Possible Violations of Fundamental Rights and Conflicts between National (ordinary) Law and Constitutional, EU and International Law

Dr. Rasa Ragulskytė-Markovienė

Professor at Mykolas Romeris University in Vilnius

Judge at Vilnius Regional Administrative Court
I. Conflicts between national law and EU law

• The main principle – direct effect and primacy of the EU law
Direct effect and primacy of the EU law

Van Gend en Loos v Netherlands (C-26/62)
Conditions for direct effect: clear and unconditional obligation, not contingent on any discretionary implementing measure.

=> automatically application without an act of transformation into the national law
Direct effect and primacy of the EU law

- **Costa v ENEL** (C-6/64)

  "the law stemming from the Treaty, an independent source of law, could not, ..., be overridden by domestic legal provisions, however framed ... The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights"

  => primacy of the EU law
Direct effect and primacy of the EU law

• *Internationale Handelsgesellschaft* (C-11/70)

“the question of the possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity an efficacy of Community law…”

=> the secondary EU law has the primacy over the national constitutional law
Direct effect and primacy of the EU law

- **Nold** (C-4/73)

“fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community;
Direct effect and primacy of the EU law

*Nold* (C-4/73)

and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. “

= -> constitutional traditions and international treaties for the protection of human rights are of significant importance
Direct effect and primacy of the EU law

• *Simmenthal II* (C-106/77)

“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 and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”
Direct effect and primacy of the EU law

“A national court … is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.”
The reaction of Member States

- > direct effect and primacy of the EU law generally respected
- > easier to accept in monist system
- > in some Member States it has taken some time to accept
- > in some Member States the legal basis of primacy and direct effect is declared in their own constitutions
The reaction of Member States

= > some constitutional / supreme courts have reserved for themselves powers of exceptional review


= > liability of Member States for breach of EU law

The reasons for the conflicts between EU and national law

1) the legal order of the EU and the legal order of the Member State may provide a different kind and level of fundamental rights protection;

2) Member States decide through national law if and to what extent EU law is applicable in the national legal order
The reasons for the conflicts between EU and national law

> national constitutional rules and principles may restrict the applicability of EU law

3) the possibility to ask for the preliminary ruling is foreseen only for constitutional/supreme courts
1) 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;
Types of conflicts between EU law and national constitutional law

2) when 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.
Types of conflicts between EU law and national constitutional law

=> main principle - lowering of the EU rights standards is not possible
Conflict Type I

- **Kreil** (C-285/98)

  > 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.
Conflict Type I

_Danski Industri_ (C-441/14)

= > 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.
Conflict Type II

• *Meloni* (C-399/11)

„Under Article 1(2) of Framework Decision 2002/584, the Member States are in principle obliged to act upon a European arrest warrant. According to the provisions of that framework decision, the Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a.“
“Article 53 of the Charter must be interpreted as not allowing a Member State to make the surrender of a person convicted \textit{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.“
Conflict Type II

• *Ackerberg* (C-617/10)

„The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.“

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Conflict Type II

„European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.“

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Conflict Type II

= > main principle - it is possible to apply national standards of human rights protection if the primacy, uniformity and effectiveness of the EU law is guaranteed
Conflict Type III

• Competence
  higher courts – lower courts

• **Melki / Abdeli** (C-188/10 / C-189/10)
  „The lower court must be free, in particular if it considers that a higher court’s legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it”
Conflict Type III

“This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary.”
Conflict Type III

“The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right … to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law”
Conflict Type III

It is not allowed to establish such procedure for the review of the constitutionality of national laws in so far as the priority nature of that procedure prevents all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.
Conflict Type III

• It is allowed such national legislation, in so far as the other national courts remain free:

1) to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,
Conflict Type III

2) to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

3) to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.
Conflict III

• A v B and others (C-112/13)

= > It is not allowed such legislation, under which ordinary courts are under a duty, if they consider a national statute to be contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them.
How to proceed

Options for national courts:

1) to interpret and apply constitutional rules in a way which is friendly to or in harmony with EU law, as interpreted by the CJEU
How to proceed

= > 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;
How to proceed

2) to interpret EU law in accordance with national constitutional law, in the context of “constitutional identity” or “counter-limits” doctrine:

> this kind of review is based on the fundamental constitutional rule that there are certain inviolable constitutional rights, essential values and principles, which are beyond the reach of European integration and limit the scope of the principle of precedence of EU law (Germany, Italy).
How to proceed

3) 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

=> this analysis can be made in conjunction with a preliminary assessment of the relevant constitutional requirements which might trigger a “constitutional identity” review (Taricco I, Taricco II)
How to proceed

• *Taricco I* (C-105/14):

> A national rule in relation to limitation periods for criminal offences is liable to have an adverse effect on fulfilment of the Member States’ obligations if 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.
How to proceed

- *Taricco II* (C-42/17)

= > the national court is required to disapply national provisions on limitation, *unless* that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.
4) the road of disobedience, that is of non-compliance with EU law, as interpreted by the CJEU.

=> in exceptional cases: “constitutional identity” review, national sovereignty and ultra vires review and legal certainty review
How to proceed

• *Dansk Industri*/*Ajos* judgment of 6.12.2016 of the Supreme Court of Danemark:

= => 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 expectations cannot alter that obligation (C-441/14)
How to proceed

=> the Danish Supreme Court 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.
II. Conflicts between national law / EU law and ECHR


  \[ \rightarrow \text{the ECHR has special significance} \]
Ackerberg (C-617/10)

= > fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.
European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law
Bosphorus (ECtHR judgement 30.6.2005, No. 45036/98)

= > the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system.
Conclusion

= > **ECHR** – an international treaty

= > is a subject to the same rules which apply to other international agreements

= > has a different status in the national system

(rank of constitutional law, rank of an ordinary law, rank above the domestic legislation but below the constitution).
Conclusion

fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law
III. Conflicts between national law and international law

=> different status in the national systems

*monist / dualist system*

=> principle *pacta sunt servanda*

=> special status of the international treaties which are the part of the EU law (e.g. Aarhus Convention)
Aarhus Convention

• In March 2017, the Convention’s Compliance Committee determined that the EU had breached the Aarhus Convention’s rules by not granting sufficient access to justice for environmental organizations and members of the public.

• The Committee found that neither the EU regulation 1367/2006, nor Court of Justice of the EU case law implements or complies with the obligations established under the Aarhus Convention.
1) The EU is a party to the Aarhus Convention in its own right; it therefore constitutes an integral part of the EU legal order;

2) The EU is in non-compliance with the Convention and therefore violates international law and primary EU law;
Based on one of the fundamental principles of the international legal order (article 27 of the Vienna Convention of the Law of Treaties), the EU cannot avoid performing its obligations by invoking its internal law;

The only option open to the Commission to remedy this violation of international law is to propose an amendment of the Aarhus Regulation.
Thank you for your attention