EJTN-AEAJ Training on Conflicts of Norms/Multi-level Protection in the Application of Fundamental Rights (HFR/2018/02)
15-16 March 2018 Thessaloniki, Greece

Summary of National Reports

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General Remarks on the relationship between the European Union (thereinafter – EU) law and national law/Constitutions

The primacy and a direct effect of EU law:

One of the fundamental characteristic features of legally binding EU law is its direct effect. The legal basis for this is Article 249 of the EC Treaty.

The Court of Justice of the European Union has clearly regognised in its case law the nature of the direct effect of EU law (including the secondary sources of the Community) and its direct applicability in the Member States.

The principle of the primacy of EU law in relation to national laws has also been developed through the case law of the Court of Justice of the European Union (thereinafter – the CJEU).

In the case *Hauer v. Land Rheinland-Pfalz* the CJEU decided that the goal of establishing a common market would be destroyed if Community law was subordinate to the national laws of different states.

In the case *Van Gend en Loos v Netherlands* *(C-26/62, 05/02/1963)* the general principle as regards the direct effect of EU law was formulated, incluging the right of an individual to rely directly on EU law before national courts even in cases where such provisions do not exist in national law.

The case *Flaminio Costa v E.N.E.L* (case 6-64, 15/07/1964) can be regarded as one of the fundamental decisions of the ECJ from the viewpoint on the relationship betweeen EU law and national law. In this case the fundamental principle of the *primacy of EU law* was formulated. The ECJ stated that the EU law takes precedence over "all national law".

Internationale Handelsgesellschaft case (C-11/70, 17/12/1970) - the principles of Community law are deriving from the constitutional traditions of the Member States.

The *Simmenthal* II case (C-106/77, 09/03/1978) (see also C-189/10 ***Melki and Abdeli*** [2010]) where the primacy of EU law had further been developed - even if the Constitutional Court (CC) is the only national court empowered to decide on the constitutionality of a national law, when a conflict between national law and Community law arises before another national court, that court must give immediate effect to Community law without awaiting the prior ruling of the constitutional court. The principle of the primacy thus does not require the abrogation of a national act but only its non-application.

Ackerberg Fransson case: implementation =„within the scope of application of EU law"

***Melloni* case** (C-399/11, 26/02/2013) (Implementation of the European Arrest Order at national level) – the case concerned the level of protection of fundamental rights /broader protection guaranteed under national law/Spanish Constitution than as under the EU Charter on Fundamental Rights (Art. 53). Obligation of a national judge including the constitutional judge to apply EU law standards in the spheres of the competence of the EU.

The CJEU allowed national courts 1) to apply national standards of human rights protection in case if that application does not jeopardize the level of protection provided by the Charter (as interpreted by the CJEU), and 2) if that does not interfere with the primacy, uniformity and effectiveness of EU law.

In *Melloni* case, 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; 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.

Aspect of the Constitutional identity – see ***Jeremy F. case*** (C-168/13, 30/05/2013) concerning the implementation of the European arrest order at national level (France); ***see also Gauweiller and Others v. Deutsches Bundestag case* (C-62/14, 16/06/2015)** – the possible solutions of conflictual situations – monetary policy (its limits of the Central European Bank) (*ultra vires* actions); the competence of the Member States in the implementation of some economic/financial measures; ***Melloni case*** (C-399/11, 26/02/2013) **- Co-operation v. Conflict.**

The Member States are also bound by **the principle of loyal interpretation (**Art. 10 of the EC Treaty) – in applying the EU law Member States should take all appropriate measures to ensure fulfilment of the obligations arising from this Treaty or other EU acts.

General conclusion - The Court of Justice of the EU has clearly recognized in its developed case law that the legal order of the EU is based on the principles of primacy, effectiveness and unity of EU law. The mentioned principles are applicable over [all] national laws including national constitutions – See the Summary of National Reports.

However, the practice of Constitutional Courts (thereinafter – CC) of the EU Member States (thereinafter – MS) differs; different doctrinal positions of CC concerning the question to what extent Union law is applicable can be seen from Information provided by Judges of this Training in their submitted National Reports[1].

National Supreme courts, including Constitutional Courts may, in certain cases, restrict the direct applicability and/or precedence of EU law.

SUMMARY of NATIONAL REPORTS[2]:

Question. 1.

What is the general relation between EU-law and National Constitutional Law under the legal system of the respective Member State? Does one overrule the other or are they on the same level?

Question 2.

2. In case the National Constitution prevails EU-law, does this apply to all provisions of the National Constitution or only to a limited extend? Is it true also for fundamental rights?

[1] This Summary reflects only the information which was provided by the Participants of the Training (-s). The Author of this Summary is not responsible for the accuracy of National Reports.

[2] Summary of National Reports (thereinafter – NR), *inter alia* selection of countries (and information) to be mentioned in this Summary, is exclusively subjective Opinion of the Author of this Summary.

I. There are countries expressly recognizing the primacy or precedence of EU-law over domestic law including the national Constitutional law (according to submitted NR):

This is the case of Austria, where the primacy or precedence of EU law over domestic law (as well as national Constitutional law) is clearly acknowledged. In general, the primacy of EU law applies to all provisions of the national constitution including fundamental rights. If domestic constitutional law is in contradiction with Community (EU) law, every domestic body has to refrain from applying the domestic norm and should apply a clear and self-executing EU norm.

In Slovenia (information provided by Marinela Maras, President of the Labour Court of Koper/Slovenia) under Art. 3a/III of the Constitution, legal acts and decisions adopted within the international organisations (including the EU) shall be applied under the legal regime of these organisations.
The CC of Slovenia has already declared itself in favour of the direct effect and primacy of EU law in the case Up-328/04/U-I-186/04 ("the Bankruptcy Procedure Case"). The CC announced that regarding the challenged national norm, it would not establish its unconstitutionality only for the fact that it is inconsistent with EU law, as, according to EU law, it suffices that national courts, including the CC, do not apply such norm, and establishing its possible unconstitutionality is not necessary. The courts, including the CC are bound by EU law, case law of the Court of Justice of the EU and also by the minimum standards guaranteed by the European Convention on Human Rights (thereinafter – the ECHR) their interpretation by the European Court of Human Rights (thereianfter – the ECtHR or Strasbourg/European Court).

In Estonia (information provided by Ragne Piir, Judge at Administrative Court of Tallinn) the Amendment Act of the Constitution of the Republic of Estonia (CREAA) determines the relation between Estonia and the EU and the conditions of the Estonian accession to the EU – that is, observance of the basic principles of the Constitution of Estonia as well as the primacy and direct applicability (where applicable) of EU law.

II. In other countries, the primacy or precedence of EU law over domestic law (as well as national Constitution) is also (or to some extend) acknowledged or

regarded as the main doctrinal constitutional principle (so-called principle of *harmonious interpretation* of the national Constitution and EU law).

Greece (3 national Reports received from Greece):

Greece does not have a Constitutional Court. It has rather four Supreme Courts […]; the Supreme Administrative Court deals mostly with issues pertaining to Constitutional law, EU law, the ECHR and fundamental rights law (Council of State/CoS). In principle, under Article 93 § 4 of the Constitution, "the courts shall be bound not to apply a statute whose content is contrary to the Constitution" - all courts in Greece are competent in view of a specific case to verify the constitutionality of domestic legislation.

Under Art. 28 of the Greek Constitution "the generally recognised rules of international law, as well as international conventions [ratified by statute] shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law". Art. 28 of the Greek Constitution, provides, *inter alia*, that it "[…] constitutes the foundation for the participation of the State in the European integration process".

The Council of State (thereinafter – CoS) has inferred from this Constitutional provision an "obligation of harmonisation of Constitutional provisions with the rules of Community law" [CoS (GC) 3470/2011).

This holding suggests that EU law is, basically, at the same level as the National Constitutional Law.

Hence, **the Constitution should be interpreted, to the extent possible, in harmony with EU law; i.e. the Constitution must be interpreted and applied exclusively in a manner compatible with the EU law.**

If, exceptionally, such an interpretation was not possible and one found a clear contradiction between a Constitutional provision and EU law, although there is no direct provision in the Greek Constitution regarding such conflict, it would be reasonable to accept that EU law overrules the national Constitution, unless it violates the core of it. Under article 87(2) of the Greek Constitution, national courts are obliged to disapply any legal rule liable to violate the Constitution.

In another National Report (submitted by Judge Anna Arnaouti) a distinction was made (when talking about the national understanding of the precedence of EU law) between two possible conflictual situations – when there is a conflict between the provisions of national (common) law and those of EU law – precedence of EU law is obvious and fully acknowledged; but this is not the case when a conflict arises between the Greek Constitution and EU law, where the predominant view is that of the harmonisation of the Constitutional Provisions to those of EU law.

As regards the protection level of fundamental rights, all provisions of the Greek Constitution stand on the same level of hierarchy, including provisions concerning fundamental rights.

It should be mentioned that there is a harmonious approach between Greek constitutional Articles on human rights and the EU law, the Charter of Fundamental Rights and also the European Convention on Human Rights. Practically, there is no field that the two different legal systems could/would actually collide.

Information provided by Judge Olga Zikou – when the applicant indicated the contradiction of the statute to both the Greek Constitution and the Fundamental Rights Charter, the Council of State first examined (and overruled) the conformity of the said statute to the Constitution, and then verified its confirmity to the Charter without specifying which takes the precedence.

Bulgaria (information provided by Judge Sibila Simeonova, Judge at the Supreme Administrative Court):

Under Art. 5 (1) of the Constitution of the Republic of Bulgaria, the Constitution shall be the supreme law, and no other law may be in conflict therewith.

According to Art. 5 (5) any [ratified, promulgated] international treaty […], shall be part of the domestic law. Any such treaty shall take priority over any conflicting standards of domestic legislation.

Art. 5 of the Constitution recognizes a general precedence of international law (including the ECHR and EU law) over national law and also covers the duty to interpret national law in a manner which is consistently compatible with these regimes (and the case law of their respective courts) **(however, the explicit primacy of EU law over national constitutional law has not been established).**

Therefore, the Bulgarian national law is to be interpreted in light of the ECHR and also in the light of the EU law. The Constitution does not reserve a particular status neither to EU law, nor to the international human rights treaties (or some of them).

It should be mentioned that the Bulgarian law has fully accepted the Community's supremacy approach after the CJ's ruling in the *Simmenthal* case. Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals. It must also set aside any provision of the national law which may conflict with it, whether precedent or subsequent to the Community rule.

Therefore, even a fundamental rule of the national constitutional law could not impede the supremacy of a directly applicable Community rule.

Romania (information provided by Mme Mihai Maria Iuliana, Judge of the Court of appeal in Brasov, and Mme Alexandru Elena Loredana, Judge of the First Instance Court of Iasi):

Art. 1 of the Constitution states its supremacy.

Nevertheless, under Art. 148 of the Constitution, as a result of the accession to the EU, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the

opposite provisions of the national laws […]. In the case of collision of international treaties provisions and the national laws, the international regulations shall take precedence, **unless the Constitution or national laws comprise more favourable provisions.**

It means that the Constitution of Romania distinguishes between the principle of the supremacy of the fundamental law (art. 1), the direct application of the Universal Declaration of Human Rights, international treaties on fundamental rights (art. 20) and the principle of the priority of European Union law over national law (Art. 148).

The jurisprudence of the Romanian Constitutional Court reflects this difference.

In any case it means that the primacy of EU has been recognized over all national laws including the Constitution, with the exception of the broader protection offered at domestic level.

Germany **(NR by Judge Christiane Stopp, Information provided for the previous Training which was held in Rome, in March 2017):**

The question of the hierarchy between EU law and National Constitutional Law plays more a theoretical role then a practical one as in practice [all] German courts and authorities respect the principle of precedence of EU-law.

This means: Sovereign acts of the EU and acts of German public authority, determined by EU-law, are not allowed to be reviewed in light of the constitutional law or the German fundamental rights contained in the German Basic Law (constitution) or any other national law.

If there is a conflict between national law and EU- law, the national regulation has to be set aside. From a dogmatic point of view, EU-law is on the same level as federal law and it stands below the constitutional law. **German authorities apply the principle of precedence of EU-law, but there are three exceptional cases, in which the Federal Constitutional Court (FCC) reserves the right to review the constitutionality of European law:**

1. **If EU no longer ensures effective protection of fundamental rights**

In its **"Solange II"** decision (2 BvR 197/83) the FCC explained under which circumstances it would use its power of review in case there is a conflict between EU- law and the fundamental rights guaranteed in the German Basic Law.

The FCC decided:

"As long as the European Communities [...] generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities in a manner and degree which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation [...]; the Federal Constitutional Court will also no longer review such legislation by the standard of fundamental rights contained in the Basic Law [...]".

2. ***Ultra vires* review**

The FCC reserves the right to control acts of European institutions with respect to the limits of their competences (only in cases when a breach of competences by the European institution is sufficiently qualified). The FCC exercises its jurisdiction on the application of secondary community law in a relationship of «co-operation» with the European Court of Justice. The requirements for the *Ultra vires* review were established by the FCC in its **"Maastricht"** (2 BvR 2134, 2159/92) and **"Honeywell"** (2 BvR 2661/06) decisions.

3. **Identity review**

The identity review conducted by the FCC in its "European Arrest Warrant II" (2 BvR 2735/14) decision targets to safeguard the constitutional identity. Precedence of EU-law only applies insofar as the German Basic Law (constitution) and the Act of Assent permit or provide for the transfer of sovereign rights**. That is why the FCC has the right to review EU-Law, if the Basic Law's constitutional identity, which also contains the right of human dignity, is affected. The mentioned powers of review reserved for the FCC are very limited and they have to be exercised with restraint and in a manner open to European integration.**

The Czech Republic **(information provided by Judge Jaroslav Vavra, Regional Court Hradec Kralove-branch Pardubice):**

The relationship between EU law and National Constitutional Law is not directly stipulated in the statute or constitutional law of the Czech Republic.

There are some guidelines given by certain Czech Constitutional Court findings (inspired by doctrine of the German Federal Constitutional Court – Solange I and Solange II).

The Czech Constitutional Court, in general, accepts the primacy of EU Law, however not absolutely (not a doctrine of absolute precedence over all constitutional provisions; fundamental rights remains the priority for the CC).

In 2013, the CCC summarized its previous case-law concerning the relationship between national and European law and emphasized that constitutional courts maintain their role of supreme guardians of constitutionality even in the realms of the EU and against potential excesses on the side of EU bodies (decision *Pl. ÚS 5/12,* following the CJEU's judgment in C-399/09 *Landtová* **("*ultra vires*").**

2 aspect - the protection of fundamental rights within the EU cannot give rise to the assumption that this standard is of a lower quality than the protection accorded in the Czech Republic.

The application of EU law may not interfere with fundamental principles of the State sovereignty of the Czech Republic and with the principle of the material rule of law.

III. In 3 other countries - Poland, Lithuania, Hungary – also Member States of the EU - the principle of the supremacy of national Constitutions has clearly been established (but the doctrinal positions of CC are different).

Lithuania (NR by Judge Marius Bartninkas, Kaunas Regional Court; information provided also by the Author of this Summary):

Article 7 part 1 of the Constitution of the Republic of Lithuania expressly states:
"Any law or other act that contradicts the Constitution shall be invalid".

The CC in its Rulings of 14-03-2006 had clearly acknowledged the priority of the application of European Union legal acts in the cases where the provisions of the European Union arising out of the founding EU Treaties compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal force is), **save the Constitution itself.**

The statement "save the Constitution itself" should be regarded as *a constitutional clause* which means that the Constitution is above all other legal acts, including EU [all] acts.

On the other hand, the CC of Lithuania has clearly acknowledged in its doctrine that the respect to international obligations undertaken under different international instruments and their implementation is one of the main features of the Lithuanian State based on the principle of the rule of law. **International law, *inter alia* ECHR can be regarded as *a minimum standard* for human rights protection in Lithuania; wider protection can be offered to the applicants under constitutional provisions (Ruling of 18 March 2014, Decision of 16 May 2016, etc.).**

The Constitutional Court does not directly answer the question, whether the Constitutional Court could declare European Union legal act unconstitutional. In principle, not, as the powers of the CC are described in Art. 102, 105 of the Constitution, where the review of the constitutionality of the EU law/acts has not been foreseen.

Furthermore, **the Constitutional Act of the Republic of Lithuania on its membership in the European Union and many Rulings of the CC allow direct application of EU law and establishes that EU law is a constituent part of the Lithuanian legal order** (EU law as well as the ECHR are also recognized as a source of construction of the Lithuanian law (Ruling of 9 September 2014, Decision to request for a preliminary Ruling from the CJEU of 20 December 2017, etc.).

Moreover, the CC refers often to the case law of the ECtHR and/or Court of Justice (e. g., CC 2016-03-15 ruling "Order on the maximum amount of maternity allowance limitation" CC 2015-03-05 ruling "Order on competition waste management services", etc.) and twice in its existence referred to the Court of Justice of the EU for the preliminary ruling (last request made in January 2018 concerning the regulation of the green milk prices).

2 aspect – the Constitution of the Republic of Lithuania has the supremacy over all laws including EU law; this principle (supremacy of the national Constitution) has also been formulated with regard to fundamental rights. **BUT, on the other**

hand, from the doctrine of the CC is quite clear, that **all international obligations arising from *inter alia* Lithuania's membership in the EU and other international organizations, should be fully executed (fulfilled). Therefore, it also means that the principle of supremacy of the Constitution should be interpreted in line with all Lithuania's international obligations, including the principles of primacy of EU law and its direct applicability (so called "harmonious or friendly interpretation" approach between national Constitution,** international treaties, including ECHR, and the EU law, including the Charter of Fundamental Rights/Lithuanian situation to some extend similar to one in Greece).

Poland (Information provided by Judge Magdalena Świetlik, District Court in Nowa Sól and Judge Dagmara Dominik-Ogińska, the Voivodship Administrative Court in Wrocław):

Art. 8 § 1 of the Constitution provides that the Constitution shall be the supreme law of the Republic of Poland.

According to Art 91. 2 and 3 of the Constitution, an international agreement ratified upon prior consent granted by statute shall have precedence over statutes. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by an international organisation shall be applied directly and shall have precedence in the event of a conflict of laws.

However, the supremacy of the Constitution, which overrules both EU law and ratified international agreements (e.g. the European Convention on Human Rights) has been clearly acknowledged in the case law of the CC.

Question no. 2 - The National Constitution prevails over EU law and this principle is applicable to all provisions, so that is also true for fundamental rights.

Nevertheless, Judges participating in this Training have also provided some practical cases showing the given priority to EU law - e.g., in tax cases national judges applied the principle of the primacy of Community law and gave preference to EU law in case of conflict with national provisions.

Hungary (Information provided by Dr. Dzsula Marianna, Dr. Duró Edit):

The Hungarian Constitution (and the constitutional doctrine) is silent about the relationship between EU law and national constitutional law.

The Hungarian Constitutional Court (HCC) considers promulgated or transposed primary and secondary EU law as a part of domestic law, but refrains from examining the relation between European law and the national constitution (Fundamental Law).

2 question - the HCC does not have a clear consept how to approach this problem. It relies on the national protection regime of fundamental rights and also takes into account the case law of the ECtHR. Under Art. I(1) of the Fundamental Law, **it is the primary obligation of the State to protect the inviolable fundamental rights; this obligation has the priority over all other State's obligations.**

Possible Conclusion - EU law prevails over national legislation BUT NOT over the Constitution.

In one case (23/2016) **the CC ruled out the protection of constitutional (self-) identity shall remain the duty of the CC as long as Hungary is a sovereign State; such constitutional identity cannot be waived by way of an international treaty.**

IV. Malta – co-existence rule (Information provided by Mr. Justice Lawrence Mintoff, LL.D).

The supremacy of EU Law can indeed co-exist with the principle of supremacy of our national Constitution.

Section 6 of the Constitution states its supremcy:

> "… if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

In accordance with Section 65 of the Constitution, Parliament's power to make laws is subject to Malta's international obligations assumed in particular by the treaty of accession to the European Union (signed on the 16th April, 2003). Hence Parliament's power to make laws under the Constitution is subject to the primacy of EU-law and should a conflict arise between an ordinary national law and an EU regulation or directive, the latter shall prevail. **Should however a conflict arise between an EU regulation or directive and an existing constitutional provision or a new constitutional amendment, the legal position would be debatable; but such a scenario is quite theoretical, as, normally, the Maltese courts would rule that EU law would prevail as long as the political intention is to stay within the EU.**

The Constitutional Court has recognised the doctrine of parallel protection and affirmed the importance of affording the wider protection to the applicants in the field of fundamental rights. This still creates some controversy among authors and jurists advocating the supremacy of the Constitution of Malta, who disagree with the **wider protection doctrine**. It is not likely that any provision of the EU Fundamental Rights Charter would be held to be in conflict with the human rights enshrined in the national constitution since the Charter enhances protection within the fundamental human rights framework under the Constitution and the Europen Convention, and does not diminish it. Hence this is more of an academic theoretical question than a practical one.

Whereas it remains uncontested that the supremacy of EU Law is fundamental to the unity of the European legal order, in practice it seems that this principle *can indeed co-exist* with the principle of supremacy of the Maltese national Constitution.

Italy: (Information submitted by Judge Federico Paciolla).

Very important, interesting and dynamic position of the Italian CC:

The relationship between EU-law and National Constitutional Law within the Italian legal system has been evaluated in a number of rulings by the Italian Constitutional Court.

The recognition of the primacy of EU law is an established fact within the case law of the Italian Constitutional Court pursuant to Article 11 of the Constitution; moreover, according to such settled case law, compliance with the supreme principles of the Italian constitutional order and inviolable (inalienable) human rights is a prerequisite for the applicability of EU in Italy.

The judgement of the CC of 22 October 1974 - whenever a national law was supposed to be inconsistent with EU law, the national judge was bound to address the Constitutional Court.

Under Constitutional Reform Act of 2001 - prevailing and direct effect of European law was recognised (Article 117 of the Constitution) - the State as a whole - including all kinds of administrative authorities – is supposed to give full effect to Community law and to set aside the inconsistent national provision.

Hence, European law has risen to a constitutional rank together with international obligations, such as those stemming from the European Convention on Human Rights.

According to Constitutional Court judgment delivered on 21 June 2010, no. 227, **the "setting aside" rule is the main remedy in front of the Italian judges in case of non-compliance of national law with European law**.

CC and the "counter-limits" doctrine:

Constitutional Court has always pointed out that **the direct effect of European provisions** does not imply that European law is beyond control about its compliance with Italian Constitution (see judgements delivered on 8 June 1983, no. 173, and on 5 June 1984, no. 170). The opinion of the Constitutional Court is that limitations of sovereignty allowed by Article 11 of the Constitution may not result in an *"unacceptable power to violate fundamental principles of constitutional order or the inviolable (inalienable) rights of human beings"*.

Therefore, when European provisions are supposed to clash with fundamental principles of Italian Constitution or inviolable (inalienable) rights of the individuals, national judges are entitled to address the Constitutional Court asking it to declare void EU Treaties Ratification Acts, in so far as they enforce European law impinging on Italian Constitution core values.

Practical Example provided in the NR - the Constitutional Court of Italy did not simply reject the enforcement of the *Taricco j*udgement of the Court of Justice of the EU (concerning the regulation of limitation period for fraud offences in relation to value added tax (VAT)) in light of the *counter-limits doctrine*, but **asked the CJEU to clarify all possible implications of *the Taricco* judgement** as regards the determination of limitation periods applicable to the pending criminal proceedings, by submitting the request for a preliminary ruling and maintaining that Italian Constitution guarantees a higher level of protection of fundamental rights than EU law.

The CJEU in the mentioned *Taricco II* judgment of 5 December 2017 stated that that Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, **to disapply national provisions on limitation** [...] which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud **affecting the financial interests of the European Union** [...].

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.**

Question No. 3. What is the national understanding of the principle of precedence of EU-law?

Slovenia:

The relationship between the CC and the Court of Justice of the European Union (CJEU) is most importantly marked by the willingness of the CC to enter into a dialogue with the CJEU. The CC declared that it has the power to review the conformity of laws (and consequently, regulations) with primary EU law. However, it has also decided that it does not have the power to review the conformity of national laws with EU directives (U-I-32/04 of 9 February 2006, U-I- 238/07 of 2 April 2009). It has already taken a position on the **principle of loyal interpretation of national laws in the light of EU law.**

Germany:

The principle of precedence implies that the competent national courts are automatically not allowed to apply a national provision found to be incompatible with the EU-law. German authorities take all appropriate steps to ensure that Community law is given full force and effect, e.g. interpretation of norms in the light of EU-law. German courts also bring questions of Community law before the Court of Justice in Luxembourg (including the FCC).

Greece:

The principle of precedence of EU law **is widely understood as meaning that EU law prevails over national legislation but not over the Constitution of Greece** (enacted in 1975). As mentioned, the principle *of harmonious interpretation* of the national Constitution with EU law has been used in Greece.

It should be mentioned that in Greece EU law could prevail over the ECHR, as interpreted and applied by the ECtHR.

In two judgments of the CoS (1992/2016, 1993/2016), which dealt, for the first time, with requests for reopening of appeal proceedings before the CoS, following a judgment of the ECtHR (30.4.2015, *Kapetanios and others v. Greece*), the CoS established seven conditions for granting such requests.

The third condition reads as follows: "[…] **compliance with the judgment of the ECtHR should not amount to a breach of another obligation of the Hellenic Republic under international law, most notably under EU law, which is considered to be of greater importance than the obligation to comply with the relevant judgment of the ECtHR** [cf. CJEU (GC) 26.2.2013 C-617/10, *Åkerberg Fransson*]".

This holding leaves adequate room for respect of the principles of primacy and effectiveness of EU law in cases where there is some kind of incompatibility between the ECHR, as interpreted and applied by the ECtHR, and the law of the EU, as interpreted and applied by the CJEU**.**

Italy:

The principle of precedence of European law is broadly accepted in Italy legal system.

Judges make use of the technique of setting aside national provision (-s) inconsistent with European law (in this case the judge must disapply a national rule which is in breach of the European law).

Such technique will, of course, only affect the single case at hand, while it is to the legislator to repeal – *erga omnes* – the provisions which are inconsistent with the European system.

Constitutional Court agrees that European Court of Justice and the EU Institutions are mainly entitled to give a correct interpretation of European law, as a mean to guarantee legal certainty by uniform application. It claims to accept the *acquis communautaire*.

Nevertheless, the CC made it clear that, if such interpretation does not comply with fundamental principles of constitutional order or human rights protection, as recognized by the Italian Constitution, it will reject European law implementation or declare void domestic provisions stemming from such European law.

This doctrine applies both to European law and International law in general.

It means that **EU law prevails over the Italian Constitution, but not over the fundamental principles of the Italian constitutional order or human rights protection (2 exceptions possible).**

Poland:

Constitutional Tribunal (case K 18/04, concerning the compliance of the accession treaty with the Constitution, judgment of 11 May 2005) ruled that, **while EU law may override national statutes, however, it does not override the Constitution (clear principle of the supremacy of the Constitution).** In cases of a conflict between EU law and the Constitution, such conflict cannot be solved by recognising the supremacy of the EU law norms. Poland can make a sovereign decision as to how this conflict should be resolved (i.e. by changing the Constitution, leaving the EU or seeking to change the EU law).
Another important case of the CC – judgment of 24 November 2010 (K32/09 concerning the consistence of the Lisbon Treaty with the Constitution), where the CC has clearly pointed out that the normative limit of transferring competences to International Organisation is set by the factors determining **the constitutional identity of the Republic of Poland, such transfer can in no way threaten the constitutional foundations of the State's system**.

Question No. 4:

How does art. 53 of the Fundamental Rights Charter affect the relation between EU-law, e.g. fundamental rights, and rights under the national constitution? Could you provide, please, the position/particular cases of national courts (inter alia Constitutional courts) concerning the relationship between EU-law and national law/Constitution?

The Czech Republic:

The CCC declared that the Fundamental Rights Charter is in conformity with the Czech constitutional order **(***Pl.ÚS 19/08*). According to Judge Jaroslav Vavra, there is no direct answer concerning the application/understanding of Art. 53 of the Fundamental Rights Charter in the doctrine of the CC of the Czech Republic.

Italy:

Article 53 of the Charter aims to ensure that the rights and freedoms protected by the Charter are applied as minimum standards; they cannot be seen as a ceiling for fundamental rights protection. Such safeguard is needed and somehow meets the *counter-limits doctrine* of the Constitutional Court;

However, the practical coordination of so many sources of law, even when the same principle is stated, is not always easy. As regards the ECHR, which has the statute of law in Italy, should domestic law infringe human rights protected by the Convention, the judge is entitled to challenge the law before the Constitutional Court.

In judgement delivered on 19 November 2012, no. 264, the Constitutional Court stated that, in the field of fundamental rights, both domestic and international systems aim to the highest possible protection of the individuals. Nevertheless, when such rights enter the national system and are brought in front of the CC, **it might be necessary to balance conflicting individual rights which are equally fundamental**.

Austria:

Even though the Austrian Constitutional Court respects the primacy of directly applicable Community law, it had found that EU-law in general is not a standard of review for its (the Constitutional Court's) proceedings, judicial review and decisions. After the Lisbon Treaty/CFR the Constitutional Court found that the Charter of Fundamental Rights does constitute a standard of review for proceedings before the CC as the CFR has now enshrined rights as they are guaranteed by the Austrian Constitution as well as those of the ECHR, which has a constitutional status in Austria and it is, therefore, directly applicable. **All these rights should be ensured by the Austrian CC – with this turn the CC tries to regain more judicial influence on the application of fundamental rights**.

It is recognised that CFR must be interpreted in accordance with common constitutional traditions and corresponding rights guaranteed by the ECHR; EU law may provide more extensive protection. Art. 53 of the CFR guarantees that the level of protection of existing guarantees of fundamental rights is not lowered by the Charta.

Greece:

The CoS has not yet applied or invoked Article 53 of the EU Charter in its case law. However, Greece might refuse to comply with a judgment of the ECtHR, finding a violation of the ECHR, in case such compliance would lead to a violation of EU law.

This consideration implies that the principles of primacy, unity and effectiveness of EU law may come into play also in relation to article 53 of the EU Charter, at least insofar as this Article concerns the protection afforded by the ECHR.

Lithuania:

The Fundamental Rights Charter is directly applied by all courts of Lithuania. Lithuanian Constitutional Court has repeatedly stated that if the Constitution provides for a higher level of protection than EU law, than the broader protection should be offered to the applicants in the cases. Nevertheless, national law including the Constitution should always be interpreted in line with [all] international obligations of Lithuania, including those arising from the membership in the EU, *inter alia* arising from the CFR.

Due to different competence/jurisdiction of ordinary courts, the Charter is mostly applied by administrative courts. Lithuanian administrative courts' case law has a clear indication that the Charter has been becoming a common source of law of a particular importance.

More problems can arise/have arisen in case of conflict between the Constitutional provisions (including the officially formulated doctrine of the CC) and the judgments of the ECtHR, especially as regards the means of execution of the Strasbourg Court's judgments, among others, in the case of *Paksas v. Lithuania* (GC, No. 34932/04, judgment of 6 January 2011) (Impeachment procedure against the State President; his inability to stand as a candidate for the parliamentary elections under Art. 3 of Prot. I of the ECHR), where the judgment of the ECtHR has clearly confronted with the doctrine of the CC – the CC has indicated that Lithuania has an international obligation to execute fully the judgment of the ECtHR; however, the adoption of the corresponding amendments to the Constitution is the only way to remote this incompatibility (and not simply changing the Law on Parliamentary Elections), as this judgment of the European Court is in conflict with core principles of the constitutional doctrine on impeachment and electoral institute.

The CC stated that the judgment of the European Court of Human Rights may not serve as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (Ruling of 5 September 2012).

Poland:

Poland and the UK secured a Protocol to the Lisbon Treaty as regards the application of the Charter of Fundamental Rights in their respective countries. There are considerable debates concerning the legal effect of the mentioned Protocol. In the joined cases C-411/10 and C-493/10, N.S. v Home Secretary and M.E. v. Refugee, the European Court of Justice ruled out that Article 1(1) of Protocol "explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter [...]".

In the Polish administrative judiciary, the Fundamental Rights Charter was referred to relatively often. A violation of the right to good administration specified in art. 41 of the Fundamental Rights Charter (e.g., order of the Voivodship Administrative Court in Warsaw on 20 May 2013 (II SO/Wa 18/13) was often found. In order of the Supreme Administrative Court of 22 August 2014 (II ONP 4/14), it was stated that the allegation of a breach of the provisions of this Charter may be raised only when the EU law other than the Charter applies or should apply in the case.

Nevertheless, even the clear supremacy of the Polish Constitution has been established, the judiciary can grant [sometimes] the priority to EU law - the Supreme Court in the judgement of 19 January 2017 resolved a collision of national law with EU law in the light of the principle of the direct application of European Union law (article 91 paragraph 3 of the Constitution), deciding that such conflict can lead to the replacement of national legislation provisions with Union law or to the exclusion of rules of national law by directly effective standard of European Union law.

Romania:

Article 53 of the Fundamental Rights Charter reserves a secondary role for the national courts. Romania can invoke its constitutional interpretations of fundamental rights and apply its higher national standards of protection, only in areas of law where the actions of the Member States are not fully dictated by EU law.

Slovenia:

Regarding the level of their protection, Article 53 of the Charter refers to Constitutions and not only to their foundations that are of essential importance for the state's constitutional identity.

In Art. 15/I, the Constitution has stipulated that human rights shall be exercised directly, based on the Constitution. However, it must be taken into account that there are only a few human rights that can be exercised directly (e.g. the right to life determined in Art. 17 of the Constitution).

When the Constitution guarantees better protection of a human right than a treaty, the Constitution naturally prevails.

Regarding the above-mentioned, Art. 15/V of **the Constitution thus introduces the principle of the maximum protection of human rights, which requires protection either according to the Constitution or according to a treaty depending on which act better protection is granted to this particular human right and what is the level of such protection.** This must be taken into account by all national courts, as the protection of human rights begins before national courts of first instance.

The Charter promotes the established principle of the maximum protection of human rights, the same principle is stated in the Constitution of Slovenia. In Slovenia, treaties that regulate human rights have, regardless of the fundamental relationship of the primacy of constitutional law over international law, a constitutional position. This proceeds from the principle of the maximum protection of human rights, which is implemented not only in the Constitution but also in the Convention and the Charter. This principle determines that a constitutional norm must yield to the provision of a treaty that ensures a higher level of protection of a human right than the Constitution.

The CC has implemented this principle in its existing case law mostly regarding the relationship towards treaties that regulate human rights, and particularly regarding the relationship towards the European Convention.

However, in determining the relationship between national constitutional law and EU law, the CC is still quite at the beginning. It has not taken yet an explicit and clear position on the fundamental question regarding the position of EU law in relation to the constitutional order.

Portugal:

This article has been interpreted **as allowing larger protection of fundamental rights by Portuguese laws**, when these have a wider scope of protection. One example is the ruling of the Portuguese Constitutional Court No. 544/12, in which it was decided that Portuguese Law of Freedom of Religion has a wider range of protection than the European Jurisprudence, and, therefore, it should be applied.

Germany:

The provision of the Art. 53 of the Fundamental Rights Charter regulates the impact of the Charter on the protection of fundamental rights contained in other sources of EU-law, international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention of Human Rights and by the Member States constitutions.

The provision can only affect the relation between EU-law and national fundamental rights in cases, where both kinds of fundamental rights are applicable at the same time; that means, when Member States are implementing Union law (Art. 51 sec. 1).

The effect of Art. 53 in such cases is that both provisions of fundamental rights are applicable cumulative. The citizen can refer to the fundamental right with the highest level of protection, even though this is the national provision. A strict application of the principle of precedence would lead to an absurd result in such cases.

General Conclusion

The fundamental principle of the *primacy of EU law* has been clearly [or to some extend] acknowledged in the case law of the majority of Constitutional Courts of the EU Member States.

Therefore, it remains uncontested that the supremacy, direct effect and effectiveness of EU Law is fundamental to the unity of the European legal order; however, from the case law of [some] Constitutional Courts of the EU Member States it is also clear that these principles can indeed co-exist with the principle of supremacy of national constitutions; furthermore, *a harmonious or "friendly-interpretation" approach* can also be used by Constitutional Courts when interpreting and applying national [including constitutional] provisions and EU law.

For some Constitutional Courts, the primacy and direct effect [applicability] of EU law cannot in any way infringe *the constitutional identity of the State*, as well as *fundamental principles of the constitutional order* (i.e. threaten the constitutional foundations of the State's system), and/or to violate *fundamental*

***constitutional (inviolable) human rights*, especially in cases where the broader protection of human rights has been offered at national level. In such cases, Constitutional Courts can show some restraints in application of EU law.**

Thank you very much for your attention.

I would also like to thank sincerely to all Judges of this Training for submitting in time very detailed and numerous National Reports.