freedom, security and justice.

However, Art. 20 of the Act of 17 March 2004 provides that where a person who is the subject of an EAW for the purposes of prosecution is a national of Luxembourg, surrender may be subject to the condition that the person, after being heard, is returned to Luxembourg in order to serve the custodial sentence or detention order passed against him in the issuing Member State. The same applies for residents of Luxembourg who have established links with the country. This provision enacts the requirements of Art. 5(3) of the EAWFD.

The *Conseil d'État* has emphasised that the requirements of Art. 12 of the Constitution need to be taken into consideration upon an arrest in the context of the EAWFD. Article 12 refers to the right to liberty and to protection from illegal arrest. According to the *Conseil d'État*, the type of hearing that would be granted to the arrested person when brought before the national court was not clear in the proposed bill. Although verifying the identity of the arrested person is considered appropriate, it is hardly conceivable that the national judge could conduct an investigation on the facts and the charges against the requested person. The judge is limited in principle to asking the person whether he intends to make any statements about the facts which form the basis of the European arrest warrant and to acknowledging and registering these statements, thereby complying with the provisions of Art. 14 of the Framework Decision.

Pursuant to this proposal, Art. 8 of the Act of 17 March 2004 provides that the arrested person should be brought before an investigative judge within 24 hours of the arrest. The investigative judge registers any statements the arrested person may declare and provides a hearing regarding his or her detention. The investigative judge decides whether the arrested person will be held in detention on the basis of the arrest warrant, by taking into consideration the circumstances of the case and the statements of the arrested person.

As underlined by the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), travels expenses are always covered by the issuing authority, while the assistance of a lawyer and of an interpreter, if necessary, is provided by Luxembourg during all proceedings taking place in Luxembourg.[54]

2.3.4.2 According to the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), the executing judicial authorities in Luxembourg do not follow up on cases of people who have been extradited, as these cases fall outside of Luxembourg's jurisdiction.[55]

Article 8 of the Act of 17 March 2004 provides that if a person held in Luxembourg on the basis of an EAW is surrendered to the issuing authority and is acquitted or dismissed in the issuing state, his or her detention in Luxembourg does not give right to compensation under the Law of 30 December 1981 on Inoperative Preventive Detentions.

According to the (incomplete) annual reports of the Ministry of Justice of Luxembourg on judicial activities for the period 2004–2013:

Judicial year	Extraditions	*EAW Ministère Public / Parquet Général* of Luxembourg	*EAW Parquet Général* of Diekirch Issued / received
2004–2005	2	35 received	7 / 3

[54] According to his estimate, no (or only a few) Luxembourgers have ever been extradited from Luxembourg. Interview with the *Premier Avocat Général* of the *Parquet Général* (Luxembourg), Jeannot Nies, conducted on 27 February 2015.

[55] Ibid.

2005–2006	25	15 received	5 / 2
2006–2007	- -	- -	1 / 7
2007–2008	- -	- -	- -
2008–2009	- -	- -	1 / 7
2009–2010	- -	- -	2 / 3
2010–2011	- -	- -	0 / 4
2011–2012	- -	- -	0 / 2
2012–2013	- -	- -	7 / 3

The aforementioned numbers may, however, be inaccurate due to a lack of sufficient information specifically regarding EAWs in the annual reports. According to another source, 207 European Arrest Warrants were issued and 109 were executed in Luxembourg from 2005–2009.[56] Finally, according to the 2011 Report of the EU Commission, during the period 2005–2009, the following EAWs were issued and executed in Luxembourg:[57]

	EAW issued in Luxembourg	EAW executed in Luxembourg
2005	42	24
2006	35	22
2007	44	15
2008	40	22
2009	46	26

2.3.5 The right to effective judicial protection: the principle of mutual recognition in EU criminal law and abolition of the exequatur in civil and commercial matters

2.3.5.1 Luxembourg is party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and has made a reservation to this convention. According to this reservation, Luxembourg applies the following legal requirements when executing requests for search and seizure of property (letters rogatory for search and seizure):

a) the offence underlying the request must be punishable both under the law of the requesting Party and of the executing Party;

b) the offence underlying the request must give rise to extradition from the requested country;

c) the execution of the request must be consistent with the law of the requested Party.

More precisely, Luxembourg has declared that any requests rogatory for search or seizure will be executed in so far as they relate to facts which give rise to extradition under the European Convention on Extradition, and if a national court has authorised the execution in accordance with its law.

The *Conseil d'État* has underlined that the EAWFD is designed to replace the provisions of the European Convention on Extradition vis-à-vis relations between EU Member States. In its Opinion, the *Conseil d'État* emphasised the new legal regime under the EAWFD. The *Conseil d'État* declared that even in the absence of an express link between the EAWFD and the European Convention on Mutual Assistance in criminal matters, the risk of the EAWFD having an impact on the reservation made by Luxembourg cannot be completely ruled out. The *Conseil d'État* argued that the reference to the European Convention on Extradition

[56] http://www.europaforum.public.lu/fr/actualites/2011/04/comm-mandat-arret-europeen/index.html.

[57] 2011 Report of the EU Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, p. 12.

regarding the requirement of dual criminality becomes inoperative in relations with other EU Member States, and that any reference to the provisions of this Convention must now be understood as a reference to the provisions under the new regime. Therefore, the *Conseil d'État* deemed the reservation made by Luxembourg in favour of the new legal regime to be inoperative.

The *Conseil d'État* did raise some constitutional concerns regarding the EAWFD. The Framework Decision does not enumerate offences of political nature among the grounds for refusal to execute a warrant.[58] Admittedly, Art. 1(3) of the EAWFD,[59] by its reference to Article 6 TEU, affects neither the law on asylum nor the right of a state to refuse to execute an EAW when the surrender is sought for political purposes. However, both the Act of 20 June 2001 on extradition and the European Convention on Extradition (Arts. 3(1) and (2)) distinguish requests for extradition which are related to political offences from extradition requests which pursue a political goal. According to the *Conseil d'État*, this distinction and rule do not have a constitutional value.[60] The *Conseil d'État* refers to the cautious position that Luxembourg took with regards to the European Convention against terrorism, where Luxembourg did not make any reservation regarding its obligation to extradite because of the political nature of the offence. However, Luxembourg does not accept or apply in a generic way the principle laid down in Art. 5 of the European Convention on the Suppression of Terrorism,[61] namely that no offence may be regarded by the Member State as a political offence, as a fact connected with such an offence or as an offence inspired by political motives. A similar stance is to be expected by Luxembourg regarding refusal to execute a warrant if the offence for which the warrant was issued was of political nature.

Regarding the abolition of the exequatur in civil and commercial matters, an empirical study of the exequatur orders issued by the District Court of Luxembourg in the period of 2008–2009 (that is before the period that the abolition of the exequatur became effective by virtue of Regulation 1215/2012) has been conducted.[62] In statistical terms, the District Court of Luxembourg declared executory on the territory of Luxembourg the totality of the decisions presented in the exequatur orders. The speed with which the exequatur orders were rendered is impressive: 80% of the orders were rendered within a week. Only 4.4% of the enforcement orders were subject to appeal before the Luxembourg Court of Appeal, of which only two (0.6%) were successful. In the first case the request in *exequatur* was found inadmissible *ratione materiae,*[63] and in the second case the court found that the defendant's rights were violated as he had not been duly notified about the case against him in the first place.[64]

2.3.5.2 Apart from the discussion on the suitability of the legal instrument (Framework Decision) in the *Conseil d'État*, no discussion on the appropriateness of mutual recognition on criminal law matters has been raised in Luxembourg. The *Conseil d'État* has underscored

[58] Opinion No. 5104/1, n. 41, p. 5.
[59] 'Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.' Recital (12), Council Framework Decision 2002/584/JHA, n. 40.
[60] Opinion No. 5104/1, n. 41, p. 6.
[61] Concluded at Strasbourg on 27 January 1977.
[62] Muller and Cuniberti 2013, p. 6; see also Cuniberti and Rueda 2010.
[63] Judgment CA Luxembourg, 7 January 2010, No. 34658.
[64] Judgment CA Luxembourg, 10 February 2011, No. 35005.

the importance of the goal of establishing an Area of Freedom, Security and Justice in Europe.

2.3.5.3 No concerns regarding any change in the role of national courts have been expressed in Luxembourg. In general, it is safe to argue that there is a strong commitment to the EU mechanisms.

2.3.5.4 Article 3 of the Act of 17 March 2004 provides for a proportionality test applicable upon both the issuance and the execution of an EAW. Specifically, an EAW may be issued only for offences punishable by law with a custodial sentence or a detention order for a maximum period of at least twelve months, or when a custodial sentence or a detention order has been imposed for sanctions prescribed for a period of at least four months.

Regarding the execution of an EAW, Art. 3(3) provides for a proportionality test even for the offences which escape the rule of double criminality. Consequently, the Luxembourgish authorities shall review whether the 32 enumerated offences are punishable in the issuing state with a custodial sentence or a detention order for a maximum period of at least three years.

The introduction of these proportionality tests was the object of analysis in the Opinion of the *Conseil d'État* and in the Report of the Parliamentary Committee.[65] Drawing analogies from the French *Conseil d'État,* both the *Conseil d'État* and the Parliamentary Committee emphasised the necessity for the issuing state to provide proof that the offence for which an arrest warrant is issued is punishable under the national law with a custodial sentence or a detention order of a specific threshold of severity. This condition responds to the requirements of the constitutional order. Therefore, it is not sufficient that the offence for which an EAW is issued falls within the scope of the exhaustive list of the 32 offences which escape the review of dual criminality, but the offence must also be sufficiently serious for the authorities in Luxembourg to execute the EAW.

2.3.6 Constitutional rights regarding other aspects of EU criminal law

To the Expert's knowledge no further constitutional issues have arisen in Luxembourg's case law and legal commentary or do arise in his view in relation to European criminal law in the Grand Duchy.

2.4 The EU Data Retention Directive

2.4.1 According to the Constitution: 'The home is inviolable. No domiciliary visit may be made except in cases and according to the procedure laid down by the law' (Art. 15); 'The secrecy of correspondence is inviolable. The law determines the agents responsible for the violation of the secrecy of correspondence entrusted to the postal services. The law determines the guarantee to be afforded to the secrecy of telegrams' (Art. 28).

However, no constitutional issues have been raised in Luxembourg with regard to the implementation of the Data Retention Directive[66] (DRD) or with regard to its application by the courts. The retention of data had already been allowed in Luxembourg before the

[65] Opinion *Conseil d'Etat* of 19 December 2003, doc. parl. No. 5104/1, p. 9 and Report No. 5104/4, n. 46, p. 6.
[66] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

adoption of the Data Retention Directive on the basis of the 'Privacy and Electronic Communications Act' of 30 May 2005.[67]

The national implementing act of the DRD of 13 July 2010 has not been challenged in the national Constitutional Court nor in any other court on grounds of the legality of the Directive.

There is no previous jurisprudence as regards the constitutionality of data retention in Luxembourg. There is also little case law of the national Constitutional Court and no cases involving a clear definition of the right to privacy versus law enforcement measures. It is therefore not possible to derive whether or not a court, when dealing with a national measure comparable to the DRD, would raise a constitutional issue or – as this is possible in the Luxembourgish legal order – directly in view of the ECHR. If asked to speculate (not based on previous case law), from a Luxembourgish perspective it is rather unlikely that a comparable measure would be struck down in its entirety.

While the transposition of the DRD in the Luxembourgish legal system does not seem to have raised particular issues,[68] it is noteworthy that, following the ECJ judgment annulling the DRD, Luxembourg decided to amend its national law and has in the meanwhile launched the legislative procedure in this respect. On 7 January 2015, the Ministry of Justice filed a proposal which modifies both the domestic Code of Criminal Procedure and the domestic Act implementing the DRD, i.e. the Act of 30 May 2005 laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector (Privacy and Electronic Communications Act 2005) (hereinafter Proposal). [69]

The Proposal concerns both traffic data (Art. 5 of the Privacy and Electronic Communications Act 2005) and location data other than traffic data (Art. 9 of the Privacy and Electronic Communications Act 2005), and brings four main amendments to the existing domestic rules. The Proposal also foresees that a grand-ducal decree will be adopted in order to lay down detailed enforcement rules to ensure the integrity and confidentiality of the data. The Proposal provides for access for law enforcement bodies to the retained data on the basis of an exhaustive list of criminal offences, which carry a sentence of at least one year (previously the crimes concerned were not listed). The Proposal further stipulates that the retained data must be irrevocably and without any delay deleted upon expiration of the retention period. Electronic communication providers are no longer permitted to store the data in an anonymised form after the expiration of the retention period. Finally, the Proposal foresees that data shall be stored on the territory of the European Union and increases the penalties in case of non-compliance with the Privacy and Electronic Communications Act 2005 to a sentence of six months to two years of imprisonment.

2.5 Unpublished or secret legislation

2.5.1 To the Expert's knowledge, the issue of unpublished EU legislation has not arisen as such in domestic case law or in the public debate. As the Luxembourgish language is not an official language of the EU and French is the official legal language in Luxembourg, no issue of EU legislation unpublished in the national language could arise in any case.

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[67] *Loi du 30 mai 2005 relative aux dispositions spécifiques de protection de la personne à l'égard du traitement des données à caractère personnel dans le secteur des communications électroniques et portant modification des articles 88-2 et 88-4 du Code d'instruction criminelle*, Memorial A-73, 7 June 2005, p. 1144.

[68] In this respect, see Cole and Boehm 2012.

[69] Doc. parl. No. 6763 *Projet de loi portant modification du Code d'instruction criminelle et de la loi modifiée du 30 mai 2005 concernant la protection de la vie privée dans le secteur des communications électroniques.*

The main rules to be referred to in this context are Arts. 112 and 36 of the Luxembourgish Constitution. According to Art. 112, '[a]ny law, order or regulation of general or municipal administration is binding only once published in the form determined by law'. In 1901, *la Cour* observed that '[a]t all times and in all legislation, there has always been the immutable principle that no law shall become mandatory without being published'.[70] Statutory and regulatory acts generally enter into force four days following their publication in the *Mémorial*, i.e. the Luxembourgish official journal.

Given that, in the Luxembourgish legal system, international treaties ratified by Luxembourg take precedence over domestic law including the domestic Constitution, the requirements as to publication apply to international agreements. In this context Art. 36(3) indeed prohibits the existence of 'secret treaties'. Acts approving international treaties are published in the *Mémorial* together with the text of the international treaties concerned.

With regard to EU secondary legislation, the publication obligation can be satisfied in Luxembourg by referring to the publication of the given act in the Official Journal of the EU.

2.6 Rights and general principles of law in the context of market regulation: property rights, legal certainty, non-retroactivity and proportionality

2.6.1 No standard of protection issues have apparently ever been raised in Luxembourg with regard to the standard of protection of property rights, legal certainty, legitimate expectations, non-retroactivity or proportionality in relation to EU measures. Again, the far-reaching understanding of primacy of EU law, the lack of competence of the Constitutional Court and the rather underdeveloped standards of fundamental rights in the Constitution may explain this finding.

2.7 The ESM Treaty, austerity programmes and the democratic, rule-of-law-based state

2.7.1 a) Luxembourg's commitment to the European Financial Stability Facility (EFSF) amounts to 1.947 billion EUR. The ESM capital subscription made by Luxembourg amounts to 1.753 billion EUR, of which 0.2 billion is as paid-in capital. The total participation of Luxembourg in the European Stability Mechanism (ESM) and EFSF amounts to 3.753 billion EUR[71]. The GDP of Luxembourg in 2013 has been estimated at approximately 45 billion EUR[72] and the Luxembourgish budget for 2015 (expenses) is foreseen at approximately 15.658 billion EUR[73].

The constitutionality of the commitment under the ESM has not been put into question although some objections to the laws approving the respective aspects related to the ESM[74] amendment of Art. 136 TFEU were voiced during the legislative procedure[75].

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[70] *Cour*, March 9 1901, Pasicrisie luxembourgeoise 6, p. 297.

[71] See *Rapport de la Commission des Finances et du Budget*, 22 June 2012, doc. parl. No. 6334/2, p. 2 and p. 8.

[72] See http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=1434&IF_Language=fra&MainTheme=5&FldrName=2&RFPath=22.

[73] See http://www.budget.public.lu/#!/bleck.

[74] *La loi portant approbation de la décision du Conseil européen du 25 mars 2011 modifiant l'article 136 du traité sur le fonctionnement de l'Union européenne en ce qui concerne un mécanisme de stabilité pour les Etats membres dont la monnaie est l'euro; loi portant approbation du traité instituant le mécanisme européen de stabilité, signé le 2 février 2012 à Bruxelle ; loi relative à la participation de l'Etat au mécanisme européen de stabilité*. For the text of these legislative acts see: Mémorial A-135, 5 July 2012, p. 1706. http://www.chd.lu/wps/PA_RoleEtenduEuro/FTSByteServingServletImpl/?path=/export/exped/sexpdata/Mag/129/168/112687.pdf.

The *Conseil d'État* has also expressed several objections.[76] It has pointed out the absence of a *fiche financière*, i.e. a financial statement that has to be associated with all Acts burdening the state budget. Also, the *Conseil d'État* has expressed some perplexity as to the specific features of the ESM, its adjustments having preceded its actual launch, which leaves the impression that the EU Member States are following rather than shaping economic realities. Interestingly, the *Conseil d'État* has expressed the position that the ESM must evolve as a part of the EU institutions and must not drift towards the intergovernmental method that some of the Member States seem to favour. Moreover, the *Conseil d'État* has questioned the arguably insufficient size of the capital of the ESM (700 billion EUR) in the light of the real needs of the Member States in difficulty as well as the needs of European banks. Finally, the *Conseil d'État* has expressed its general regret with regard to the unsatisfactory management of the public debt in the eurozone and the systemic nature of the financial crisis therein. It its view, the statement of reasons of the legislative proposal could have been more analytical and could have spelled out the position that Luxembourg should defend in the context of the ongoing discussion in Europe.

b) See the reply in a) above.

c) In Luxembourg, debate on the unconditional nature of the commitments does not seem to have arisen.

2.7.2 No debate on other proposed measure seems to have taken place in Luxembourg. This may also be due to the fact that Luxembourg has not been subject to any austerity regime and, rather to the contrary, benefits from the presence of the ESM on its territory. In this respect, it is noteworthy that the predecessor of the ESM, the European Financial Stability Facility (relevant for financing programmes pre-existing the establishment of the ESM), was not an international organisation but a private law entity (*société anonyme*) established under Luxembourgish law. For this reason the *Conseil d'État* criticised the initially broad scope of the immunity of jurisdiction and execution granted to the EFSF (which was suggested to be similar to that granted to the ESM) as contrary to Art. 6 ECHR and Art. 10bis of the Constitution.[77] In response to this critique, the draft Act regarding Luxembourg's participation in the ESM was modified.

2.7.3 The question on bailouts is not applicable to Luxembourg. Economic issues have been dealt with recently by Luxembourg, but their nature cannot be compared with those that have been tackled in relation to austerity programmes. The unsatisfactory competitiveness of Luxembourg has been pointed out. As of 2013, Luxembourg has modified its system of pensions and the system of automatic wage increases has been limited in order to bring such increases in line with the economic reality.[78]

2.8 Judicial review of EU measures: access to justice and the standard of review

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[75] For an overview of the position of Luxembourg on the euro crisis and its management as well as on the legislative discussion, see Kroeger 2014.

[76] See opinion of *Conseil d'Etat* dated 6 March 2012, on *Projet de loi portant approbation de la décision du Conseil européen du 25 mars 2011 modifiant l'article 136 du traité sur le fonctionnement de l'Union européenne en ce qui concerne un mécanisme de stabilité pour les Etats membres dont la monnaie est l'euro*, doc. parl. No. 6334/1.

[77] Complementary Opinion *Conseil d'Etat*, doc. parl. No. 6406/3, 12 June 2012, p. 2.

[78] Cf. Kroeger 2014, point I.1.

2.8.1 a) There are unfortunately no reliable statistics available in Luxembourg concerning the number of cases in which the applicants have requested preliminary rulings with regard to the validity of EU measures. In the time frame since 2001, only two cases were identified after a thorough research of the case law of the respective civil, social and administrative courts.

First, in a case brought to the *Conseil supérieur des assurances sociales*, the applicant challenged the validity of Regulation 1408/71 (on the cooperation between social security systems) with regard to former Art. 48(2) EC (now Art. 45 (2) TFEU) on the free movement of workers. It was argued that the application of the residence clause in Art. 71 of that Regulation constitutes indirect discrimination on grounds of nationality with regard to unemployed frontier workers.[79]

Second, in a case brought to the *tribunal administratif*, the applicants challenged the validity of Directive 2003/87/CE (from 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community) based on the ground that the Directive would not sufficiently take into account the specific situation of the steel industry within global competition.[80] The courts did not submit a reference for a preliminary ruling to the ECJ in either of these cases.

b) From 2006 to the end of 2014, Luxembourgish courts sent 26 preliminary ruling requests to the ECJ. All of them were interpretative questions, and not a single one contested the validity of an EU measure.

2.8.2 In the Expert's view, it does not seem that the standard of judicial review by the EU courts is considered lower than that of the domestic courts from a Luxembourgish point of view. Moreover, the domestic courts commonly give the impression that they share the standards of review applied by the EU courts, to which they refer quite extensively.

2.8.3 The approach of the Constitutional Court reviewing the constitutionality of legislative acts could be considered – at least statistically – as rather vigorous. In almost one-third (36) of its currently (by 20 February 2015) 116 decisions, it has declared provisions of legislative acts contrary to articles of the Constitution. Its control is, however, very limited in scope, as it can only review the constitutionality of such provisions in response to preliminary questions from ordinary judges that must precisely indicate the contested provisions and the relevant articles of the Constitution. It has furthermore been shown that the Constitutional Court apparently recognises a wider margin of appreciation for the legislator in the field of economic and social law that in the field of civil and family law.[81]

If the Constitutional Court declares a legislative provision contrary to the Constitution, the ordinary judges who have to decide on the case are obliged to disregard that provision, which, however, remains formally in force.

The *Conseil d'État* also plays an important role as a guardian of the Constitution. Its function is to assess *ex ante* the conformity of all draft legislative acts and grand-ducal decrees with norms of higher law, comprising the Constitution, international treaties and the general principles of law. The *Chambre* in general follows its opinions.

Unfortunately, there are no further reliable statistical data available on the proportion of challenges to the validity of a domestic Act of Parliament that have lead to annulment of the Act in question.

[79] *Arrêt du 3 décembre 2007*, ADEM 2006/0094.
[80] *Arrêt du 5 avril 2006*, nos. 20372 et 20373 du rôle.
[81] Cf. Kinsch 2008 at p. 89.

2.8.4 On the one hand, the Constitutional Court is not entitled to review legislative acts approving international treaties. Acts of the *Chambre* transposing or executing obligations deriving from secondary EU legislation are not explicitly excluded from the Constitutional Court's competence. Until now, no such Act has, however, been submitted to the Constitutional Court in the context of a preliminary question from an ordinary court. The opinion seems to prevail that the 'immunity' of Acts approving treaties also covers Acts implementing EU legislation. No legislative act implementing EU legislation has ever been submitted to the Constitutional Court.

On the other hand, the ordinary courts may not review the constitutionality of legislative acts at all and, regarding the conformity of the latter with international law, they usually apply the principle of primacy very strictly. Thus, no judgment reviewing national measures implementing EU legislation against national or ECtHR standards of protection of rights could be identified.

2.8.5 To the Expert's knowledge no concern has been expressed in Luxembourg about a gap in judicial review resulting from an allegedly lower standard of review by the ECJ. As the fundamental rights guaranteed by the Luxembourgish Constitution do not go beyond the standard of the ECHR in many respects, the accession of the EU to the ECHR does not raise concerns about a potential gap in judicial review either.

2.8.6 The issue of equal treatment of individuals falling within the scope of EU law and those falling within the scope of domestic protection of constitutional rights has only been raised once when the *Chambre* adopted the measure implementing Directive 2004/38 on the free movement of citizens of the EU[82]. In order to avoid any situations of 'reverse discrimination', Art. 12 (3) of the Act of 29 August 2008 on free movement of persons and immigration contains a clause stating that 'family members of a Luxembourgish citizen … are equated with family members of a citizen of the EU'.

2.9 Other constitutional rights and principles

2.9.1 No other significant issues have arisen in Luxembourg with regard to constitutional rights or the rule of law in relation to EU law.

The transposition and implementation of EU measures by grand-ducal decrees is undeniably seen as a way to increase the speed of implementation, as well as the Grand Duchy's ranking on the European Commission's scoreboards. Every year, the Government as well as the *Chambre* proudly announce the progress made in this respect. The matter is currently determined by an Enabling Act (*loi d'habilitation*) adopted by the *Chambre* in 1971, which is criticised because of technical insufficiencies and its limited scope, but is considered indispensable in principle. The Working Draft of the current constitutional amendment procedure foresees the addition of an article to the Constitution that will explicitly give the executive power the competence to transpose and implement EU measures by grand-ducal decree.

Acts of Parliament will thus lose some of their importance in national legislation because of the perceived need to streamline the procedures for the transposition and implementation of secondary EU legislation. In so far as ever more important sections of national legislation

[82] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] OJ L 158/77.

are directly conditioned by Union law and legislators face strict deadlines for the transposition of directives, the *Chambre* has adopted an Enabling Act conferring the competence to proceed on the executive exercising its regulatory competence.[83]

This Act, however, is limited in scope and has not really proven an 'appropriate and effective response' to the problems encountered.[84] The inclusion of a new Art. 45 in the Constitution, set out in the 2015 Working Draft and which obligates the Head of State to adopt all the necessary regulations for the application of legally binding acts of the European Union, will eradicate a number of legal uncertainties in this area.

2.10 Common constitutional traditions

2.10.1 In the Expert's view, 'common constitutional traditions' is a very broad and rather vague concept that has helped the ECJ to legitimise its jurisprudence that introduces fundamental rights as general principles of law in the EU legal order. This concept may certainly encompass the constitutional rights and principles addressed in the Questionnaire as well as the rights and principles enshrined in the ECHR or within the Charter of Fundamental Rights of the EU. However, in the Expert's view, the broadness of the concept does not allow for the deduction of a precise normative substance and a clear-cut scope of these rights and principles that would be shared by all of the Member States.

It appears difficult to infer the existence of a 'common constitutional tradition' from an element considered in a single Member State as an element of its constitutional identity. To be considered as a 'common constitutional tradition', such a right or principle does not need to be part of a Member State's identity. It would be sufficient that it has been recognised as an element of constitutional law by the Constitution itself or any relevant case law.

2.10.2 For reasons of uncertainty regarding their content and scope, it seems difficult to envisage how these 'common constitutional traditions' could become a more direct and relevant source of EU law. Within the judicial dialogue between national judges and the ECJ, there might, however, still be merit in invoking these traditions at least in so far as it would be possible to establish the existence of a commonly shared standard based on a serious study of comparative case law stemming from a large group of Member States. The question is whether this is reasonably feasible for national courts when sending a preliminary ruling reference to the ECJ.

2.11 Article 53 of the Charter and the issue of stricter constitutional standards

2.11.1 There has been no discussion in Luxembourg on whether the Court of Justice was justified in setting the standard of protection of Charter rights at the level of the ECHR. There are no constitutional rights or principles protected under the Luxembourgish Constitution or by the national courts where a significantly higher level of protection can be identified in comparison with the standards set by the ECtHR.

In the Expert's view, higher standards at national level and a greater deference to national constitutional or supreme courts should be allowed by the ECJ whenever the courts of the relevant Member State can reasonably argue that this higher standard is an element of its constitutional identity as protected under Art. 4 TEU. The national courts should, however,

[83] Act of 9 August 1971 (as amended) 'on the execution and sanctioning of decisions and directives and the sanctioning of regulations of the European Communities in the economic, technical, agricultural, forestry, social and transport spheres'.
[84] Cf.. Schmit 2013, p. 5 and Weirich 1986, p. 966.

also seek to avoid conflicts between supposedly different standards by seeking to interpret the relevant national constitutional rights and principles, as far as possible, in the light of the corresponding provisions of the ECHR and the Charter, even in cases which do not fall within the scope of the latter.

2.12 Democratic debate on constitutional rights and values

2.12.1 a) There has been no significant public deliberation on constitutional rights in Luxembourg, neither at the time of adoption nor at the time of national implementation of the EAWFD. The debate was exclusively held within the *Conseil d'État* and the *Chambre* during the legislative implementation procedure. No objection based on the safeguards for constitutional rights was raised.

b) The same applies with regard to the adoption and implementation of the DRD.

2.12.2 From a Luxembourgish point of view, no important constitutional issue has ever been raised at the stage of implementing EU law. For the reasons already explained, the domestic system of constitutional review has never experienced a challenge made to national legislation implementing EU law.

In the Expert's view, the members of the national governments should raise such important constitutional issues when deliberating new EU legislation within the Council of Ministers. In order to be aware of such issues before the final adoption of an EU act, Member States should establish internal advisory procedures alerting the Government of any foreseeable constitutional implications of an envisaged EU act. In Luxembourg such a preliminary opinion could be prepared by the *Conseil d'État*. A wider consultation including the *Chambre* and other bodies and NGOs would probably be difficult to accomplish within the usual time constraints.

2.12.3 The Expert would indeed support a recommendation to suspend the application and carry out a review of EU measures, if important constitutional issues have been identified by a number of constitutional courts, even though some Member States' constitutional courts do not review the constitutionality of EU measures or national implementation acts of these measures. A Member State like Luxembourg would indeed be excluded from such a mechanism for the time being.

The problem will be to define what an 'important' constitutional issue exactly is, and what number of national constitutional courts would be considered sufficient to initiate such a suspension procedure. Another practical problem would arise from the fact that such issues might be raised over a long period after the adoption of the EU measure according to the features of the national systems of constitutional review providing for *ex ante* review, *ex post* review or a combination of both.

The Expert would not support a general recommendation to recognise as a defence on the part of a Member State in an infringement proceeding that unconstitutionality has been identified in accordance with the domestic system of control of constitutionality. On the one hand, such a defence would not be applicable to Luxembourg and, on the other hand, it should be strictly limited to infringement proceedings that concern the implementation of an EU measure that is considered in the particular Member State as contrary to an element of the constitutional identity of that Member State.

2.13 Experts' analysis on the protection of constitutional rights in EU law

2.13.1 From a Luxembourgish point of view (but also as a general position), the Expert does not share the concerns of an 'overall reduction' in the standard of protection of constitutional rights and the rule of law in the context of EU law. With regard to the standard of protection under Luxembourgish constitutional law, it might even be argued that there has been an overall increase of the standard of protection of fundamental rights due to the combined influence of the case law of the ECtHR and of the ECJ. The alleged reductions in the standard of protection linked in particular to the EAWFD and the DRD can not be confirmed with regard to the Grand Duchy.

3 Constitutional issues in global governance

3.1 Constitutional rules on international organisations and the ratification of treaties

3.1.1 As outlined in Sect. 1.3.1, although Art. 49bis provides only for temporary transfers of powers, it has been interpreted broadly in order to be compatible with the accession of Luxembourg to the EU Treaties.

In 1956, the *Conseil d'État* considered it more appropriate to retain the temporary character of the delegation of powers, as it emphasised the precariousness of any consented devolution to international institutions.[85] No other limits to the transfer of powers are provided for in the Constitution. However, Art. 1 of the Constitution postulates the values upheld in Luxembourg in general and not in the specific context of international cooperation: democracy, liberty, independence and the indivisibility of the state.

Regarding the ratification of international treaties, Art. 37 of the Constitution provides that treaties are operative after having been approved by law and published in the form specified for the publication of laws. Secret treaties are abolished. International treaties that transfer powers to international institutions need to be approved by Parliament, according to a special majority requirement of two-thirds of the members, similarly to the constitutional amending procedure as provided by Art. 114. Reservations to international treaties by Luxembourg require legislative approval as well.[86] Article 95ter(2) explicitly prohibits the Constitutional Court from reviewing Acts of Parliament which transpose international treaties in the domestic legal order.

There is no reference to international customary law in the Constitution or in the draft text of the Constitution which is under consideration.

Luxembourg is a founding member of the United Nations, NATO and the International Criminal Court (ICC). Article 118 of the Constitution provides that its provisions do not constitute an obstacle to the approval of the ICC Statute and to the exercise of Luxembourg's obligations under the ICC Statute.[87] The draft text of the Constitution contains a similar provision in Art. 107. Luxembourg also accepts the jurisdiction of the International Court of Justice as compulsory, *ipso facto* and without the requirement of reciprocity, in any disputes arising after 1930, regarding situations or facts subsequent to its signature, except in cases

[85] Doc. parl. No. 25 (516), p. CCIV.
[86] 'Approbation des traités' in Besch 2005, p. 143.
[87] Original French text: *'Les dispositions de la Constitution ne font pas obstacle à l'approbation du Statut de la Cour Pénale Internationale, fait à Rome, le 17 juillet 1998, et à l'exécution des obligations en découlant dans les conditions prévues par ledit Statut.'*

where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement.[88]

3.1.2 Article 49bis was introduced in 1956 by a constitutional amendment. This provision essentially raised two controversial questions: the position of the article in the Constitution's structure and its content. Regarding the first question, the *Conseil d'État* opined that this provision needs a distinct position in the Constitution because it introduces a derogation to the exercise of the sovereign powers (executive, legislative and judicial) that are also regulated in Arts. 33–49. Moreover, this provision deals with the exercise of a new type of power, which is also linked to sovereignty. For these reasons the *Conseil d'État* proposed the addition of a new article, 49bis, instead of incorporating a new paragraph in the existing provisions. As for the choice of the wording 'institutions of international law', the *Conseil d'État* had originally proposed the phrase 'international institutions'. This proposal, however, was not retained by the Parliamentary Committee, which opted for the term 'institutions of international law' in order to encompass not only international but supranational institutions as well.[89]

Drawing inspiration from the Belgian Constitution of 1831, Art. 37 was last modified by the 1956 constitutional amendment. During the revision, Art. 37 was at the centre of a debate between the Government and the *Conseil d'Etat*. The Parliament declared its intention to systemise and integrate all the constitutional provisions on international relations in one chapter, while the Government proposed the addition of a series of new articles to Art. 37 in order to exhaustively consolidate all the constitutional provisions on international relations. These proposals were weighed with care by the *Conseil d'Etat*, which opted for the solution of adding only a new Art. 49bis, leaving the structure of the Constitution intact.

The amendment of 1956 did not alter the principle of the approval of international treaties by Parliament. The constitutional amendment only specified the form that this approval would take, by adding the requirement of approval by a law. In its Opinion of 10 July 1956, the *Conseil d'État* underlined the distinction between the enforceability of the approving law and of the international treaty. They are two different procedures, which may take place simultaneously or separately, but both need to be compatible with the corresponding constitutional provisions. The *Conseil d'État* adopted, finally, one formal requirement, that of the publication of the approving law.

Article 48 of the proposed draft Constitution contains a similar provision to Art. 37 regarding the ratification of international treaties. Instead of naming the Grand Duke, the provision states that the 'Head of State' shall be responsible for concluding international treaties. The draft provision includes a reference to the procedure for the termination of an international treaty, similar to the procedure foreseen for the conclusion of a treaty, which is not included in the current version of Art. 37. The new draft article also states explicitly that the Head of State shall adopt all necessary regulations for the application of EU law in Luxembourg.

Article 118 was introduced in 2000 to allow for the approval of the ICC Statute and the participation of Luxembourg in the ICC. The *Conseil d'État* emphasised the principle of complementarity of the ICC vis-à-vis the national courts. The ICC was considered as advancement for the international protection of human rights, but the relevant constitutional amendment provoked difficulties. In its Opinion of 4 May 1999, the *Conseil d'État* stated that the non-recognition of immunity for state officials might not be consistent with Art. 4 of the Constitution, which provides for the inviolability of the Grand Duke, with Arts. 68–69 on the

[88] See http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=LU
[89] Doc. parl. No. 25 (516), p. CCIV.

immunity of Members of Parliament and with Arts. 82 and 116, which deal with the criminal responsibility of ministers. However and contrary to the position of the French Constitutional Court, the *Conseil d'État* in Luxembourg concluded that the ICC Statute was not incompatible with the Constitution, because the ICC Prosecutor's investigation procedure is based on consultations with the state authorities concerned. The *Conseil d'Etat* did not consider it appropriate to revise all the relevant constitutional provisions concerning the immunity of state officials. According to the *Conseil d'Etat*, Art. 118 intended to neutralise any obstacle that the Constitution might pose to the creation and function of the ICC.[90] The Parliamentary Committee accepted the opinion of the *Conseil d'Etat*. Article 118 was considered the necessary step for the adaptation of the Luxembourgish constitutional legal order to the ICC Statute.[91] Since the approval of the ICC Statute has already taken place and is no longer relevant, the new draft Art. 107 provides that the Constitution shall not hamper Luxembourg's obligations under the ICC Statute.[92]

All these amendments and the current Constitution revision process constitute an expression of Luxembourg's commitment to European integration and its longstanding deference to international law.

3.1.3 Article 49bis, which provides for the transfer of powers to international institutions only temporarily, is to be modified in the course of the current revision procedure.

3.1.4 In the Expert's view, the relevant constitutional provision, 49bis, regarding the temporary limits of the delegation of powers to international institutions, indeed requires amendment. However, there seems to be a consensus not to include any other limits to such delegation. Furthermore, an explicit reference to the status of international law vis-à-vis the national legal order may also be in order. However, the constitutional revision procedure is still ongoing and the protection of constitutional rights is included in the discussions.

3.2 The position of international law in national law

3.2.1 In the Constitution, there is no express reference to the legal status of international treaties in domestic law. However, as discussed in Sect. 1.3.1, the *Conseil d'État* as well as the *Cour de cassation* have firmly confirmed that in the case of conflict between a rule of domestic law and a rule of international law that has direct effect in the domestic legal order, the rule of the international treaty shall prevail.[93]

Regarding Art. 37 of the Constitution, there is jurisprudence clarifying the following issues: types of international treaties, procedure for the promulgation of international treaties, interpretation and suspension of international treaties, the conflict between an international treaty and national law and the power of the Grand Duke to delegate his authority to conclude international treaties.

Regarding types of international treaties, in 1960 the *Cour de Cassation* decided that the procedure used for the conclusion of an international treaty does not affect the determination of its legal status domestically, because the procedure, the type of obligations and even the terminology used for a treaty are determined on the international level by diplomatic means.

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[90] Doc. parl. No. 4634/1, p. 1.

[91] *Rapport de la commission des Institutions et de la Revision constitutionnelle du 6 juillet 2000*, doc. parl. No. 4634/2.

[92] Original French text: *'Art. 107 Les dispositions de la Constitution ne font pas obstacle aux obligations découlant du Statut de la Cour pénale internationale.'*

[93] *Conseil d'Etat*, 28 July 1951, Pasicrisie 15, p. 263. See also *Cour de Cassation*, 8 June 1950, Pasicrisie 15, p. 41 and *Cour de Cassation*, 14 July 1954, Pasicrisie 16, p. 151.

Despite their diversity, all international treaties are equipped with the same binding effect in Luxembourg.[94] Furthermore, the jurisprudence has confirmed that no specific form of international treaty is required for the regularity of an international instrument duly approved by law.[95]

Regarding the procedure, as early as in 1949 the national courts declared that international treaties are not enforceable or judiciable unless approved by Parliament and published in the Memorial.[96] Interestingly, in 1889, the court in Luxembourg declared that international arrangements which have not been the subject of a published Act or of a general administrative measure, would not create any obligations for Luxembourgers.[97]

3.2.2 The traditional distinction between monist and dualistic approaches to international law is outdated. When researching the issue of the interaction between the international and domestic legal orders, a strictly dualistic approach is not effective in capturing the perplexity of the different normative structures set in place for the protection of fundamental rights or the different levels of international obligations of states. Even using the term 'different legal orders' has a dualistic connotation and refers to a more enclosed system of hierarchical legal orders. Such an enclosed system of hierarchical legal orders, however, does not correspond to reality, given the international protection of human rights regime and the case law of both the Court of Justice of the European Union and the European Court of Human Rights.

No legal commentary exists on the applicability of monism and dualism in Luxembourg. Luxembourgish institutions and courts have adopted a progressive view on the position of international law in the national legal order, following a somewhat monistic approach, should this term still be considered relevant.

3.3 Democratic control

3.3.1 a) As regards constitutional rules on parliamentary involvement with regard to the initial negotiations and ratification of international treaties, the *Chambre* is not involved in the negotiation of treaties but intervenes prior to ratification. The approval of an international treaty by the Luxembourgish legislator and the subsequent publication of the approving Act are indeed the necessary conditions that have to be fulfilled so that the international treaty can be ratified internationally[98] and so that it can produce domestic legal effects[99].

An international treaty is approved by a legislative act (see Art. 37 of the Constitution) and follows the same rules as approval of an Act of Parliament dealing with domestic affairs (except for treaties conferring the execution of legislative, executive or judicial powers temporarily to an international body; in such case the special majority requirements under Art. 114(2) of the Constitution related to constitutional amendments are to be followed). The legislative act is a purely formal measure by which the national legislator approves the treaty and possible reservations to the treaty.[100] Due to the requirements related to the publication of Acts approving international treaties, it seems that simplified (executive) international agreements cannot produce legally binding domestic effects (unless submitted to the publication procedure).[101] While the legislature can block the ratification of an international

[94] *Cour*, 3 December 1960, Pasicrisie 18, p. 223.
[95] *Cour de Cassation*, 21 Décembre 1961, Pasicrisie 18, p. 424.
[96] *Trib.Lux*., 21 December 1949, Pasicrisie 15, 25.
[97] *Cour*, 2 August 1889, Pasicrisie 3, p. 123.
[98] Kinsch 2010, pp. 403–404.
[99] *Trib. Lux*., 21 December 1949, Pas. 15, p. 25.
[100] Kinsch 2010, p. 402.
[101] Ibid., p. 403.

treaty by not approving it, legislative approval does not oblige the executive power to proceed with the ratification on the international plane.

b) Under the Constitution, and apart from the EU-specific rules on the involvement of national parliaments based on the principle of subsidiarity (see Sect. 1.4.1), the *Chambre* is not endowed with any post-ratification monitoring/implementation powers as regards international treaties that have been ratified by Luxembourg (and internally approved and published). However, as a matter of practice, the Luxembourgish legislator is present through its delegations within various international and European fora, such as NATO, Benelux and the Interparliamentary Conference on Common Foreign and Security Policy and Common Security and Defence Policy.

3.3.2 As noted in Sect. 1.4.2 above, referendums in Luxembourg have remained rare and have only been used three times to date (February 2015), including in 1919 on the economic union to be established with France or Belgium. For EU-related referendums, see Sect. 1.4.2.

No constitutional ban applies to referendums concerning international treaties.

3.4 Judicial review

3.4.1 The relationship between domestic Luxembourgish law and international law is determined by a strong deference to international law. The best illustration of this approach is Art. 95ter(2) of the Constitution that explicitly prohibits the constitutional review of Acts of Parliament approving international treaties by the Constitutional Court. To the Expert's knowledge, the domestic courts have not challenged international law norms in order to protect domestic legal standards. However, the domestic tribunals are likely to insist on the requirement that only international treaties that have been published as required can produce legal effects in the domestic legal system. Also, the Luxembourgish tribunals have engaged in the analysis of the direct applicability of specific international treaties referred to in cases pending before them. This analysis has been flawed with some inconsistency. Legal scholars have referred, in this respect, to the evolution of the stance taken by the Luxembourgish *Cour de cassation* (as well as by lower domestic courts) on the direct applicability of the International Covenant on Civil and Political Rights.[102]

3.5 The social welfare dimension of the Constitution

3.5.1 To the Expert's knowledge, the above concerns have not been translated into a significant constitutional discourse.

3.6 Constitutional rights and values in selected areas of global governance

3.6.1 As was discussed in greater detail in Sect. 2.3.5.1, the *Conseil d'État* has raised some constitutional concerns regarding the EAWFD, which does not allow for refusal to execute a warrant where the offence is of political nature.[103] However, both the Act of 20 June 2001 on extradition and the European Convention on Extradition (Arts. 3(1) and (2)) distinguish requests for extradition which are related to political offences from extradition requests which pursue a political goal. In the context of the EAWFD and its relation to other international

[102] Ibid., pp. 403–405.
[103] Opinion *Conseil d'Etat*, 19 December 2003, doc. parl. No. 5104/4, p. 5.

law instruments, the *Conseil d'État* has underlined that it may seem surprising at first that a framework decision based on Art.3 4 TEU provides for rules which substitute rules resulting from Member States' international treaties elaborated within the framework of the Council of Europe, such as the European Convention on Extradition and the Additional Protocols and the European Convention on the Suppression of Terrorism. Regarding the European Convention on the Suppression of Terrorism, Luxembourg has not made any reservation to its obligation to extradite a person even when the relevant offence may be of political nature. Article 5 of the Convention against Terrorism provides that it shall not be interpreted 'as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'. However, according to the *Conseil d'État,* Luxembourg does not accept or apply broadly the principle laid down in Art. 5 of this Convention. A similar approach is to be expected by Luxembourg regarding any refusal to execute a warrant if the offence for which the warrant was issued is of political nature.

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