Some thoughts on Judicial Cooperation and the Protection of Human Rights in the European Union: Theoretical Background and Open Questions**

Alfredo Rizzo*

Summary. I. Judicial Cooperation in the Rome Treaty and Beyond – II. Principles of EU Judicial Cooperation – III. The Protection of Human Rights and EU Judicial Cooperation – IV. International Law Sources on Human Rights Protection and EU Judicial Cooperation – Concluding remarks.

I. Judicial Cooperation in the Rome Treaty and Beyond

Under Article 220[1] of the Treaty establishing the European Economic Communities (1957, hereinafter, EEC Treaty), the latter communities encouraged own member states improving mutual cooperation in civil law matters. This objective was later achieved at first in 1968 with the establishment of Brussels Convention assessing criteria for

* Researcher in public research inst. (INAPP), EU Law Expert at University of Rome "la Sapienza".

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[1] According to that provision, the Member States would have initiated among themselves, *"negotiations aimed at ensuring, for the benefit of their citizens [...] the simplification of the formalities to which the mutual recognition and mutual enforcement of judicial decisions are subjected",* see Treaty establishing the European Economic Communities, accessible (just in French, German, Dutch and Italian) on-line here: https://eur-lex.europa.eu/eli/treaty/teec/sign.

judicial competence and the mutual recognition of judgments on contractual obligations[2].

It is wise recalling how, as from entry into force of Brussels Convention, a judge institutionally placed outside national legal systems, that is, the Court of Justice of the EU (CJEU), is empowered by national judiciaries to understand same Convention's provisions, in particular by means of the preliminary ruling mechanism under previous article 177 EEC Treaty (corresponding to current art. 267 of the Treaty on the Functioning of the European Union, TFEU [3]).

The so called "Brussels system" (based on abovementioned basic provisions and criteria) left behind a more traditional approach to private international law issues, providing for specific and independent interpretative tools, in particular when the

[2] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ C 27 of 26.1.1998 p. 1. On this source of EU Law, an abundant literature exists. It may suffice to mention here F. Pocar (ed.), *La Convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze*, Milano, 1995 and T.C. Hartley, *International Commercial Litigation. Text, Cases and Materials on Private International Law,* Cambridge, 2009, part. pp. 19 ff.

[3] On this core provision the literature is abundant. See, *ex multissimis,* L. Ferrari Bravo, *Commento sub art. 177*, in R. Quadri, R. Monaco, A. Trabucchi (eds.), *Commentario CEE*, III, Milano, 1965, p. 1310 ff.; H.G. Schermers, D.F. Waelbroeck, D. F. (eds.), *Judical protection in the European Union*, the Hague, London, New York, 2001 and R. Mastroianni, M. Condinanzi, *Il contenzioso dell'Unione europea,* Torino, 2009, pp. 186 ff.; G. Caggiano, *Invito alla lettura di L. Ferrari Bravo sull'articolo 177 del Trattato CEE,* in G. Nesi, P. Gargiulo (eds.), *Luigi Ferrari Bravo. Il diritto internazionale come professione,* Trento/Napoli, 2015, pp. 99 ff. It seems wise recalling that, as from the entry into force of the Lisbon Treaty and of the Charter of fundamental rights of the EU (art. 6 Treaty of the European Union, TEU), a specific "urgency" procedure has been settled with the view of coping with any art. 267 TFUE procedure dealing either with cases related to children (i.e. family law cases) or with cases where fundamental human rights might be infringed by national procedural lengths (i.e., criminal law proceedings, see Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24 of 29.1.2008, p. 42; Amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29.1.2008, p. 39, and OJ L 92 of 13.4.2010, p. 12). On these issues see *ex multis*, R. Baratta, *Réflexions sur la cooperation judiciaire civile suite au Traité de Lisbonne*, in G. Venturini, S. Bariatti (eds.), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar,* Milano, 2009, part. p. 11; A. Rizzo, F.M. di Majo, *Commento alla Carta dei diritti fondamentali dell'Unione europea,* in A. Tizzano (ed.), *Trattati dell'Unione europea,* 2014, Milano, pp. 2605-2606.

national judges are called to assess the true character of the disputed question in a proceeding pending before them, that is to say, whether that question concerns contractual or non-contractual obligations.

In fact, it is the CJEU's view that the general criterion followed by the Brussels system[4] – that is, the jurisdiction of courts of the Member State in which the defendant is domiciled – inspires the regulation as a whole. Consequently, it is only by way of derogation from that principle that same regulation provides for special rules of jurisdiction for exhaustively listed instances in which the defendant may or must, depending on the case, be sued in the courts of another Member State (i.e. the jurisdiction of the place where the contract must be executed). In that regard, it is settled case-law that those special rules on jurisdiction get a restrictive reading, that is to say, that those rules cannot be given an interpretation going beyond the cases expressly envisaged in same Regulation[5].

This exemplifies how and to what extent EU system differently works than other existing international agreements dealing with conflict of laws.

The EU legal system in general allows that other international law sources on judicial cooperation in civil and commercial matters replace corresponding EU law

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[4] Regulation (EC) n. 44/2001, OJ L 12 of 16.1.2001, p. 1. With this Regulation, the previous Brussels Convention's rules have been transferred into a legislative source of the EU, also in accordance with Maastricht and Amsterdam treaties' reforms. See, on those issues, *ex multis,* A. Borras (ed.), *La revisión de los Convenios de Bruselas de 1968 y Lugano de 1988 sobre competencia judicial y ejecución de resoluciones judiciales: una reflexión preliminar española, Seminario celebrado en Tarragona, 30-31 de mayo de 1997*, Madrid-Barcelona, 1998; S.M. Carbone, *Il nuovo spazio giudiziario europeo. Dalla Convenzione di Bruxelles al Regolamento CE 44/2001*, Torino, 2002. On the recent reforms of the Brussels I Regulation (Reg. 1215/2012, OJ L 351 of 21.12.2012) see also C. Tuo, *Armonia delle decisioni e ordine pubblico,* Studi sull'integrazione europea, 2013, p. 507-524.

[5] CJEU C-51/97, *Réunion européenne and Others* [1998], ECR I-6511, paragraph 16, and CJEU C-265/02, *Frahuil* [2004], ECR I-1543, paragraph 23. In relation to the Brussels Convention, see in particular Case C-168/02, *Kronhofer* [2004] ECR I-6009, para. 14 and additional mentioned case-law.

sources dealing with alike topics. However, this option has been read restrictively by same CJEU [6]. In particular, it is true that Brussels Regulation allows that more specific ("special") agreements be applied in the place of same regulation's rules; however, in the CJEU's view, the implementation of such agreements in lieu of the relevant EU legislation must be rigorously assessed to prevent this from calling into question those principles inspiring judicial cooperation in civil and commercial matters under same Brussels system. The main mentioned principles are the following:

1. **free movement of judgments** in civil and commercial matters;
2. **legal certainty for litigants** with the view of granting, *inter alia*,
   2.1 a satisfactory level of **predictability of the courts having jurisdiction** on each specific case;
3. **sound administration of justice;**
4. **minimization of the risk of concurrent proceedings**;
5. **mutual trust in the administration of justice in the European Union**.

These "public law" requirements (based on the general principle of mutual trust) qualify EU law in matters of judicial competence and mutual recognition of judgments

[6] CJEU Grand Chamber, Case C-533/08, *TNT Express Nederland BV* [2010], ECR I-4107 . This judgment has been mentioned in particular for its impact on issues of relations between international law commitments and EU law commitments that can both be binding on EU Member States. In such cases, any international agreement concluded by an EU Member State forms part of that specific national law, and, as such, must yield to any commitment coming from EU law for that State (that is, EU treaties' provisions, international agreements concluded by the EU and any secondary EU law source enjoying specific characters and effects). This approach is not per se in contrast with the provision under current art. 351 TFEU, allowing EU Member States to keep, under certain conditions, obligations stemming from international agreements concluded with non-EU States or organizations before entering EU (A. Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States,* Fordham International Law Journal, 2011, pp. 1304-1345; on general issues coming from art. 351 TFEU, see, *ex multis,* J. Klabbers, *Treaty Conflict and the European Union,* Cambridge, 2009; let us also mention, for further comments, A. Rizzo, *Legal Foundations of the Competence of EU on Foreign Direct Investments,* Italian Yearbook of International Law, 2013, part. pp. 138-144).

from other international legal instruments dealing with similar matters. And finally, this can only lead the CJEU to make obligations stemming from own (EU) legislation prevail over related obligations stemming from other non-EU judicial cooperation sources.

II. Principles of EU Judicial Cooperation

The EU is based on several general principles aimed at establishing an effective, reliable and consistent legal system based on minimum standards equally applicable to EU Member States and the EU itself. These general rules and principles work as "blocking devices " whenever relevant sources of EU law, while aiming at the same legitimate objectives pursued by the EU treaties, do not establish sufficiently detailed and coherent legislative frameworks as to entail effective and stringent obligations for EU Member States. For example, in the area of freedom, security and justice (AFSJ), since the Treaty of Amsterdam, the EU has developed its own legislation step by step, without however being able to cover in an always effective, coherent and complete way the many topics that fall into that ambit of law[7].

This is especially true when we come considering cooperation on criminal law matters. An example of this is offered by the decision concerning the *Pupino* case[8],

[7] This coherence is lacking even in substantial terms, if we consider the adoption, in this field, of regulations mainly having coordination purposes, or else of directives which, as such, need to be implemented at national level in order to enter in force and be equally applied into each EU member state's legal system. This highlights how, to date, the objective of a truly uniform system of civil and criminal law, whether substantive or procedural, has not been fully reached at European level so far.

[8] CJEU, case C-105/03, *Criminal proceedings against Maria Pupino*, [2005], ECR I-5285; see, *ex multis*, R. Conti, R. Foglia, *Decisioni quadro e interpretazione conforme del diritto interno*, Il Corriere giuridico, 2005 p.1149.

when the CJEU, although the EU did not have exclusive competence in the relevant legislative field, gave priority to some provisions of the framework decision on crimes' victims [9], that is, a type of source envisaged in the pre-Lisbon regime which was not directly applicable as such and whose provisions couldn't perform direct effects in national legal orders. The CJEU has given priority to the main aim pursued by the framework decision (that is to say, the protection of individuals affected by crimes) and, to this end, resorted to the "sincere cooperation" criterion, currently foreseen under art 4 (3) of the Treaty on the European Union (TEU). In fact, in accordance to that principle (previously foreseen at art. 5 EEC treaty) the CJEU has frequently enhanced the content and the effects of obligations that for same EU Member States result from relevant EU law sources, especially when same content and same effects cannot be clearly inferred from related provisions of that sources[10].

In the Court's words: "*It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation – requiring in particular that Member*

[9] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings OJ L 82, 22.3.2001

[10] For an overview of the case-law on the sincere cooperation principle, see annotations under art. 10 of the Treaty of the European Community (TEC, before the Treaty of Lisbon reforms) in L. Ferrari Bravo, A. Rizzo, F. di Majo, *Codice dell'Unione europea. Annotato con la giurisprudenza della Corte di giustizia,* Milan, 2008, pp. 53-81. For the implementation of that principle, the national judiciaries have been given a peculiar task in the light, again, of the relevant tools foreseen under same EU treaties (*in primis*, the preliminary reference foreseen now under art. 267 Treaty on the Functioning of the EU, TFEU). The CJEU, in the *Factortame* decision (C-213/89, *Factortame Ltd and oth.* [1990], ECLI:EU:C:1990:25, with commentary of, *ex multis,* G. Tesauro, *Tutela cautelare e diritto comunitario*, Rivista italiana di diritto pubblico comunitario 1992 p.131-138) has reiterated in particular that "*it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law*"; consequently, connecting such principle to the functioning of the preliminary reference, the same CJEU has added that mentioned mechanism "*would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice*".

States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law – were not binding also in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions".

Though concerning a specific source of EU law aimed at protecting particularly fragile individuals (such as the victims of a crime), the cited case gives us a sufficiently clear example of the role played by the CJEU on those issues, explaining the juridical path that, though under some conditions, can lead giving precedence to EU legislation.

In fact, in a more recent case[11], the Luxembourg court itself clearly recalled how the prohibition of torture and inhuman or degrading treatment, as enshrined in art. 4 of the EU Charter of Fundamental Rights (with the same content as article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR) requires that national judges, who have been asked to transfer a person in execution of an European arrest warrant, assess in advance that the EU country in which the individual should be addressed obeys various general conditions relating to the effective protection of anyone involved in criminal proceedings.

[11] CJEU of 15 Oct. 2019, case C-128/18, *Dumitru-Tudor Dorobantu* [2019], ECLI:EU:C:2019:857. The judgment makes amply reference to the precedent CJEU of 5 April 2016, *Aranyosi and Căldăraru*,C-404/15 and C-659/15 PPU [2016] EU:C:2016:198 (on the latter judgment, see, *ex multis,* N. Lazzerini, *Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru,* Diritti umani e diritto internazionale, 2016, pp. 445-453; S. Montaldo, *A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case*, European Papers, 2016, pp. 1183-1193; V. Carlino, G. Milani, *To trust or not to trust? Fiducia e diritti fondamentali in tema di mandato d'arresto europeo e sistema comune di asilo,* Freedom Security and Justice, European Legal Studies, 2019, pp. 64-90). Both judgments deal with the understanding of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

Actually, this approach is particularly demanding as it “turns around” the Pupino decision’s perspective: in fact, while this latter case dealt with the protection of victims of a crime, the last mentioned cases (Dorobantu and Aranyosi and Căldăraru) deal with specific guarantees for persons who have been already condemned for crimes and who, for whatever formal or factual reason, should or could be put under restrictive measures in more than one single EU member State. Once again, it should be emphasized that, even in particularly sensitive situations linked to the well-being of individuals subjected to public authorities’ constraints, the CJEU’s point of view seems rather defensive of the aforementioned principles of mutual trust and of sincere cooperation, which are both aimed at granting effectiveness to relevant EU law on judicial cooperation in criminal matters. According to the CJEU, it is anyway solely for the national judiciaries to assess if, when implementing an European Arrest Warrant, both mentioned EU law principles and relevant human rights are equally satisfactorily protected under the national legal system of a "destination" State.

III. The Protection of Human Rights and EU Judicial Cooperation

In addition to the general principles of EU law, such as the aforementioned duty of sincere cooperation, we know that judicial cooperation in civil and criminal matters raises many questions relating to human rights protection.

EU policies in the Area of freedom security and justice (AFSJ) affect a core of fundamental human rights – particularly those concerning issues of procedural law and of access to a judge (i.e. art. 6 ECHR) – amply foreseen in the multi-level dimension of

justice. However, one should not forget that protecting those rights might encroach mentioned general aims and principles pursued by the EU legal system.

It looks difficult that a common area of justice based on some of the mentioned principles, such as those of sincere cooperation and mutual trust, is completed if fundamental human rights are not all equally granted at the same level of intensity in all EU member States and in the EU itself. At the same time, we have to bear in mind that this approach must be carefully followed if we look at the scopes pursued by the EU.

Indeed, the EU aims to achieve a degree of autonomy either from other international organizations or from the national legal systems of its Member States. With this approach in mind, we can understand an assertive bearings of the EU Court's on matters not unrelated with judicial cooperation and also implying human rights protection issues (the protection of EU financial interests). In fact, in the decision on the *Akerborg Fransson*[12] case, often debated at the academic level, the EU Court has censored one national legislation forcing national courts to set aside any national provision infringing an individual right enshrined in the Charter of Fundamental Rights of the European Union. Although apparently compliant with same EU law, in EU Court's view such an automatism on the contrary infringes the national courts' discretionary power to assess on a case-by-case basis and also with the support of same

[12] Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson,* [2013], ECLI:EU:C:2013:105, V. Skouris, *Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts Melloni et Åkerberg Fransson*, Il diritto dell'Unione Europea, 2013, p. 229 ; in more general terms, A. Di Stasi, *L'ambito di applicazione della Carta dei diritti fondamentali per gli Stati membri dell'Unione europea : a proposito dell'interpretazione dell'art. 51 par. 1,* Studi sull'integrazione europea, 2014, part. p. 298.

CJEU (through the aforementioned preliminary reference), whether national provisions falling within EU law scope of application are compatible or not with the EU Charter.

This assessment must be understood in the light of the autonomy attributed to, on the one hand, the judiciary by comparison to the other two powers of the State and, on the other, the EU legal order as such, since such autonomy was reached exactly through the adoption of same Charter of Fundamental Rights of the EU, always considering the peculiar meaning of referring to the Charter and human rights in general when dealing with judicial cooperation issues.

IV. International Law Sources on Human Rights Protection and EU Judicial Cooperation

Finally, few words to stress how reference to the international level of protection of human rights concerns in particular the fact that art. 6 TEU, being the legal basis for human rights standards in the EU, recalls other international law sources on human rights, and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR.

However, the CJEU reiterated that the EU's objectives also prevail over different protection standards, that is to say, not only with respect to those set at national level (as was stated in the Melloni case[13]), but also on standards established by other international agreements, including the aforementioned ECHR (which is an international treaty, albeit with a peculiar character).

[13] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, N. De Boer, *Addressing rights divergence under the Charter: Melloni*, Common Market Law Review, 2013 p.1083-1103.

In particular, in opinion 2/2013 on EU accession to the European Convention for the Protection of Human rights and Fundamental Freedoms (ECHR, to be considered as an international agreement between EU Member States and other non-EU countries[14]), the CJEU stressed that an international judge like the Strasbourg Human Rights Court, different from that established by the EU treaties, has no competence over human rights issues raised in the implementation of relevant sources of EU law. Therefore, for the CJEU, any problematic issue raised by such implementation, including related human rights protection issues, falls (particularly after the entry into force of the Charter of the fundamental rights of the EU following the Lisbon treaty reforms, i.e. art. 6 TEU) within its exclusive competence and cannot be "shared" with other judiciaries placed "outside" of same EU institutional and legal framework (as is the ECHR)[15].

What above, allows us concluding that any problematic question of judicial cooperation at the same time raising issues of human rights protection falls into EU Court's competence whenever that question deals with the implementation of relevant EU law sources.

[14] Opinion of the Court, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], ECLI:EU:C:2014:2454. On that opinion, see, *ex multis,* V. Di Comite, *Autonomia o controllo esterno? Il dilemma dell'adesione dell'UE alla CEDU alla luce del parere 2/13*, la Comunità internazionale, 2015, p.223-243; P. Eeckhout, *Opinion 2/13 On EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?,* Fordham International Law Journal, 2015, pp. 955-992; S. Vezzani *L'autonomia dell'ordinamento giuridico dell'Unione Europea. Riflessioni all'indomani del parere 2/13 della Corte di giustizia*, Rivista di diritto internazionale, 2016, p.68-116.

[15] The "autonomy" of EU from national legal systems as well as from other international agreements and organizations (including same ECHR), is reiterated in a long-standing case-law since *van Gend & Loos*, case 26/62 [1963], EU:C:1963:1; *Costa c. ENEL*, case 6/64, [1964] EU:C:1964:66; *Internationale Handelsgesellschaft,* case 11/70 [1970] EU:C:1970:114 (in part. at p. 3) and, dealing with the relevance of international agreements, Opinion 1/09, *Draft Agreement on the Creation of a Unified Patent Litigation System* [2011] EU:C:2011:123, in part. under p. 65. Let also mention further considerations on same topic at A. Rizzo, *Introduzione,* in A. Rizzo (ed.), "Investment security" *in Nord Africa,* Roma, 2015, in part. pp. 12-13.

V. Concluding remarks

From the above it is apparent that the EU legal system is undoubtedly made stronger and more independent after the entry into force of the Charter of Fundamental Rights of the European Union.

However, in less theoretical terms, it seems that everything revolves around the need for a more fine-tuned institutional balance between different levels of jurisdiction. Indeed, the CJEU should be involved whenever, following a case-by-case criterion, relevant EU law sources and provisions, although not always sufficiently effective and detailed, deal with particularly pressing issues raised by judicial cooperation, whose application per se often implies the need to resort to EU law principles, such as mutual trust, sincere cooperation, primacy and the consistency of EU law.

It is in this context that the EU Charter of Fundamental Rights can play fully its role. Otherwise, the same meaning of "judicial cooperation" – also in this "vertical" scheme – would be devoid of any content. And again, the preliminary reference as a means of dialogue between the national judiciaries and the EU Court stands as a procedural tool particularly fit to the purpose.

On the concurring role played by national constitutional courts on those issues, we would need another entire meeting[16].

[16] At the core of last mentioned topic stands the s.c. *Taricco saga,* CJEU C-105/14, *Taricco* [2015] EU:C:2015:555 and CJEU C-42/17, *M.A.S. and M.B.* [2017], ECLI:EU:C:2017:936. On these judgments see, *ex multis,* C. Amalfitano, *Da un'impunità di fatto ad un'imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?*, Quaderni di SIDI Blog, 2, 2016, 561 ss., R. Mastroianni, *La Corte costituzionale si rivolge alla Corte di giustizia in tema di "controlimiti" costituzionali: è un vero dialogo?*, Federalismi.it, 2017, n. 7; G. Di Federico, *La "saga Taricco": il funzionalismo alla prova dei controlimiti (e viceversa),* Federalismi.it, 2018, n. 11.

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