Conflicts between EU law and National Constitutional Law in the Field of Fundamental Rights

By Ioannis Dimitrakopoulos
Judge of the Council of State of Greece

I. Introduction – Reasons for Conflicts

The relationship between EU law and national constitutional law is a rather sensitive and sometimes complex issue, that national judges have to tackle when they deal with fundamental rights cases, having a sufficient nexus with EU law. In this context, national courts and, in particular, national supreme or constitutional courts act in a double capacity, namely both as national and european judges, since they have to interpret and apply, at the same time, EU law and national constitutional law. EU (primary or secondary) law and national constitutional rules in the area of fundamental rights usually point to the same direction and lead to results which are similar or at least compatible with each other. Nevertheless, in certain exceptional cases there may be divergences between EU and national rules, likely to create tensions, conflicts and even incompatibilities.

The reason for such conflicts is twofold. On the one hand, the legal order of the EU and the legal order established by each one of the national constitutions of its Member States are distinct and may provide for a different kind and level of fundamental rights protection. On the other hand, while the legal order of the EU is based on the principle of primacy, effectiveness and unity of EU law, Member States decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order[1], which implies that national constitutional rules and principles, as interpreted by national supreme courts, may restrict the applicability of EU law[2].

[1] See German Constitutional Court, order of 15 December 2015, 2 BvR 2735/14, para. 44.
[2] See judgments of national constitutional/supreme courts referred to in para. 47 of the above-mentioned order of the German Constitutional Court.

II. Basic Types of Conflicts

A. There are two basic types of such possible conflicts between EU law and national constitutional rules. First, conflicts may occur when the level of protection of fundamental rights afforded by primary or secondary EU law is greater than the one granted by national constitutional law, which, nevertheless, precludes such protection. Second, we may also have cases where national constitutional law offers higher protection than EU law, which does not allow it, either because it has been harmonised in the specific field, through secondary EU legislation, in a way that cannot be reconciled with the relevant national standard, or because its effectiveness would be undermined, for some other reason, if this national standard were to be applied.

B. The first kind of possible conflicts is reflected in cases like *Kreil* (C-285/98) and *Dansk Industri* (C-441/14). In the first case, the ECJ found that Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and working conditions precluded the application of national provisions, such as those of article 12a of the German Constitution, which imposed a general exclusion of women from military posts involving the use of arms[3]. In the second case, the ECJ held that the principles of legal certainty and protection of legitimate expectations, which are not only general principles of EU law, but also fundamental principles of national legal orders, could not relieve the national judge from its duty to disapply provisions of national legislation which were incompatible with the general principle of EU law prohibiting discrimination on grounds of age.

C. The second type of conflicts is exemplified by the *Melloni* (C-399/11) and *Åkerberg Fransson* (C-617/10) judgments of the CJEU. In *Melloni*, the Court held (a) that Article 4a(1) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, which provides in essence, that, once the person convicted in absentia was aware, in due time, of the scheduled trial and was informed that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, gave a mandate to a legal counsellor to defend

[3] Following this judgment of the ECJ, the German Fundamental Law was amended in a way that allowed women's access to such military posts.

him at the trial, the executing judicial authority is required to surrender that person, with the result that it cannot make that surrender subject to there being an opportunity for a retrial of the case in the issuing Member State, (b) that Article 4a(1) of Framework Decision 2002/584, as interpreted above, is compatible with the requirements of Articles 47 and 48(2) of the EU Charter and (c) that Article 53 of the Charter did not allow Spain to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its Constitution. In *Åkerberg Fransson*, the Court replied to a request for a preliminary ruling concerning the application of the *ne bis in idem* principle in relation to criminal and administrative sanctions for VAT violations, by noting, inter alia, that Member States may apply national standards of protection of fundamental rights, provided that the primacy, unity and effectiveness of European Union law are not thereby compromised, which implies that the combination of tax penalties and criminal penalties for the same tax violation may be considered illegal, as long as the remaining penalties are effective, proportionate and dissuasive, in light of the Member States' obligation to provide for and impose such penalties for violations of EU legislation on VAT.

III. Main Provisions of Primary EU Law Concerning its Relationship with National Constitutional Law

A. Article 6(3) of the Treaty on European Union: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." This provision reflects well-settled case law of the ECJ[4] and the resulting interaction between primary EU law and national constitutional rules, in the field of fundamental rights. For example, in *Berlusconi* (C-387/02), the ECJ found that the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the

[4] See, e.g. 11/70, *International Handelgesellschaft* and 4/73, *Nold*.

Member States and, as such, amounts to a general principle of EU law. Another striking example is *Mangold* (C-144/04), where the ECJ held that the principle of non-discrimination on grounds of age, found in various international instruments and in the constitutional traditions common to the Member States, should be regarded as a general principle of Community law. While inferring general principles of EU law from the constitutional traditions of the Member States promotes, in general, the convergence between EU law and national constitutional law, it may also create tensions between them, to the extent that the retroactive application of such unwritten principles, not clearly established beforehand, may frustrate legitimate expectations and, hence, run counter to the fundamental principle of legal certainty[5]. This possible kind of tension is reflected in the *Dansk Industri* judgment of the CJEU (C-441/14) and the subsequent *Ajos* judgment of the Supreme Court of Denmark[6].

B. Article 4(2) of the Treaty on European Union: "The Union shall respect the [… Member States'] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions […].". The case law of the CJEU on this provision is limited and mainly concerns the possibility for a Member State to invoke an element of its national identity as a legitimate public interest capable of justifying a national measure, which restricts one of the fundamental Union freedoms (see, in particular, C-208/09, *Sayn-Wittgenstein* and C-58/13, *Torresi* – cf. C-36/02, *Omega*). From the point of view of the CJEU, it is clear that Article 4(2) does not grant Member States a *carte blanche* to deviate from EU law on the basis of the respect of their national identity, which, nevertheless amounts to a compelling state interest

[5] Relatedly, Advocate General Trstenjak, in her opinion in case C-282/10, *Dominguez*, emphasized (para. 164) that "[…] the principle of legal certainty requires that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them. However, as it will never be possible for a private individual to be certain when an unwritten general principle given specific expression by a directive will gain acceptance over written national law there would, from his point of view, be uncertainty as to the application of national law similar to that experienced where a directive is directly applied in a relationship between private individuals, which the Court, as so often affirmed in its case-law, has been at particular pains to avoid. This would have serious consequences in the field of employment law, in particular, where the details of an almost immeasurable number of employment relationships are regulated.".

[6] See M.R. Madsen & H.P. Olsen, "L' arrêt *Ajos*: une rébellion danoise?", RTDEur 2017, pages 111-113.

that must be duly taken into account when balancing the conflicting obligations and interests involved. It seems undisputed that the "national identity" of Member States includes their constitutional identity, which, however, does not cover all constitutional rules of each Member State[7], but includes the essential constitutional protection of fundamental rights. The assessment of a national supreme court as to whether a specific element is part of the national identity of its Member State may bear considerable weight but is not decisive as regards the correct application of Article 4(2), which is ensured by the CJEU. The most relevant judgment of the CJEU in this respect, is *Sayn-Wittgenstein* (C-208/09), where the Court held that the Austrian Law on the abolition of the nobility, which has constitutional status and implements the principle of equal treatment, constitutes an element of national identity, which may be taken into consideration when a balance is struck between legitimate state interests and the right of free movement of persons recognised under EU law and is capable of justifying a Member State's refusal to recognise the surname of one of its nationals, as accorded in another Member State, which comprises an element of nobility. Relatedly it must be noted that, in *Taricco II*, the CJEU avoided dealing with the argument of the Italian Constitutional Court that the constitutional principle excluding retroactive application of a rule that extends the statutory limitations period in criminal cases forms part of Italy's national/constitutional identity.

C. Article 53 of the EU Charter provides that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party […] and by the Member States' constitutions". In *Melloni*, the Court held that Article 53 of the Charter cannot be construed as giving general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of secondary EU law, since

[7] See opinion of Advocate General Maduro in case C-213/07, *Michaniki AE*, paras. 31 and 33, making reference to *Internationale Handelsgesellschaft* (case 11/70) and noting that, otherwise, national constitutions could become instruments allowing Member States to avoid their obligations under Union law in certain fields.

such an interpretation of Article 53 would be contrary to the principle of the primacy of EU law, under which rules of national law, even of constitutional order, cannot undermine the effectiveness of EU law. *Melloni* went on to point out that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised. Hence, as regards matters fully governed by secondary EU law, national courts cannot use Article 53 as a legal instrument for resolving, in favor of their national law, conflicts between constitutional law and EU law in the field of fundamental rights.

IV. Avoiding, Minimising and Resolving (Potential) Conflicts : the National Courts' Perspective

When dealing with cases raising (potential) conflicts between constitutional law and EU law in the field of fundamental rights, national courts are basically presented with four options as to how to proceed.

A. The first option, is to interprete and apply constitutional rules in a way which is friendly to or in harmony with EU law, as interpreted by the CJEU. This approach, which seems to be and, in any event, should be the normal course of action for national courts and, in particular, national constitutional and supreme courts, presupposes a preliminary reference to the CJEU, if the meaning of the applicable EU rules is not clear enough. This implies that the national court's definitive assessment of the constitutional issue will be made after (and not before) the CJEU's reply, which should be taken properly into account by the national court in the context of its interpretation and application of the relevant constitutional rules. For example, this approach was adopted in the *Melloni* case by the Spanish Constitutional Court, which, in its judgment 26/2014, departed from it previous case law regarding the interpretation of article 24(2) of the Spanish Constitution, by holding, in light of the *Sejdovic* judgment and other decisions of the ECtHR and the *Melloni* judgment of the CJEU, that the absolute/core content of the constitutional right to a fair trial does not require that a person convicted in absentia have the chance to apply

for a retrial, if he waived his right to appear in person at his trial, namely if this absence has been voluntarily and unequivocally decided by the defendant, who was duly summoned and was effectively defended by an appointed lawyer. In a similar vein, the Greek Council of State, in its judgment 3470/2011, interpreted article 14(9) of the Greek Constitution in harmony with the principle of proportionality, which constitutes both a constitutional rule and a general principle of EU law, and with Directive 93/37/EC, as interpreted by the ECJ in case C-213/07, *Michaniki AE*.

B. The second option of the national judge is to interpret EU law in accordance with national constitutional law, in the context of "constitutional identity" or "counter-limits" review. This kind of review, normally performed only by national constitutional or supreme courts, is based on the fundamental constitutional rule that there are certain inalienable constitutional rights and certain essential values and supreme principles embodied in the Constitution, which are beyond the reach of European integration and, hence, limit the scope of the principle of precedence of EU law. The possibility of this kind of review, which concerns the compatibility of EU law with national constitutional law, has been reserved by a number of national supreme courts, like the Constitutional Courts of Germany[8], Italy[9] and Spain[10]. Relatedly, both the German and the Italian Constitutional Courts have held that such review is compatible with primary EU law, in light of Article 4(2) of the TEU. The above interpretational approach is exemplified by the order of 15 December 2015 of of the German Constitutional Court, which, after the *Melloni* judgment of the CJEU, interpreted the Council Framework Decision 2002/584/JHA on the European arrest warrant in conformity with the fundamental constitutional principles of respect for human dignity and the rule of law, which imply the principle that there must be no punishment without individual guilt (a principle that is beyond the reach of European integration) and further held, on the basis of this interpretation, that the requirements of the Framework Decision

[8] See, in particular, German Constitutional Court, order of 15 December 2015, 2 BvR 2735/14, paras. 36-49 [in para. 44, it is noted that the identity review in inherent in the concept of Article 4(2) of the TEU].

[9] See, in particular, Italian Constitutional Court, order 24/2017 (preliminary reference to the CJEU, case C-42/17), ground 6.

[10] See, in particular, Spanish Constitutional Court, judgment 26/2014 (*Melloni*).

as regards the execution of a European arrest warrant did not fall short of the minimun constitutional guarantees of the rights of the accused.

C. The third option availabe to the national judge is a preliminary reference attempting to convince the CJEU to qualify or change its existing case law, in a way that affirms the compatibility of a national constitutional rule with EU law. Such an attempt, if it is to have a reasonable chance of success, must be founded on a careful analysis of the relevant case law not only of the CJEU but also of the ECtHR, in view of Article 52(3) of the Charter. The chances of success may be even greater when this analysis is made in conjuction with a preliminary assessment of the relevant constitutional requirements, which might trigger a "constitutional identity" review on the part of the national court. This course of action was successfully adopted by the Italian Constitutional Court in the *Taricco II* case. In *Taricco I* (C-105/14), the CJEU held that a national rule in relation to limitation periods for criminal offences, such as that laid down by the Italian Penal Code, which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax, had the effect of extending the limitation period by only a quarter of its initial duration, is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU, if, given the complexity and duration of the criminal proseedings, that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union. The Court went on to hold that the national court should give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law, the effect of which would be to prevent the Member State concerned from fulfilling its obligations to provide for and impose effective sanctions for serious violations of EU legislation on VAT. These holdings were not particularly convincing, given that the Court failed to take into account its own case law and also the most recent case law of the ECtHR on the fundamental principles of legal certainty, precision and foreseeability, in relation to criminal law and limitations periods. Subsequently, the Italian Constitutional Court made a request for a preliminary ruling, in which it noted that disapplication of the relevant provisions of the Italian Penal Code would lead to a violation of overriding principles of the Italian

constitutional order, since rules regarding limitation periods in criminal cases are substantive in nature in the Italian legal system law and are covered by the fundamental constitutional principle of legality and non-retroactivity of criminal offences and sanctions. At the same time, the Italian Constitutional Court emphasized that the CJEU had failed to examine an important aspect of the principle that offences and penalties must be defined by law, namely the requirement that the rules on criminal liability must be sufficiently precise and foreseeable in their application, as this requirement has been developed in the case law of both European Courts. Moreover, the Italian Constitutional Court invoked article 4(2) TEU and article 53 of the Charter and indicated that, if the CJEU insisted on the interpretation given in its *Taricco I* judgment, it could apply its "counter-limits" doctrine and, on this basis, decide to set aside the obligations resulting from Article 325 TFEU in the Italian legal order, as contrary to the overriding constitutional principle *nullum crimen, nulla poena sine lege*. In view of the argumentation of the Italian Constitutional Court and the shortcomings of its *Taricco I* judgment, the CJEU did not appear to be left with much choice but to qualify *Taricco I*, by crafting an exception to its holding, on the basis of the principle that offences and penalties must be defined by law, and by accepting that compliance with *Taricco I* might be incompatible with the necessity for precision of the applicable criminal law or could lead to the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed. In reaching this conclusion, the CJEU was careful enough not to undermine its *Melloni* judgment, by holding that, at the material time, the matter of limitation periods applicable to criminal proceedings relating to VAT had not been regulated by secondary Union law and Italy was, thus, free to provide that, in its legal system, such rules, like the rules on the definition of offences and the determination of penalties, form part of substantive criminal law, and are thereby subject to the principle of legality of criminal offences and penalties.

D. The fourth option open to the national judge is the road of disobedience, that is of non-compliance with EU law, as interpreted by the CJEU. It is clear that this path may be purspued only as a last resort and in exceptional cases. The main methods for taking this course of action are three and may be

combined or overlap with each other to a certain extent: “constitutional identity” review, national sovereignty and *ultra vires* review and legal certainty review. In this context, we have two recent decisions of national supreme courts refusing to apply the holdings of the CJEU. First, after the judgment of the CJEU in case C-399/09, *Landtová*, where it was held that Articles 3 and 10 of Regulation No 1408/71 (Annex III to which refers, inter alia, to articles of the Agreement on Social Security of 1992 between the Czech Republic and the Slovak Republic) preclude a national rule, such as the one in question, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, the Czech Constitutional Court, in its judgment 31.1.2012, Pl. ÚS 5/12, decided not to comply with this holding. In reaching this decision, the Court noted, inter alia, that the EU had exceeded the powers that the Czech Republic had transferred to it, by disregarding European history and by considering that Regulation 1408/71 was applicable in the specific type of cases, which did not contain any genuine “foreign” element, and, in particular, by failing to distinguish the legal relationships arising from the dissolution of a State, like Czechoslovakia, with a uniform social security system from the legal relationships arising, in relation to social security, from the free movement of persons in the Union. This *ultra vires* review was quite aggressive and seems to deviate significantly from the relevant standard of review adopted by the German Constitutional Court, in its *Honeywell* judgment, under which the breach of the principle of conferral of state powers to the EU must be “sufficiently qualified” and the EU act found in violation of this principle must be “highly significant” in the structure of competences between the Member States and the EU[11]. The second instance of insubordination to the CJEU was manifested through the *Dansk Industri*/*Ajos* judgment of 6.12.2016 of the Supreme Court of Danemark. In its relevant judgment in case C-441/14, the CJEU held that a national court is obliged to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age, in the field of employment and labour law, and that the principles of legal certainty and the protection of legitimate

[11] See German Constitutional Court, order of 6.7.2010, 2 BvR 2661/06, para. 61.

expectations cannot alter that obligation. Following this judgment, the case went back to the Danish Supreme Court, which refused to comply with the above holding of the CJEU, by invoking the limits imposed upon it by its constitutional mandate and the constitutional principle of separation of powers, the fundamental principle of legal certainty and Danemark's act of accession to the EU, which could not be interpreted as providing a legal basis for precedence over national law and for direct applicability of unwritten EU law principles in relationships between private persons. In doing so, the Supreme Court pointed out, inter alia, that the CJEU, in its *Mangold* judgment (case C-144/04), had failed to balance the principles of legal certaintly and legitimate expectations against the general principle of prohibition of discrimination on grounds of age.

V. Conclusion

Conflicts between EU law and national constitutional law in relation to fundamental rights may be relatively rare but, when they arise, they test the endurance of the European structure and the limits of European integration. As a matter of rule, such conflicts are to be avoided or minimised through converging interpretational approaches, that may be promoted on the basis of a constructive dialogue between the CJEU and national constitutional or supreme courts. However, the national judge, who has the final word, is not excluded from disapplying EU law, as interpreted by the CJEU, in order to ensure respect for the essential rules and principles of the constitutional legal order, in which his powers originate. In this context, national supreme courts are expected to demonstrate particular self-restraint, which implies that they may consider this possibility only in exceptional cases and as a last resort.