Declaration 1/2004 (Unofficial translation)

DTC 1 /2004

The plenary session of the Constitutional Court, formed by María Emilia Casas Baamonde, President, Guillermo Jiménez Sánchez, Vicente Conde Martín de Hijas, Javier Delgado Barrio, Elisa Pérez Vera, Roberto García-Calvo y Montiel, Eugeni Gay Montalvo, Jorge Rodríguez-Zapata Pérez, Ramón Rodríguez Arribas, Pascual Sala Sánchez, Manuel Aragón Reyes and Pablo Pérez Tremps, Judges,

IN THE NAME OF HIS MAJESTY THE KING OF SPAIN

has made the following

DECLARATION

With regard to the requirement (case No. 6603-2004) formulated by the Attorney General, on behalf of the Government of the Nation, concerning the existence or inexistence of contradiction between the Spanish Constitution and Articles I-6, II-111 and II-112 of the Treaty which lays down a Constitution for Europe, signed in Rome on 29 October 2004. The Judge rapporteur was Vicente Conde Martín de Hijas, who expresses the opinion of the Court.

I. Recitals

1. By virtue of a document registered in this Court on 5 November 2004, the Attorney General, by virtue of his/her legal representation and of the Agreement adopted by the Government of the Nation in the ministers' cabinet meeting of 5 November 2004, in accordance with the provisions set forth in Art. 95.2 of the Constitution and in Art. 78.1 LOTC, requires this Court to pronounce its opinion on the existence or inexistence of a contradiction between the Spanish Constitution and Article I-6 of the Treaty which lays down a Constitution for Europe, signed in Rome on 29 October 2004, and in view of the provisions set forth in Art. 10.2 CE, concerning the existence or inexistence of a contradiction between the Spanish Constitution and Articles II-111 and II-112 of the aforementioned Treaty, which forms part of the Charter of Fundamental Rights of the European Union. Furthermore, and in accordance with the answer given to said questions, the Government requires the Court to pronounce its opinion on the sufficiency of Art. 93 CE in order to channel the consent of the State to said Treaty or, as applicable, on the procedure for the constitutional reform which must be implemented to adapt the text of the Spanish Constitution to the aforementioned international Treaty.

By virtue of the above, the Attorney General hereby requests that, having accepted his/her application, the requirement, in the name of the Government, be understood as issued to this Court so that in accordance with Arts. 95.2 CE and 78.1 LOTC, after the appropriate procedures, it may issue a binding declaration on the following matters:

1. The existence or inexistence of a contradiction between the Spanish Constitution and Article I-6 of the Treaty which lays down a Constitution for Europe.

2. In view of the provisions set forth in Article 10.2 of the Spanish Constitution, the existence or inexistence of contradiction between the Spanish Constitution and Articles II-111 and II-112 of the Treaty which lays down a Constitution for Europe, which form part of the Charter of Fundamental Rights of the European Union.

3. The sufficiency or otherwise of Article 93 of the Spanish Constitution with regard to the consent of the State to the Treaty which lays down a Constitution for Europe.

4. Where applicable, the channel of constitutional reform to be followed to adapt the text of the Spanish Constitution to the Treaty which lays down a Constitution for Europe.

2. The requirement presented by the Attorney General is accompanied by a copy of the Agreement of the cabinet of ministers of 5 November 2004, whereby this Constitutional Court is

required to issue a Declaration of Conformity in accordance with Art. 95.2 CE and Art. 78.1 LOTC.

Said governmental agreement is the basis for the requirement set forth in a series of considerations that are structured on the basis of the exposition of the legal bases that have led to the signing of the Treaty which lays down a Constitution for Europe.

A. In accordance therewith, it is set forth that the last significant reform of the Treaty of the Union and of the Treaties of the European Communities, adopted in Nice in 2000, was then considered insufficient for the requirements that would result from the enlargement of the Union to Central and Eastern Europe and to the new needs of a changing economic, social and international reality, where a growing concern for the disinterest of citizens regarding European affairs was also becoming increasingly evident. In said context, the Intergovernmental Conference of Nice adopted a declaration on the future of the Union, where it called for an in-depth debate to consider questions such as how to establish and supervise a more precise delimitation of the distribution of competences between the European Union and the member states, the statute of the Charter of Fundamental Rights of the European Union, the simplification of the Treaties and the function of national parliaments in the architecture of Europe. Finally, the conference agreed to call a new Intergovernmental Conference in 2004.

Subsequently, the Declaration of Laeken of 15 December 2001, made by the heads of state and government of the member states to 'guarantee a preparation as broad and transparent as possible for the coming Intergovernmental Conference' agreed to 'call a Convention to bring together the main participants in the debate on the future of the Union [to] examine the essential questions proposed by the future development of the Union and examine the different answers possible.'

On 18 July 2003, the Chairman of the Convention delivered to the President of the European Council the draft project of the Treaty which lays down a Constitution for Europe. On 18 June 2004, the heads of state and government of the member states reached an agreement on the text of the Treaty, which was to be signed in Rome on 29 October last. The signing of the Treaty by Spain was authorized by the agreement adopted by the ministers in cabinet on 22 October 2004.

B. The government's agreement focuses, as follows, on the examination of the main features of the Treaty which lays down a Constitution for Europe, highlighting that it represents an authentic legal relaunch of the European Union, since, in accordance with Article IV-437 thereof, the new Treaty repeals the Treaty of the European Community and the Treaty of the European Union, as well as, under the conditions set forth in an annexe Protocol, the documents which have completed or modified said treaties. Similarly, the various Treaties of Adhesion are also repealed, with the exceptions set forth in two Protocols.

With the coming into force of the Treaty, Spain shall no longer be a member of the Community and of the European Union in accordance with the Treaty of Adhesion of 1985, but rather only by virtue of the constitutional Treaty itself. However, the Government understands that it is necessary to highlight the fact that the basic legal and institutional characteristics which define the project for European integration currently present in the Community and in the Union with which we are familiar are not altered. Likewise, despite its obvious nature, emphasis must also be placed on the fact that the text under examination is an international treaty on both a formal and material scale, and it cannot be denied that, as a result of its general content, it also has many of the features typical of a constitutional text. The Government points out that this does not mean that a constitutional text cannot arise from a treaty, but rather aims to point out that the ratification (Art. IV-447) and the subsequent revision of the Treaty (Arts. IV-443, IV-444 and IV-445) require the unanimous consent of all the member states.

Having given a summarized description of each of the four Parts of the Treaty and its thirty-six Protocols, the Government points out the following outstanding features of the Treaty:

a. The consolidation in one single text of the current Treaties of the European Community and the European Union, with the consequent systematization and simplification of the main provisions thereof, and the inclusion of a series of new precepts with a high level of political and institutional content, especially Part I and the Chapters of Part III related to the space of freedom, security and justice and the exterior action of the Union.
b. The integration in the Treaty of the Charter of Fundamental Rights of the Union, which makes said Treaty legally binding, together with the inclusion of a clause which shall make it possible for the Union to subscribe as such to the European Agreement on Human Rights, which will submit the European Union to the external control of the Tribunal de Strasbourg regarding matters to do with human rights.
c. The clear inscription of certain fundamental principles to regulate the relations between the Union and the member states (principle of attribution of competences, principle of loyal cooperation, principal of primacy of the Law of the Union, principle of respect for the national identity of the States, etc.).
d. The recognition of a unique legal personality of the European Union, enabled by the 'fusion' of the Treaties of the European Community and the European Union in one single text and in favour of the disappearance of the structure of the 'pillars' created by the Maastricht Treaty of 1992.
e. The simplification of the instruments and procedures of action of the Union, which are ordered in legislative documents (European framework legislation and law), non-legislative documents (European regulations and decisions) and non-mandatory documents (recommendations and opinions).
f. The introduction of the possibility of the Community legislative body (European Council and Parliament) giving the Commission the power to adopt delegate regulations which complete or develop non-essential elements of the law or framework legislation, to furnish the Community regulatory procedure with greater flexibility.
g. The generalization of the current procedure of co-decision as an ordinary legislative procedure, in other words, the need, as a general rule, for the agreement of the European Council and Parliament to adopt regulations from secondary legislation.
h. The classification of the competences of the Union into three categories: exclusive, shared and support measures. The Government points out that, while the list of matters of the exclusive competences and that of the support measures are exhaustive, the list of matters included in the shared competences is indicative and is defined by opposition to all the scopes of action that are neither exclusive nor considered as support measures. Both the non-exhaustive nature of the shared competences and the subsistence of a flexibility clause (ex Art. 308 TCE) would be a minimum guarantee for enabling the evolution of the Union and its adaptation to the new needs of social and economic reality.
i. The anticipation of a new role for national parliaments when verifying the fulfilment of the principle of subordination. This point explains that the Protocol on the application of the principles of subordination and proportionality contains a mechanism, commonly known as 'early warning', whereby all the legislative proposals put forward by the Commission must be sent directly to the national parliaments so that they may issue an opinion for the attention of the European Commission, Council and Parliament. If at least one third of the national parliaments (one quarter in the case of proposals in the scope of justice, freedom and security) were to issue opinions resulting from the non-fulfilment of the principle of subordination, the Commission must re-examine its proposal. Finally, the Court of Justice is competent for hearing the claims made by the member states concerning the violation of the principle of subordination, as indicated and where applicable, by their national parliaments, in accordance with their respective constitutional legislations.

C. The Government subsequently refers to the origin of this requirement in view of the opinion issued by the State Council of 21 October 2004. Said opinion, issued after consultation with the Government in accordance with Art. 22.1 of Organic Statute 3/1980, of 22 April, of the State Council, the Permanent Commission of the Cabinet carried out a detailed examination of the Treaty regarding its compatibility with the Spanish Constitution, analyzing its main innovations.

Firstly, the State Council appreciates that the Treaty is a question of supranational integration which is incorporated naturally into our legislation by virtue of Art. 93 CE, which, together with other provisions set forth in the Constitution, is an expression of the provisions planned for the opening-up of Spanish legislation to the influences of international law, since it enables the verification of a transfer of the exercise of competences resulting from the Constitution to the European Union. Consequently, the State Council analyzes the sufficiency and ideal nature of said channel to ratify the Treaty, concluding that, 'although the system for the attribution of competences in the Treaties (whose repeal shall lead to the system considered here) has led to the questioning of the existence of sufficiently defined competences as the object of the attribution set forth in Article 93 of the Constitution, the new system set forth in the Treaty explains and details the competence framework of the Union, consequently reducing the broad margin for interpretation allowed by the Treaties until now.' Consequently, the State Council considers the channel of Art. 93 CE as ideal for the ratification of the Treaty.

With regard to Part II of the Treaty, which integrates with full legal weight the Charter of Fundamental Rights of the European Union, the State Council declares that its meaning must be considered on the basis of the fact that the provisions set forth in the Charter limit its binding force for the member states 'only when they apply the legislation of the Union' (Section 1 of Article II-111), a delimitation which is joined to the declaration which states that neither the Charter nor the European Agreement imply whatsoever extension of the competences attributed to the Union. Furthermore, Article II-113 prevents, in a similar way to Article 53 of the European Agreement, the provisions of the Charter from being interpreted as limiting or detrimental to the human rights and fundamental liberties recognized, in their respective scopes of application, by the Law of the Union, international law and the international agreements of which the Union or all the member states form a part and, in particular, the European Agreement for the Protection of Human Rights and Fundamental Liberties, as well as the constitutions of the member states. For its part, with regard to the rights set forth in the Charter corresponding to the rights guaranteed by the European Agreement, Article II-112 sets forth that, 'its meaning and scope shall be the same as those awarded by said Agreement', without hindrance to the fact that 'the Law of the Union awards greater protection' (Section 3), and adds that the rights recognized by the Charter resulting from the constitutional traditions common to the member states 'shall be interpreted in harmony with the aforementioned traditions' (Section 4).

From the above, the State Council concludes that it appears to be guaranteed 'to a sufficient extent that the provisions set forth in the Charter shall not lead to contradictions or discordances with the configuration the Spanish Constitution makes of said rights and liberties.' However, the coexistence of the two guarantee systems with the system set forth in the European Agreement also expressly referred to in the Charter, implies the coexistence of three regimes or parameters for the protection of fundamental rights (Constitution, European Agreement and Charter), which, if the Treaty comes into force, shall lead to a future process of mutual influences not free from legal problems whose clarification, in the opinion of the State Council, corresponds to the Constitutional Court with regard to the significance of the extent to which the Charter is binding for the Spanish authorities, as well as to the relations of said Charter with our constitutional system of rights and freedoms and the way of refining the contradictory regulations. All of these questions justify the Government's present doubts concerning constitutionality.

Thirdly, the State Council examines the statute of European citizenship in view of the new Treaty (Title II of Part I and Title V of Part II), highlighting the fact that, 'leaving aside the systematic disparities which may be inferred [...], it is true that the opening-up to the basic content of European citizenship was verified by Spanish legislation and the new laws refer to the scope of action of the powers of the Union and are in full agreement with the rights of the administrators in accordance with the constitutional traditions of the member states'. And with regard to the subjective scope of application of the aforementioned statute of citizenship, the State Council highlights that the citizenship of the Union 'is added to national citizenship without replacing it or including it in the current formulation of the Spanish Constitution, which means that it would not appear to pose problems regarding the incorporation of said provisions into national legislation'.

Finally, the State Council analyzes the explicit and formal proclamation in Article I-6 of the principle of primacy of the Law of the Union, considering possible conflicts between said precept and the Constitution. The State Council points out that, 'the Treaty raises the primacy of Community Law to a regulation of the Constitution for Europe. Said principle, which has been qualified as an 'existential requirement' of said Law, as is well-known, is the result of the jurisprudential construction of the Court of Justice of the European Communities on the basis of the Sentence of 15 July 1964 (Costa c. ENEL) and developed in subsequent sentences, such as the SSTJCEs of 14 December 1971 (Politi), 13 July 1972 (Comisión c. Italy), 9 March 1978 (Simenthal), among many others, and means that whatsoever regulation of Community Law, not only of primary legislation but also of secondary legislation, prevails over those of internal legislation, whatever the rank thereof, including constitutional legislation. Consequently, it operates against whatsoever source, whether prior or subsequent to Community legislation and with regard to both the jurisdictional bodies and the other organs of the State'.

In view of the above, the State Council understands that the text of Article I-6 of the new Treaty of the Union may contradict with the consideration of the Spanish Constitution as the supreme legislation of our legal system and consequently recommends that the faculty set forth in Art. 95.2 CE be used so that the Constitutional Court may declare whether or not there exists contradiction between the Treaty which sets forth a Constitution for Europe and the Spanish Constitution.

Should said contradiction be considered as existing with regard to said specific question, the State Council indicates, as a possible formula for saving, in this case and pro futuro, eventual problems of compatibility between the Constitution and Community legislation, which 'perhaps rather than proceeding to specific material reforms whenever a contradiction is detected, would be, in accordance with the guidelines of other European constitutional models, to introduce into the Constitution itself (i.e. with a reformulation of Article 93) a clause of integration which incorporates a mechanism which by and within itself enables – with the limits of intangibility considered inalienable and with the objectives or with the formal aggravated requirements considered necessary – a general opening-up of Spanish legislation to Community Law and, by virtue thereof, the constitutionality of said legislation – compatibility with the Constitution – is recognized a priori.

In view of the recommendation formulated by the State Council and the abovementioned considerations and opinions, the Government has adopted the agreement to require the abovementioned declaration from the Constitutional Court.

3. By virtue of a Ruling of 8 November 2004, the Plenary Session agreed to admit the requirement of the Government of the Nation in accordance with Arts. 95.2 of the Constitution and 78.1 LOTC, and to summons, in accordance with the provisions set forth in Art. 78.2 LOTC, the Government, the Spanish Congress and the Senate, by means of their respective presidents, so that, within the maximum term of one month, they may give their founded opinion on the matter.

4. By means of a document registered in the Court on 18 November 2004, the President of the Senate notified this Court of the agreement adopted by the Parliamentary Assembly on 16 November 2004, whereby, acknowledging the receipt of the notification of the abovementioned Ruling of 8 November, it is declared that the Upper House shall not exercise its right to issue a founded opinion on the matter set forth in the requirement issued by the Government.
5. By virtue of a document registered in this Court on 19 November 2004, the President of the Spanish Congress shall not take a personal part in this procedure nor express his/her founded opinion on the matter, in reference to the General Secretary's Department of Studies and Documentation.
6. By virtue of a document registered on 19 November 2004, which was acknowledged by the Department of Justice of the Plenary Session on 22 November 2004, the Attorney General, by virtue of his/her legal representation and in fulfilment of the instructions set forth in the Agreement of the Cabinet of Ministers of 19 November 2004, declared that the Government of the Nation would not formulate a founded opinion on the procedure of Art. 78.2 LOTC, in reference to the text of the Agreement of the Government which gave rise to the initiation of this procedure.
II. Legal Base
1. This is the second occasion on which this Court has been required to give its opinion on the conformity with the Constitution of an international treaty which is to be integrated into Spanish legislation, in this case the Treaty which lays down a Constitution for Europe. Said requirement must be substantiated by means of the specific procedural channel set forth in Art. 95.2 of the Constitution and in Art. 78 LOTC, about whose nature and significance we made a series of considerations in Declaration 1/1992, of 1 July (DTC 1/1992, hereinafter).
Indeed, it was said at that time that, with the procedure set forth in Art. 95.2 of the Constitution, this Court is entrusted with a double commission, since the general or common issue, consisting of the jurisdictional defence of the Constitution, is joined by that of guaranteeing the security and stability of the international commitments Spain is capable of assuming. If preferred, by virtue of the preventive exercise thereof, a precautionary dimension is added to the jurisdictional commission in order to safeguard the international responsibility of the State. In short, it is a question of ensuring the supremacy of the Constitution without prejudice to said commitments, seeking to avoid the possible contradiction between one and the other having to be solved once the agreed regulations have been integrated into the legislation, in other words, when the logic of the supremacy of the Constitution may give rise to consequences that are incompatible with the logic of respect for international agreements. Article 95.2 CE makes it possible for the doubts on the constitutionality which result from a treaty to be solved prior to the ratification thereof, in such a way that, should the former be confirmed, the latter shall be blocked until the constitutional text is reviewed or the treaty is renegotiated in terms that make it compatible with the Constitution In short, the aim is to avoid a situation where the aforementioned contradiction between the supreme regulation on the one hand and a regulation that has not yet been integrated in the system governed by the former on the other is substantiated on a contradiction between the Constitution and an international regulation incorporated into our legislation.
With said anticipated jurisdictional defence, the supremacy of the Constitution is ensured with regard to international regulations from the moment of the integration of said regulations into national legislation, seeking to remove 'the disturbance which the eventual declaration of unconstitutionality of an agreed regulation would imply for foreign policy' (DTC 1/1992, FJ 1) if the contrasting opinion is verified once it has been incorporated into internal legislation. The contradiction is therefore resolved by avoiding it in its origin and not only when it has already occurred and there is no other channel except for the activation of two guarantee systems, i.e. the international and the internal systems [ex Art. 27.2.c) LOTC], which may lead to mutually disturbing consequences.

Consequently, based on the strictly jurisdictional nature of the preventive procedure set forth in Art. 95.2 of the Constitution, in the aforementioned Declaration 1/1992, we have stated that 'what can be requested of us is a declaration, not an opinion; a decision, not a mere opinion founded on Law, [since] this Court does not cease to be a court to occasionally become a consultant body by virtue of requirement. As happens in matters concerning unconstitutionality, what the requirement involves is the exposition of a reasonable doubt, but what is being requested of us is not a reasoning that resolves said doubt, but rather a binding decision' (DTC 1/1992, FJ 1). And it is said jurisdictional nature which means that our opinion can be based only on legal-constitutional arguments – suggested or not by the requiring party or by those who may appear in the procedure – and limit itself to [...] the contrast between whatsoever provision set forth in the Constitution and the clause or clauses of the Treaty that have been subject to preliminary control, since Art. 95.1 of the former has reserved exclusively for the Government and for one or the other of both Chambers the faculty of formulating said doubt concerning constitutionality, whose consideration and explanation ex officio does not correspond, therefore, to the Court, which, as in other procedures, lacks initiative and is bound to the constitutional principle of congruence. This is without prejudice to the fact that this Court may request new information and explanations or extensions in accordance with Art. 78.3 of the LOTC.' (loc. ult. cit.)

2. The doubt concerning constitutionality proposed by the Government of the Nation refers to three precepts set forth by the Treaty which lays down a Constitution for Europe, signed in Rome on 29 October 2004: Articles I-6, II-111 and II-112. Furthermore, the Government requires this Court to give its opinion on the sufficiency of Art. 93 CE to make way for the integration of the Treaty into internal legislation or, where applicable, concerning the pertinent procedure of constitutional review to adapt the Constitution to the Treaty prior to its integration.

Before giving a detailed reply to the proposed questions, certain preliminary considerations are necessary concerning the scope and content of Art. 93 CE, whose introduction constitutes an application of the Constitution itself, an exponent, at the same time, of an unmistakeable act of exercise of the sovereignty of Spain.

As becomes clear from the work of the constituent courts, Art. 93 is conceived as the constitutional means for our integration into the European Communities. Said phenomenon of integration goes further than the mere procedure thereof and involves the consequences of the insertion into a different supranational body, susceptible to the creation of its own legislation furnished with its own governing principles of efficiency and demands and limits to the applicability of its regulations. The former was a long-awaited and undoubtedly constitutionally desired integration and, consequently, enabled by virtue of the aforementioned Art. 93 CE.

The adhesion of the Kingdom of Spain to the present European Union has been effectively carried out by virtue of Art. 93 of our Constitution, a key precept therefore for said purpose, which this Court has now characterized in its jurisprudence and in its previous DTC 1/1992, and in whose complexity, which we previously declared in said Declaration as 'not slight' (FJ 4), we must continue to examine further in order to provide an answer to the requirement presented to us at this present time.

Of Art. 93 CE, the 'final base' of our incorporation into the process of European integration and our connections with Community legislation, we have said that it is 'an organic procedural precept (STC 28/1991, of 14 February, FJ 4, and DTC 1/1992, FJ 4) which enables the attribution of the exercise of competences derived from the Constitution to international institutions or organizations. Said dimension was the only one considered in the aforementioned Declaration in order to determine, in response to the doubt considered at that time, whether or not Art. 93 CE was a sufficient mechanism for the exception of the limit Art. 13.2 CE set forth to the extension to foreigners by the Treaty or by the law of the right to passive suffrage in municipal elections, where the conclusion with regard to the contradiction corresponding to the text of a substantive

constitutional regulation was that said precept did not incorporate a channel for review which could be compared with the procedures for constitutional reform as regulated by Title X CE. However, it is indeed the channel set forth by the Constitution for the transfer or attribution to international institutions or organizations of the exercise of competences resulting therefrom, thus modulating, as we recognized in said Declaration, the scope of application and legislation of the exercise of the transferred competences (FJ 4).

What we said in DTC 1/1992 was based on precise reasoning, consisting at that time of the existence of a contradiction between Art. 8.B of the Treaty for the Constitution of the European Community and the text of the Spanish Constitution, Art. 13.2, where said reasoning was ground for the understanding of the scope of some of the content of said Declaration when issuing the present Declaration, which operates in a very different framework, where, as we shall explain, said contradiction with the text does not exist.

Article 93 CE is undoubtedly a basic constitutional support for the integration of other legislations into our own, through the transfer of the exercise of competences resulting from the Constitution, legislations that are required to coexist with internal legislation and legislations that are of a regional origin. Metaphorically, it could be said that Art. 93 CE operates as a door through which the Constitution itself allows the entry of other legislations into our constitutional system through the transfer of the exercise of competences. Consequently, Art. 93 CE is given a substantive or material dimension which must not be ignored.

After the integration, emphasis must be placed on the fact that the Constitution is no longer the framework of validity of Community legislation, but rather the Treaty itself, which carried out the sovereign operation of transfer of the exercise of competences resulting from the former, although the Constitution requires that the legislation accepted as a result of the transfer be compatible with its basic values and principles.

As results from the mechanism set forth in the constitutional precept itself, the need for providing international bodies in whose favour the exercise of competences has been transferred with the instruments required to guarantee the fulfilment of the legislation they have created must not be ignored. Said function can only be blocked by an inadequate understanding of the aforementioned constitutional precept and its integrationist substance. Accordingly, an interpretation is required which answers to the unavoidable dimension of Community integration included in the constitutional precept.

Said interpretation must be based on the recognition of the fact that the operation of the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own impose unavoidable limits to the sovereign faculties of the State, acceptable only when European legislation is compatible with the fundamental principles of the social and democratic State of Law established by the national Constitution. Consequently, the constitutional transfer enabled by Art. 93 CE is subject to material limits imposed on the transfer itself. Said material limits, not expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Art. 10.1 CE), limits which, as we shall see later, are scrupulously respected in the Treaty under analysis.

Having made the above considerations, we shall now give direct answers to the questions posed by the Government.

3. The first question refers to Article I-6 of the Treaty, whose literal content is as follows:

‘The Constitution and the legislation adopted by the institutions of the Union in the exercise of the competences attributed thereto shall prevail over the legislation of the member states.’

This clause of the Treaty, as has been formally pointed out by the Conference of Representatives of the Governments of the Member States by virtue of the Declaration provided as an Annexe to

the Treaty (Declaration in Annexe to Art. I-6), 'shows the existing jurisprudence of the Court of Justice of the European Communities and the First Instance Court', and in its express proclamation it sets forth the primacy of the Law of the Union in the scope of the exercise of the competences attributed to the European institutions. Said primacy is not set forth as a hierarchical superiority but as an 'existential requirement' of said Law, in order to achieve in practice the direct effect and equal application in all states. The consequent coordinates for the definition of the scope of force of said principle are, as we shall see, determining for its understanding in view of our own constitutional categories.

The first point to highlight for the correct interpretation of the proclaimed primacy and the framework in which it is developed is that the Treaty which lays down a Constitution for Europe is based on the respect for the identity of the states involved therein and their basic constitutional structures, and it is founded on the values that are to be found in the base of the constitutions of said states.

Art. I-5.1 is sufficiently explicit to this regard when it states:

'The Union shall respect the equality of the member states before the Constitution, together with their national identity, inherent to their political and constitutional structures, and with regard to their local and regional autonomy. It shall respect the essential functions of the State, especially those aimed at guaranteeing their territorial integrity, keeping public order and safeguarding national security.'

At the same time, with regard to the values on which the Union is based, Art. I-2 is conclusive, and sets forth the following:

'The Union is based on the values of human dignity, freedom, democracy, equality, State of Law and respect for human rights, including the rights of people belonging to minority groups. Said values are common to the member states in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women.'

In turn, it is continued in the Charter for Fundamental Rights of the Union, set forth in Part Two of the Treaty, whose preamble sets forth that, 'it is founded on the indivisible values of human dignity, freedom, equality and solidarity', and none of the provisions set forth therein 'may be interpreted as limiting or detrimental to the human rights and fundamental freedoms recognized [...] by the constitutions of the member states' (Art. II-113 of the Treaty).

Said precepts, among others, confirm the guarantee of the existence of the states and their basic structures, as well as their values, principles and fundamental rights, which under no circumstances may become unrecognizable after the phenomenon of the transfer of the exercise of competences to the supra-state organization, a guarantee whose absence or lack of explicit proclamation previously explained the reservations against the primacy of Community legislation with regard to the different constitutions by known decisions of the constitutional jurisdictions of certain states, in what has become known in the doctrine as the dialogue between the constitutional courts and the TJCE. In other words, the limits referred to by the reservations of said constitutional justifications now appear proclaimed unmistakeably by the Treaty under examination, which has adapted its provisions to the requirements of the constitutions of the member states.

Consequently, the primacy proclaimed in the Treaty which lays down a Constitution for Europe operates with regard to a legislation which is built on the common values of the constitutions of the states integrated into the Union and their constitutional traditions.

On the basis of said guarantees, it must also be pointed out that the primacy set forth for the Treaty and its resulting legislation in the questioned Art. I-6 is reduced expressly to the exercise of the competences attributed to the European Union. Therefore, it is not a primacy with a general scope, but one which refers exclusively to the competences of the Union. Said competences are set in accordance with the principle of attribution (Art. I-11.1 of the Treaty), by virtue of which 'the Union acts within the limits of the competences attributed thereto by the

member states of the [European] Constitution to achieve the objectives set forth thereby' (Art. I-11.2). Therefore, the primacy operates with regard to the competences transferred to the Union by the sovereign will of the State and also sovereignly recoverable by means of the procedure of 'voluntary withdrawal' as set forth in Article I-60 of the Treaty.

At the same time, it must be pointed out that the Union must exercise its non-exclusive competences in accordance with the principles of subordination and proportionality (Art. I-11.3 and 4), in such a way that the phenomenon of the expansion of competences, which was previously caused by the functional and dynamic nature of Community legislation, is rationalized and limited, since, thereafter and by virtue of the 'flexibility clause' as presently set forth in Article I-18 of the Treaty, in the absence of specific powers for taking the necessary actions for obtaining its objectives, the Union may act only through measures adopted unanimously by the Cabinet of Ministers on the proposal of the Commission and after approval by the European Parliament, including the participation of the national parliaments in the framework of the procedure for controlling the principle of subordination set forth in Article I-11.3 of the Treaty.

And as a result of what it does to the way of distributing competences between the European Union and the member states, Articles I-12 to I-17 of the Treaty define the scope of competences of the Union in a more precise way. Consequently, the new Treaty does not alter the situation created after our adhesion to the Communities in any substantial way and, if anything, simplifies and reorders it in a way that provides greater precision to the scope of the transfer of the exercise of competences as verified by Spain. But above all, the competences whose exercise is transferred to the European Union could not, without a breakdown of the Treaty itself, act as a foundation for the production of Community regulations whose content was contrary to the values, principles or fundamental rights of our Constitution.

4. Having defined the essential elements of the regulatory framework in which the precept on which the Government's doubts are based, it must be pointed out that the Government echoes the doubts expressed by the State Council in its Opinion of 21 October 2004 concerning the compatibility of this article with the Constitution, identifying as a possible contradictory constitutional precept Art. 9.1, which would proclaim a principle of supremacy of the Constitution on which Title IX of the fundamental regulation (of the Constitutional Court) is based and whose guarantee is sought with the provisions set forth in Title X (of the constitutional reform). In fact, having considered the terms under which the matter is being considered, the aforementioned contradiction must be extended to Art. 1.2 of the Constitution, since the supremacy supposedly challenged by the Treaty results from a regulation in which it is set forth as an expression of the exercise of the will of the State by the Spanish people, in whom national sovereignty resides.

However, we shall see below that said contradiction does not exist.

The fact that the Constitution is the supreme regulation of Spanish legislation is a matter which, even when it is not expressly proclaimed under whatsoever precept, undoubtedly results from the principle of many of them, including, among others, Arts. 1.2, 9.1, 95, 161, 163, 167, 168 and prov. of repeal, and it is consubstantial to its condition as a fundamental regulation; supremacy or superior rank of the Constitution with regard to whatsoever other regulation and, in particular, with regard to the international treaties, which we set forth in DTC 1/1992 (FJ 1). The proclamation of the primacy of Union legislation by Art. I-6 of the Treaty does not contradict the supremacy of the Constitution.

Supremacy and primacy are categories which are developed in differentiated orders. The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of

application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons. In principle, all supremacy implies primacy (which leads to its occasional equivalence, as in our DTC 1/1992, FJ 1), unless the same supreme regulation has set forth, in some scope, its own displacement or non-application. The supremacy of the Constitution is therefore compatible with application systems which award applicative preference to regulations of another legislation other than the national legislation as long as the Constitution itself has set forth said provision, which is what happens exactly with the provision set forth in Art. 93, which enables the transfer of competences resulting from the Constitution in favour of an international institution thus enabled constitutionally for the regulatory provision of matters until then reserved for constituted internal powers and the application thereto. In short, the Constitution has accepted, by virtue of Art. 93, the primacy of the Union legislation in the scope inherent to said Law, as now recognized expressly in Art. I-6 of the Treaty.

And things between us have been so since the incorporation of Spain into the European Communities in 1986. At that time, an autonomous regulatory system was integrated into Spanish legislation, equipped with a specific system of applicability, based on the principle of prevalence of its own provisions regarding whatsoever provision from the internal legislation it may contradict. Said principle of primacy, based on jurisprudence, formed part of the Community heritage incorporated by virtue of Organic Statute 10/1985, of 2 August, authorized for the adhesion of Spain to the European Communities, since it looks back to the doctrine begun by the Court of Justice of the Communities with the Sentence of 15 July 1964 (Costa/ENEL).

Otherwise, our jurisprudence has pacifically recognized the primacy of European Community legislation over internal legislation in the scope of the 'secondary competences of the Constitution', whose exercise Spain has attributed to the Community institutions based, as we have said, on Art. 93 CE.

In particular, we have referred expressly to the primacy of Community legislation as a regulatory principle or a technique aimed at ensuring its effectiveness in our STC 28/1991, of 14 February, FJ 6, with a partial reproduction of the Simmenthal Sentence of the Court of Justice, of 9 March 1978 and in the subsequent STC 64/1991, of 22 March, FJ 4 a). In our subsequent SSTC 130/1995, of 11 September, FJ 4, 120/1998, of 15 June, FJ 4, and 58/2004, of 19 April, FJ 10, we reiterate the recognition of said primacy of the regulations of primary and secondary Community legislation and their direct effect for citizens, assuming the characterization which had been carried out on the basis of said primacy and effectiveness by the Court of Justice in, among others, its known and former Sentences of Van Gend and Loos, of 5 February 1963, and the aforementioned Costa/ENEL, of 15 July 1964.

Therefore, in view of the above, it must be concluded that, in accordance with the provisions set forth in Art. 93 CE, correctly understood, and given the specific provisions of the Treaty set forth in the preceding legal base, this Court does not understand whatsoever contradiction between Art. I-6 of the Treaty and Art. 9.1 CE, where, in short, the supposed regulation set forth in Art. 95.1 CE is not applicable.

In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent through the corresponding constitutional procedures, apart from the fact that the safekeeping of the aforementioned sovereignty is always ultimately assured by Art. I-60 of the Treaty, the actual counterpoint of Art. I-6, which makes it possible to define, in its real

dimension, the primacy set forth in the latter, incapable of overcoming the exercise of a waiver, which is reserved for the supreme, sovereign will of the member states.

5. The Government also requires a declaration concerning the possible contradiction with the Constitution of two clauses of the Treaty included in Title VII of Part II and referring to the scope of application and the scope and interpretation of the rights and principles of the Charter of Fundamental Rights of the Union proclaimed in Nice on 7 December 2000 and now incorporated into the Treaty. The first of the precepts about which the Government inquires is Article II-111, by virtue whereof:

'1. The provisions of this Charter are aimed at the institutions, organs and bodies of the Union, within the respect for the principle of subordination and at the member states exclusively when they apply Union legislation. Consequently, the member states shall respect the rights, observe the principles and promote the application thereof, in accordance with their respective competences and within the limits of the competences attributed to the Union in the other Parts of the Constitution.

2. This Charter does not extend the scope of application of the legislation of the Union beyond the competences of the Union, nor does it create whatsoever new competence or mission for the Union, nor modify the competences or missions set forth in the other Parts of the Constitution.'

The second of the clauses indicated by the Government – Article II-1123 – sets forth the following:

'1. Whatsoever limitation to the exercise of the rights and freedoms recognized by this Charter must be set forth by law and respect the essential content of said rights and freedoms. Within the respect for the principle of proportionality, limitations may be introduced only when they are necessary and effectively respond to the objectives of general interest recognized by the Union or the need for protection of the rights and freedoms of others.

2. The rights recognized by this Charter and set forth in other Parts of the Constitution shall be exercised under the conditions and within the limits set forth thereby.

3. Insofar as this Charter contains rights that correspond to the rights guaranteed by the European Agreement for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope shall be similar to those awarded by said Agreement. This provision shall not prevent the Union legislation from awarding a more extensive protection.

4. Insofar as this Charter recognizes the fundamental rights resulting from the constitutional traditions common to the member states, said rights shall be interpreted in accordance with the aforementioned traditions.

5. The provisions set forth in this Charter and containing principles may be applied by means of legislative and executive documents adopted by the institutions, organs and bodies of the Union, and by means of documents of the member states when they apply the legislation of the Union in the exercise of their respective competences. They may be alleged only before a jurisdictional body with regard to the interpretation and control of the legal nature of said documents.

6. Full consideration shall be given to the national practices and legislations in accordance with the specifications set forth in this Charter.

7. The explanations given as guidance in the interpretation of the Charter of Fundamental Rights shall be taken duly into account by the jurisdictional bodies of the Union and the member states.'

Echoing the opinion of the State Council, the Government understands that the provisions set forth in the Charter do not contradict with the constitutional configuration of rights and freedoms, particularly when taking into account the invocation of the European Agreement for the Protection of Human Rights and Fundamental Freedoms by Article II-112.3 of the Treaty, since the common remission of the Treaty and Art. 10.2 of the Constitution to said Agreement implies the substantial conformity of Part II of the Treaty with the order of values, rights and

principles guaranteed by the Spanish Constitution. The difficulty pointed out by the Government would be that which results from the coexistence of three systems for the protection of fundamental rights (Constitution, European Agreement and Charter), which shall necessarily determine a process of mutual influences not exempt from difficulties. In particular, in its opinion, the State Council indicates that it shall correspond to this Constitutional Court to 'explain the meaning of the connection of the Spanish authorities by virtue of the Charter, the relations thereof with our constitutional system of rights and freedoms and the way of refining the contradictory regulations'.

The Agreement reached by the Cabinet of Ministers which has led to this requirement seems to interpret the previous consideration of the State Council insofar as it is within the framework of this procedure of Art. 95.2 CE where an answer from this Court would correspond to the problems resulting from the coexistence of three systems for the guarantee of fundamental rights and freedoms. In view of the above, the specific question proposed by the Government refers to the compatibility of Articles II-111 and II-112 of the Treaty with the Constitution 'in view of the provisions set forth in Article 10.2 of the Spanish Constitution'. On the basis of all this, the Government's doubt which may be answered here extends exclusively to the compatibility with the Constitution of a system of laws which, by virtue of the remission set forth in Art. 10.2 of the Constitution, would stand, after the integration thereof, as a determining factor of the configuration of the rights and freedoms, not only in the scope of European legislation, but also by virtue of its inherent expansive vocation, also in purely internal legislation.

6. The problems of configuration between the guarantee systems are characteristics of our system of fundamental rights, where this Constitutional Court is responsible for the function of setting forth the specific content of the rights and freedoms assured by the Spanish public power on the basis of the concurrence, in the definition thereof, of international regulations and strictly internal regulations, where the former are equipped with their own protection measures and, consequently, with an authorized definition of the content and scope thereof. The specific constitutional problems which may arise from the integration of the Treaty may not be the object of an anticipated and abstract opinion. As happens with those being proposed from the beginning by the integration of the Agreement of Rome, the solution may only be sought within the framework of the constitutional procedures attributed to the knowledge of this Court, i.e. weighting for each specific right and in the specific circumstances thereof the more relevant formulas for constitution and definition, in constant dialogue with authorized jurisdictional instances, where applicable, for the authentic interpretation of the international agreements that contain declarations of rights that coincide with those set forth by the Spanish Constitution.

Consequently, the doubt that can be examined here refers to the eventual contradiction with the Constitution of a Charter of Rights which, by virtue of the provisions set forth in Art. 10.2 CE, should stand, after its integration into Spanish legislation, as a model for the interpretation of 'the regulations related to the fundamental rights and to the freedoms which the Constitution recognizes'. This is, of course, without prejudice to their value regarding the legislation of the Union, integrated into our legislation ex Art 93 CE. This is the only possible meaning of the reference to Articles II-111 and II-112 of the Treaty, which, respectively, lay down the scope of application of the rights of the Charter, on the one hand, and the criteria that define the interpretation and scope thereof, on the other. With regard to the former, the Treaty identifies as addressees of the Charter the 'institutions, organs and bodies of the Union', as well as the member states thereof 'when they apply the legislation', with the express exception of the fact that the Charter does not alter, by extension, the scope of competence of the European Union. Said reduction of the scope of applicability of the Charter – and, consequently, of the criteria of interpretation set forth in Article II-112 – could not prevent, should the consent for obligation by the Treaty be given, the fact that as an agreement of rights ratified by Spain, through the

procedure set forth in Art. 93 CE, its interpretative efficiency regarding the rights and freedoms proclaimed by the Constitution has the general scope set forth in Art. 10.2 CE.

Consequently, the doubt is whether or not the unavoidable extension of the criteria for the interpretation of the Charter beyond the limits set forth in Article II-111 is compatible with the system of rights and freedoms guaranteed by the Constitution. In other words, whether or not the criteria set forth by the Treaty for the organs of the Union and for the member states when they apply European legislation can be reconciled with the fundamental rights of the Constitution and, to said extent, can also be applied to Spanish public powers when they act outside the scope of the legislation of the Union, namely, also in circumstances that do not offer whatsoever connection with said legislation. Finally, it must be remembered that it is completely evident that the application by the national judge, as by the European judge, of the fundamental rights of the Charter must imply, almost without exception, the simultaneous application of the correlative fundamental national right, a hypothesis which could be considered if the interpretation of the constitutional rights in view of the Charter (Art. 10.2 CE) can be reconciled, in turn, with the definition thereof resulting from our jurisprudence, which, as we have already said, always considers the corresponding treaties and agreements.

It is the reiterated doctrine of this Court that the international treaties and agreements referred to by Art 10.2 of the Constitution 'constitute valuable interpretative criteria for the meaning and scope of the rights and freedoms recognized by the Constitution', in such a way that they must be considered 'in order to corroborate the meaning and scope of the specific fundamental right which [...] has been recognized by our Constitution [...].' [STC 292/2000, of 30 November, FJ 8, precisely with reference to the Charter of Nice; also STC 53/2002, of 27 February, FJ 3 b)]. The interpretative value which, with this scope, the Charter would have regarding fundamental rights would not cause more difficulties in our legislation than those currently resulting from the Agreement of Rome of 1950, simply because both our own constitutional doctrine (on the basis of Art. 10.2 CE) and Article II-112 (as shown by the 'explanations' which, as a means of interpretation, are incorporated into the Treaty by virtue of Paragraph 7 of the same Article) operate with a set of references to the European Agreement which give rise to the jurisprudence of the Court of Strasbourg as a common denominator for the establishment of shared elements of interpretation in the minimum content thereof. Even more so when Art. I-9.2 imperatively sets forth that 'the Union shall adhere to the European Agreement for the Protection of Human Rights and Fundamental Freedoms'.

Said reduction of the complexity inherent to the concurrence of criteria for interpretation says nothing new about the value the jurisprudence of the Courts of the European Union must have for the definition of each right. In other words, it does not represent a qualitative change for the relevance of said doctrine in the ultimate configuration of fundamental rights by this Constitutional Court. It simply means that the Treaty assumes as its own the jurisprudence of a court whose doctrine is already integrated into our legislation by virtue of Art. 10.2 CE, in such a way that there are no new or greater difficulties for the ordered constitution of our legislation. And the resulting difficulties, as has been said, may only be apprehended and solved by the constitutional processes with which we are familiar.

Furthermore, emphasis must be given to the fact that Article II-113 of the Treaty sets forth that none of the provisions in the Charter 'may be interpreted as limiting or detrimental to the human rights and fundamental freedoms recognized, in their respective scope of application, by the legislation of the Union, international law and the international agreements of which the Union and all the member states are a part, and in particular, the European Agreement for the Protection of Human Rights and Fundamental Freedoms, as well as by the constitutions of the member states'. Consequently, besides the bases of the Charter of Fundamental Rights in a community of values with the constitutions of the member states, it is clear that the Charter is conceived, in whatsoever case, as a guarantee of minimums on which the content of each right

and freedom may be developed up to the density of content assured in each case by internal legislation.

The conclusion reached in answer to the second of the Government's questions must therefore be that there is no contradiction between the Spanish Constitution and Arts. II-111 and II-112 of the Treaty which lays down a Constitution for Europe.

7. With regard to the third of the points on which the Government requires a declaration from this Court, namely, the sufficiency of Art. 93 of the Constitution for the integration of the Treaty into Spanish legislation, said sufficiency has practically been affirmed in the preceding legal base and consequently, it need not be reiterated here, where a mere reference to the above shall suffice.

Other considerations which, in keeping with the indications given by the State Council, are posed by the Government regarding the possible convenience of introducing modifications to the current text of Art. 93 CE in express allusion to the process of European integration and to make room for the ulterior developments of said process, refer to the opportune nature thereof and, obviously, we cannot give an opinion to this regard, since our jurisdiction – and its exercise is also examined in this procedure, as was said at the beginning – empowers us only to make declarations on what is constitutionally necessary. From this viewpoint, the current text of Art. 93 CE is sufficient for the integration of a Treaty such as that under our analysis.

8. Finally, and with regard to the fourth question posed by the Government, the corresponding premise is missing. Said premise is the need for a reform of the Constitution, which is not applicable in this case as there is no contradiction between the precepts of the Treaty referred to in the Government's requirement and the Spanish Constitution. Consequently, there is no call to issue an opinion on said question.

In accordance with the above, the Constitutional Court, BY VIRTUE OF THE AUTHORITY AWARDED THERETO BY THE CONSTITUTION OF THE SPANISH NATION,

DECLARES

1. That there is no contradiction between the Spanish Constitution and Article I-6 of the Treaty which lays down a Constitution for Europe, signed in Rome on 29 October 2004.

2. That there is no contradiction between the Spanish Constitution and Arts. II-111 and II-112 of said Treaty.

3. That Art. 93 of the Spanish Constitution is sufficient for the State to consent to the aforementioned Treaty.

4. That no declaration whatsoever is required concerning the fourth of the Government's questions.

This declaration shall be published in the Official State Gazette.

Issued in Madrid on the thirteenth day of December of two thousand and four.