Between Scylla and Charybdis

Reconciling the Greek Constitution and EU Law in the Council of State's Judgment on Non-State Universities

Konstantinos Lamprinoudis

22.01.2026 doi: 10.59704/7358a78a87defdb7

When the public character of higher education is expressly consecrated in a State's Constitution, can a statutory law validly allow for the creation of foreign non-state (private) universities? The Greek Council of State (*Simvoulio tis Epikratias*, hereafter "CoS"), Greece's supreme administrative and quasi-constitutional court par excellence, has answered in the affirmative. By upholding the compatibility of Law n. 5094/2024 with the Greek Constitution as interpreted in light of EU law, the CoS opened the way for the coexistence between public and private educational institutions.

The CoS' decision, the latest episode of the long-standing "Greek higher education saga", faced severe criticism, amid the already heated political, legal, and public debate that the new bill has sparked since its proposal (see, e.g., here, here, and here). Even though the CoS inappropriately resorted to an EU-conforming interpretation *contra Constitutionem* and refused to request a preliminary ruling from the EU Court of Justice (CJEU), its judgment is a prime example of how EU law can challenge and eventually reshape Member States' constitutional orders in the context of what is often referred to as "multilevel constitutionalism" or "constitutional pluralism".

The Greek higher education saga

Art. 16 of the 1975 Greek Constitution stipulates that higher education at university level shall be provided exclusively by public institutions subject to the supervision of the State (para. 5), while the creation of higher education institutions by private individuals shall be prohibited (para. 8). Based on these provisions aiming at ensuring a high level of university education, Greek authorities systematically refused in the past to recognise diplomas awarded by the competent authorities of other Member States following the completion of education received, in whole or in part, by private bodies in Greece in the framework of a homologation agreement with those authorities. As consistently held by the CoS in this respect, any possibility of recognising, as a university or higher education degree, an educational qualification awarded by such private institutions established in Greek territory would amount to a circumvention of the Constitution (see, e.g., judgment n. 3457/1998, para. 5; n. 2274/1990, para. 3).

However, in several cases (see *Commission v Greece* (2008, C-274/05), *Kastrinaki*, *Chatzithanasis*, and *Commission v Greece* (2008, C-84/07)), the CJEU concluded that Greek authorities are required to recognise the aforementioned diplomas under the relevant EU rules on recognition of professional qualifications, as now laid down in Directive 2005/36/EC. The CJEU clarified, though, that the EU recognition regime does not concern academic qualifications (ie giving access to postgraduate and doctorate studies), but solely professional qualifications giving access to regulated professions (see *Commission v Greece* (2008, C-274/05), para. 37; this distinction has also been endorsed by the CoS since then, see, e.g., judgment n. 178/2023, para. 15). In the aftermath of these judgments, the Greek legislator decided to regulate the operation of private centres that provide post-secondary education in Greece under a validation or franchising agreement with foreign partner institutions, while also enabling the professional recognition of the diplomas granted by these centres (see Law n. 3696/2008, as repeatedly amended to address the European Commission's concerns regarding its compliance with EU law).

Against this background, and despite the failed attempts to revise Art. 16 of the Constitution which has been largely criticised as outdated (see, e.g., Alivizatos and other scholars), Law n. 5094/2024 was adopted. This bill introduced the framework governing the establishment and operation in Greece of branches of parent universities in the form of non-profit "University Legal Entities", which are associated with higher education institutions originating from other EU Member States or third countries that are parties to the General Agreement on Trade in Services (GATS), and award degrees that are fully recognised as per both the professional and academic qualifications they attest. Pursuant to Arts. 130-155 of that Law, such entities are subject to authorisation and supervision by the Greek State, and need to further comply with a number of formal requirements.

Ruling on a legal action challenging Law n. 5094/2024 as unconstitutional, the CoS delivered on October 24 its judgment n. 1918/2025. Sitting in full court, the CoS concluded by majority – against a strong dissent of eight judges – that the Greek Constitution does not preclude the setting-up of foreign university branches by virtue of statutory legislation which guarantees academic freedom as well as the high level and non-profit character of education. To reach this conclusion, the CoS emphasised that Art. 16 of the Constitution needs to be interpreted in conformity with EU law and, particularly, in light of the latest developments in the field of higher education under Arts. 6, 49 and 165 TFEU, Directive 2006/123/EC, the EU Charter of Fundamental Rights, and the case law of the CJEU. Accordingly, by mostly relying on the Court's judgments in *Kirschstein*, *Commission v Hungary* (2020) and *Cilevičs*, the CoS found that the absolute prohibition of any private higher education institution is contrary to the EU freedom of establishment, the freedom to found educational establishments enshrined in Art. 14(3) of the Charter, and the principle of proportionality.

The CJEU's case law and the Commission's stance regarding Art. 16 of the Greek Constitution

The EU courts had already the chance to assess the Greek constitutional framework for higher education in several cases. More specifically, in *Commission v Greece* (1988) concerning the ban on setting up private vocational training schools, the Court ruled that Art. 16(7) of the Greek Constitution, which prescribes that vocational training shall be provided only by the State, does not give rise to prohibited nationality discrimination under the Treaties, in the absence of an implementing law authorising the creation of such schools by private individuals in general (see para. 13). Building on that judgment, the EU General Court also concluded in *Panagiotopoulou* that the prohibition of establishing private universities laid down in Art. 16 of the Constitution does not discriminate between Greek nationals and nationals of other Member States and is thus not contrary to the freedom of establishment (see para. 73). As for the cases relating to Greece's refusal to recognise foreign diplomas, although the CJEU took Art. 16 of the Greek Constitution into account in its reasoning (see *Commission v Greece* (2008, C-274/05); para. 23; *Kastrinaki*, paras. 7-8; *Chatzithanasis*, paras. 11-12; and *Commission v Greece* (2008, C-84/07), para. 12), it refrained from explicitly pronouncing itself over the compatibility of that provision with EU law.

It is worth recalling here that, in the context of an infringement action pursuant to Art. 258 TFEU, the Court can only judge the merits of the pleas in law put forward by the Commission in the pre-litigation procedure, during which the subject-matter of the dispute is defined (see, e.g., *Commission v Italy* (1997), paras. 58-59). Accordingly, as per the position adopted by the CoS' majority (see para. 24), it cannot be inferred from the judgment in Commission v Greece (1988) that Art. 16 of the Greek Constitution does not violate the Treaties on grounds other than discrimination based on nationality. This is all the more so, considering the evolution of the CJEU's case law since its ruling in *Gebhard*, pursuant to which all measures that prohibit, impede or render less attractive the exercise of the freedom of establishment constitute restrictions on

that freedom, even if they apply in an indiscriminate manner (see, e.g., *Società Italiana Imprese Balneari*, para. 48).

Interestingly, it has been argued by some scholars that the fact that the Commission has never challenged the prohibition of establishing private universities under Greek constitutional law, as it has done in relation to other aspects of Greek legislation in the field of higher education and beyond, attests to the non-violation of EU rules by Art. 16 of the Constitution (see, e.g., Kontiades and Drosos). However, this view overlooks that the Commission enjoys a discretion to commence proceedings under Art. 258 TFEU in the event of an alleged infringement of EU law (see, e.g., *Star Fruit v Commission*, paras. 11-12). Furthermore, the Commission is not empowered to determine conclusively whether a given conduct of a Member State complies with the Treaties but this can be appraised only by the CJEU (see, e.g., *Essevi and Salengo*, para. 16). Consequently, the decision not to bring proceedings against Greece in this respect does not mean that the latter is not in breach of EU law (see Lenaerts et al).

EU-conforming interpretation or primacy of EU law?

The main point of criticism against the judgment of the CoS revolved around the bypassing of the clear wording of the Greek Constitution in the name of EU-conforming interpretation. It has been argued, in particular, that Law n. 5094/202 directly contravenes Art. 16 of the Constitution and thereby essentially introduces a constitutional amendment through the back door with the judicial support of the CoS. The latter has been thus accused of exceeding the limits imposed by the principle of EU-consistent interpretation by adopting a *contra Constitutionem* interpretation of Art. 16 (see dissenting opinion, para. 33; see also, among others, Vlachopoulos and Karampatzos).

It is true that the duty of national courts to interpret the relevant rules of their domestic legislation, including constitutional provisions, in compliance with EU law cannot serve as the basis for an interpretation of national law *contra legem* (see, e.g., *Adeneler*, para. 110). However, pursuant to settled case law, where such conforming interpretation proves impossible, national courts are still required, in light of the primacy principle, to disapply any national provision, even of constitutional origin, that is at conflict with EU law, without them having to await the prior setting aside of that provision (see, e.g., *Commission v Poland* (2025), para. 115; *Asociaţia "Forumul Judecătorilor din România"*, paras. 245-247).

Given the CoS' detailed reference to the aforementioned considerations in its reasoning (see paras. 8, 23), one may wonder why it eventually hesitated to frame its conclusion in primacy-related terms. It seems that, sitting uneasily with either explicitly admitting the supremacy of EU rules over the Greek Constitution or deferring to the absolute prohibition enshrined in Art. 16 thereof, the CoS opted for EU-conforming interpretation as a compromise "between Scylla and Charybdis". Besides, the same approach (also suggested by Venizelos and the former CJEU President Skouris) had been previously adopted in other instances of tension between Greek constitutional law and EU law by both the CoS (see judgment n. 3470/2011, para. 9, following its preliminary reference in *Michaniki*) and the CJEU itself (see *M.V.*, paras. 70-75, and *Angelidaki*, paras. 203-207).

Indeed, when faced with the challenge of upholding EU law while at the same time paying due respect to their own Constitution, national courts may resort to EU-consistent interpretation as the most effective tool to smoothly reconcile the two legal regimes and avoid any conflict between them. Nevertheless, where such a conflict is unavoidable due to the unequivocal wording of the constitutional provisions in question, this can only be resolved through recourse to the principle of primacy of EU law. Accordingly, instead of "interpreting" Art. 16 of the Greek Constitution in a way that deprived it of its normative content, the CoS should have left it inapplicable in favour of the relevant EU rules, no matter how "unpleasant" this might have sounded to constitutional lawyers (see also Metaxas and Vlachopoulos).

The reluctance to refer the case to the CJEU

Despite the inextricable link of the dispute with EU law and the urging of the dissenting judges to the opposite direction, the CoS found it unnecessary to make a preliminary reference to the CJEU. Taking the view that all the relevant issues of EU law raised in the case had already been resolved by existing case law, and that, in any event, the correct interpretation of the applicable provisions appeared so obvious as to leave no scope for any reasonable doubt, the CoS concluded that it was relieved of its obligation under Art. 267(3) TFEU to refer to the CJEU (see para. 31). Regardless of whether an *acte éclairé* or an *acte clair* within the meaning of *CILFIT* actually existed (which seems rather doubtful given the large divide among the CoS' judges), the fact remains that the CoS' stance aligns with the general reluctance of Greek courts to avail themselves of the preliminary reference mechanism (see in detail CJEU's 2024 Annual Report; see also Skouris).

It is hard to say which exact reasons might have prompted the CoS to withhold the case and refrain from engaging in a judicial dialogue with the CJEU. Was it the fear that the Court would expressly require the CoS to "sacrifice" Art. 16 of the Greek Constitution on the altar of primacy of EU law (see also Venizelos)? Was it instead the uncertainty about the Court's answer, especially given the potential incompatibility with the EU fundamental freedoms of the conditions laid down in Law n. 5094/2024 for the setting-up of foreign university branches? Or was it merely the need to settle the case quickly as a matter of political expediency?

Be that as it may, the CoS' hesitation to refer to the CJEU is regrettable. Most importantly, it appears paradoxical – if not hypocritical – for a Member State's supreme court, which decides to overturn its settled case law and interpret its national Constitution contrary to its letter through recourse to EU law (!), to not seek the guidance of the ultimate authority on EU legal matters. Furthermore, the CoS missed the opportunity to "transfer" the responsibility for adjudicating on such a controversial topic to the competent supranational judges and thus reinforce the legitimacy of its reasoning.

Concluding remarks

Notwithstanding its methodological flaws, the CoS' judgment on the establishment of non-state universities is truly seminal. By engaging in a comprehensive analysis of the influence that EU law exercises on Greek constitutional law, it reinvigorates the never-ending discussion about the relationship and potential conflict between Member States' national Constitutions and the EU *acquis*. This becomes particularly relevant in view of the recent allegations of the European Chief Prosecutor Laura Kövesi that Art. 86 of the Greek Constitution on the liability of government members obstructs the investigations of the European Public Prosecutor's Office (EPPO) for misconduct in the management of EU funds. A similar tension between Greek constitutional and EU law provisions is also at stake in the currently pending case *Aliki*, concerning the personal liability of a European Delegated Prosecutor on the basis of an action for damages against national judges and prosecutors provided for in Art. 99(1) of the Greek Constitution.

In any event, the Greek higher education saga is far from over. For once, the licenses granted to three foreign university branches to operate in Greece have also been challenged before the CoS. Moreover, several questions remain open: do the requirements set out by Law n. 5094/2024 meet the proportionality test for compliance with the EU freedom of establishment (for a negative answer, see, e.g., Hatzopoulos)? Could a foreign educational institution decide to create or transfer its primary establishment in Greece, or is it only allowed to set up a branch? And what happens with the reverse discrimination suffered by Greek nationals who are still subject to the prohibition of Art. 16 of the Constitution? From an EU law perspective, it is only for the CJEU to settle these issues once and for all, whenever they reach the Luxembourg courtrooms.

ABOUT THE AUTHOR

Konstantinos Lamprinoudis
Konstantinos Lamprinoudis is a PhD candidate and lecturer of European Law at the Europa Institute of Leiden Law School in the Netherlands and holds an LLM from the College of Europe (Bruges).

SUGGESTED CITATION

Lamprinoudis, Konstantinos: Between Scylla and Charybdis: Reconciling the Greek Constitution and EU Law in the Council of State's Judgment on Non-State Universities, Verfassungsblog, 22.01.2026, doi: 10.59704/7358a78a87defdb7.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260122-172245-0.