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***"Interpretation of the same or similar fundamental rights by different competent Courts"***

- Since the treaty of Lisbon (2009) the fundamental rights are explicitly mentioned in the Treaty (art. 6 TEU) and the Charter of the Fundamental Rights of the European Union is now explicitly legally binding:

  - *Art. 6 § 1 TEU. "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

- Moreover, the EU has (had?) the intention to accede to the ECHR :

  - *Art. 6 § 2 TEU. "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

  - See however a.o. :

    - http://data.consilium.europa.eu/doc/document/ST-5339-2016-INIT/nl/pdf;

    - Opinion of the ECJ of December 18, 2014 :
    - http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=973251

- A lot of the fundamental rights however are not only guaranteed by the EU-Treaty but equally or similarly by the ECHR and the resp. constitutions of the different MS;

- This has as a consequence - *a fortiori* in countries having a Constitutional Court – that different Courts (ECHR, ECJ, Constitutional Courts,…) have jurisdiction with respect to the interpretation of fundamental rights;

- As far as Belgium is concerned, the Constitutional Court was created in 1989 and at different occasions its jurisdiction was extended later on;

- The Belgian Constitutional Court is competent to verify national laws against a large number of provisions of the Constitution but not (directly) against international treaties signed by Belgium;

- So in case of fundamental rights covered both by the Constitution and international treaties it was for a long time unclear whether regular Courts could directly verify national laws against international treaties (such as the ECHR) or were on the contrary obliged to refer first the question by way of interlocutory procedure to the Constitutional Court (which lead to the so called "*Guerre des Juges*");

- The Belgian legislator therefore intervened in 2009;

- By law of July 12, 2009 regular Courts are – in case fundamental rights are equally or similarly covered by the Constitution and international treaties – obliged to refer the question first by way of interlocutory procedure to the Constitutional Court (with a few exceptions e.g. in case of *acte clair* or *acte éclairé* *(e.g. in case an international Court decided before that the provision is clearly a violation of an international treaty)*);

- This law is comparable to a similar provision introduced in France: according to art. 61-1 of the French Constitution the French Conseil d'État or Cour de Cassation *can* refer by way of interlocutory procedure a question on the compatibility of a legal provision with the French Constitution:

> *"If, in the course of proceedings before a court or tribunal, it is claimed that a legislative provision prejudices the rights and freedoms which the Constitution guarantees, the matter may be brought before the Conseil constitutionnel [Constitutional Council] further to a reference from the Conseil d'État [Council of State] or the Cour de Cassation [Court of Cassation], which shall rule within a fixed period."*

- The question therefore raises whether such a national provision providing for a referral to the Conseil Constitionnel (France) (or Constitutional Court (Belgium)) is compatible with EU-law.

- This issue was referred by the French Cour de Cassation to the ECJ in the *Melki & Abdeli* case *(ECJ, June 22, 2010, C-188/10 and C-189/10)*

  - *" Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order No 58-1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil constitutionnel of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?"*

*Article 267 TFEU*

*"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
*(a)the interpretation of the Treaties;*
*(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*

*If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."*

## ***The decision of the ECJ in the Melki & Abdeli case***

*"the Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law 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 provision by legislative or other constitutional means (see, inter alia, Simmenthal, paragraphs 21 and 24);"*

*"Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law (see Simmenthal, paragraph 22);"*

*"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 (see, to that effect, Simmenthal, paragraph 23)."*

*"Lastly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration, that a rule of national law is unconstitutional, is subject to a mandatory reference to the constitutional court."*

*"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 conferred on it by Article 267 TFEU 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."*

*"Accordingly, the reply to the first question referred is that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – 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."*

*" On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:*

*-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;*

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

*-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.*

*It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law.*

**Conclusion:**

-National legislation providing for a referral to a national Constitutional Court is according to the ECJ not contrary to art. 267 TFEU provided national Courts have the possibility at any stage of the procedure to refer the question also to the ECJ and that it can take all necessary provisional measures.

-Exception:

> *"It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly."*

- According to the above mentioned Belgian provision, Belgian Courts have - contrary to the French provision - an obligation to refer the question **first** to the Constitutional Court in case fundamental rights are involved which are equally or similarly guaranteed by the Belgian Constitution and international treaties;

- But most commentators consider that 'first' does not preclude the national Court to refer the question *at the same time* to the ECJ;

- They consider therefore that the above mentioned Belgian legislation is not in breach of EU-law and compatible with the above mentioned Melki & Abdeli ruling of the ECJ;

- The question whether such domestic legislation is compatible with EU-law was however referred by the tribunal of first instance of Liège to the ECJ:

  - *'Do Article 6 [EU] and Article 234 [EC] preclude national legislation, such as the Law of 12 July 2009 (…), from requiring the national court to make a reference to the Constitutional Court for a preliminary ruling, if it finds that a citizen taxpayer has been deprived of the effective judicial protection guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) ("the ECHR"), as incorporated into Community law, by another national law, namely: Article 49 of the Programme Law of 9 July 2004, without that national court's being able to ensure immediately the direct effect of Community law in the proceedings before it or to carry out a review of compatibility with the ECHR when the Constitutional Court has recognized the compatibility of the national legislation with the fundamental rights guaranteed by Title II of the Belgian Constitution?""*

- The case concerned the retroactive application of a tax provision by which the Belgian authorities tried to avoid the application of the statute of limitation;

- The Belgian Constitutional Court had decided before in this respect that this law could indeed be considered as an interference of the legislator into a pre-existing litigation and therefore potentially in conflict with art. 10, 11, 172 of the Belgian Constitution and art. 6 ECHR (and its first Protocol) but nevertheless admissible in view of reasons of general interest;

- So by referring the case to the ECJ, the tribunal wanted to ascertain whether it was obliged to follow the interpretation of the Belgian Constitutional Court (*acte éclairé*) or whether the issue could also be referred to the ECJ;
  - According to art. 9 §2 of the law on the Constitutional Court, other Courts are in principal bound by the interpretation of the Constitutional Court in case of an appeal *in annulment of a specific law;*

- unfortunately, since the facts concerned a purely domestic matter, the ECJ considered that it had no jurisdiction;
- but nevertheless, the ECJ referred to its earlier decision in Melki & Abdeli;

- Interestingly the question on the compatibility of the above mentioned Belgian tax law was in the meantime also referred to the ECHR;

- The ECHR ruled however that neither art. 6 § 1 ECHR nor the First Protocol to the ECHR was applicable in the case at hand :

  - ECHR, 12 September 2012, Optim & Industerre vs. Belgium, case 23819/06

  - *"The two taxpayers in this case challenged that law on grounds that it interfered with their right to a fair trial under article 6 and their right to enjoyment of their possessions under article 1 of the First Protocol.*
  - *So far as article 6 was concerned, this was met with the finding that ordinary tax matters (not involving a penalty) do not fall within the scope of that article.12 So far as the right to the enjoyment of possessions was concerned, the question was whether the expectation that the limitation period would operate to bar recovery of tax was or was not a "possession" within the scope of the article. The conclu- sion of the ECtHR was that it was not a possession. The Court concluded that, whilst the taxpayers might have had a legitimate expectation that their tax debts would be subject to the operation of the limitation rules, the intro- duction of the change in the law did not deprive them of a "possession" in the sense of Article 1 of the First Protocol." (Baker P., "Recent tax cases of the European Court of Human Rights", European Taxation, 2012, 584 (586))*

- But the above mentioned ruling of the ECJ concerns of course only the relationship between national law and EU law.

  - *Under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law (Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39; Case C-115/08 ČEZ [2009] ECR I-0000, paragraph 138; and Case C-91/08 Wall [2010] ECR I-0000, paragraph 70).*

- And although the above mentioned legislation is by most commentators considered as being in line with EU law (since all guarantees as mentioned by the ECJ in the Melki & Abdeli case seem to be fulfilled), Belgium decided nevertheless to adapt its legislation: by law of April 4, 2014 it has now been explicitly clarified that the above mentioned provision does not preclude national Courts to refer the question at the same time or later also to the ECJ.

- So the fact that different Courts have jurisdiction over the interpretation of fundamental rights not only leads to some procedural issues but implies also that those fundamental rights might – at least theoretically - be interpreted differently or even contradictorily :
    - In Belgium we see that in practice, although the Constitutional Court has no competence for (directly) verifying a national law against international treaties, the Court tries to interpret the fundamental rights guaranteed by the Constitution as much as possible in line with the interpretation given by the Competent international Courts;

- Experiences is other countries?