

Primacy of European Union Law**Professor Ion GÂLEA, PhD***University of Bucharest, Faculty of Law*

Abstract: *This short presentation has the purpose not only to expose the main features of the principle of primacy of European Union law, but to underline the difference – or the different nuances – between "primacy" and "supremacy". The short presentation also attempts to outline the terminological difficulties in the Romanian language, where the same term, "supremație", is officially used. The presentation argues that primacy of EU law is not a matter of hierarchy of norms, is not inherent to a pyramid of norms, but relies on dialogue between Courts, through the preliminary reference procedure, on the fact that the national judges are the judges of EU law and on the reality that EU enjoys direct effect in the domestic law irrespective of the provisions of the latter.*

Key words: *primacy of EU law, supremacy, direct effect, preliminary reference procedure, dialogue between Courts.*

Primatul dreptului Uniunii Europene

Rezumat: *Această scurtă prezentare are scopul nu numai de a expune principalele caracteristici ale principiului supremației dreptului Uniunii Europene sau, dacă ne putem permite să propunem un termen diferit, al primatului dreptului Uniunii Europene, ci și de a sublinia diferența – sau nuanțele diferite – dintre „primat” și „supremație”. Prezentarea încearcă, de asemenea, să evidențieze dificultățile terminologice din limba română, unde se utilizează oficial același termen, „supremație”. Prezentarea susține că primatul dreptului UE nu este o chestiune de ierarhie a normelor, nu este inerent unei piramide de norme, ci se bazează pe dialogul dintre instanțe, prin procedura trimiterii preliminare, pe faptul că judecătorii naționali sunt judecătorii dreptului UE și pe realitatea că dreptul UE se bucură de efect direct în dreptul intern, indiferent de dispozițiile acestuia din urmă.*

Cuvinte cheie: *supremația dreptului UE, primatul dreptului UE, efect direct, procedura de trimitere preliminară, dialogul dintre instanțe.*

INTRODUCTION, PURPOSE OF THE PRESENTATION

The purpose of this short presentation is to underline the importance of primacy of EU law, one of principles of the EU legal order. The presentation also intends to outline the difference between "primacy" and "supremacy", as it may appear that these concepts are different.

As recalled, primacy is one of the characteristics of the EU legal order. As mentioned in Opinion of 18 December 2014 for the accession of the EU to the ECHR that "the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation"¹. Moreover, as indicated in the two "rule of law conditionality" judgments of 16 February 2022, the Court referred to the values enshrined in article 2 TEU as values which "define the very identity of the European Union as a common legal order"². Thus, it appears that the EU not only "has" a legal order, but "is" a common legal order (paras 127 and 145).

1. TERMINOLOGICAL CHALLENGES

It would be appropriate to start with a terminological comment. In the Romanian language, the official word is "supremație", which derives from the Romanian version of the Declaration no. 17 annexed to the Final act of the Intergovernmental Conference which adopted the Treaty of Lisbon³. The term coincides with the one employed by article 1, paragraph (5) of the Constitution of Romania, which provides (unofficial translation): "In Romania, the observance of the Constitution, of its supremacy and of the laws shall be mandatory".

However, we may note that in other languages, different terms are employed. In English and French, the words employed are "primacy" and "primauté", even if the terms "supremacy" and "suprémacie" exist and are used. In German, the word "Vorrang" names the primacy. However, article 25 of the Constitution (Grundgesetz), relating to the precedence of international law over domestic law uses the verb "vorgehen", while article 31, concerning the relation between federal law and Land law, stipulates that "Bundesrecht bricht Landesrecht". In Italian, the word employed is "il primato" and in Spanish "la primacia". Thus, supremacy and primacy appear not to be the same concept.

2. THE CASE-LAW BASIS OF PRIMACY

According to Declaration no. 17, the Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference annexes to the

¹ Opinion 2/13 (Accession of EU to the ECHR), 18 December 2014, EU:C:2014:2454, para. 158.

² Judgments of 16 February 2022, Hungary/Parliament and Council, C-156/21, EU:C:2022:97, para. 127 et Poland/Parliament and Council, C-157/21, EU:C:2022:98, para. 145.

³ Official Journal of the European Union, C 115, 09.05.2008, p. 344.

Final act the Opinion of the Council Legal Service on the primacy of EC law of 22 June 2007, which indicates that at the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64), there was no mention of primacy in the treaty. The Declaration quotes the case Costa/ENEL, according to which *"It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question"*⁴.

The following question could be raised: was it unusual for the Court of Justice to make such a statement, that "EU law cannot be overridden by domestic law", in 1964? Or was it unusual, in 1970, to rule in the *International Handelsgesellschaft* case (11/70), that *"the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to [...] the constitution of that state or the principles of a national constitutional structure"*⁵.

A comparison with international law may show us that statements according to which domestic law cannot be invoked in order to justify not complying with a legal obligation are not entirely new. In 1872 an international arbitral tribunal in the *Alabama* case held that *"the government of Her Britannic Majesty cannot justify for a failure [its international obligation] on the plea of insufficiency of the legal means of action which it possessed"*⁶. Moreover, in 1932 the Permanent Court of International Justice held in the case concerning *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* that: *"while on the one hand, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"*⁷.

3. THE SPECIFICITY OF PRIMACY, AS A PRINCIPLE OF EU LAW

It appears from the above quoted cases that it was not totally unusual for an international court to hold that international law cannot be overridden by provisions of domestic law, even constitutional law. Thus, the following question could be addressed: what is the specificity of primacy, as a principle of EU law?

Two elements should be outlined in this respect. First, primacy is to be seen in the light of the words *"because of its special and original nature"* and *"character of Community law"* mentioned in the Costa/ENEL case. As mentioned above, the EU "has" a "new kind of legal order" and "is" a "common legal order"⁸. Primacy is not to be seen only "on its own", but as englobing the "original nature" of EU law. More precisely, the EU law enjoys direct effect and

⁴ Judgment of 15 July 1964, Costa, 6/64, EU:C:1964:66.

⁵ Judgment of 17 December 1970, 11/70, EU:C:1970:114, para. 3.

⁶ Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, Reports of International Arbitral Awards, VOLUME XXIX, pp.125-134, at p. 131.

⁷ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), p. 24.

⁸ *Supra*, footnotes 1 and 2.

direct applicability in the law of the Member States and the national judges are the judges of the Union law. Before a domestic court, international law applies only when domestic law prescribes so and under the conditions provided by domestic law. On the contrary, EU law applies in domestic law by virtue of its peculiar nature.

Even if the two following cases are (maybe too) well-known, it is worth reminding the importance of certain quotations. Thus, in the Van Gend and Loos judgment 1963, the Court of Justice held that "the Community constitutes *a new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. *Independently of the legislation of Member States*, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"⁹. The merit of this case was that, on one hand, it acknowledged for the first time the "specificity" (new legal order of international law) of EU law and, on the other hand, established the most important difference between international law and EU law, namely that EU law is applicable within the domestic law "independently of the legislation of Member States", by virtue of its peculiar nature.

Moreover, in the Simmenthal, judgement of 1978, the Court held that "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"¹⁰. It was for the first time when the obligation of the domestic court to "set aside" conflicting national legislation was expressly indicated.

Second, let us not forget that, when ruling in the Van Gend en Loos, Costa, International Handelsgesellschaft or Simmenthal cases, the Court acted in the preliminary ruling procedure. Thus, it was in a dialogue with the national court and it was providing an answer to the national court. As recalled by the Court of Justice in the Opinion 2/13 the Treaties have established a "judicial system intended to ensure consistency and uniformity in the interpretation of EU law". In that context, "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law". In particular, "the judicial system as thus conceived has as its keystone [clé de voute/cheia de bolta] the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law"¹¹.

4. PRIMACY AS AN EXPRESSION OF DIALOGUE BETWEEN COURTS

Based upon the importance of dialogue between the Court of Justice and the national courts, primacy is a matter of mutual interaction. Two elements should be pointed out in this respect.

First, in certain cases mutual interaction means "repeated interaction". Thus, the Court of Justice recalled in the so-called "CILFIT 2" case that the authority of a preliminary ruling does not preclude the national court or tribunal to which it is addressed from taking the view

⁹ Judgment of 5 February 1963, Van Gend en Loos, 26/62, EU:C:1963:1, page 23.

¹⁰ Judgment of 9 March 1978, Simmenthal, 106/77, EU:C:1978:49, para. 26.

¹¹ Opinion 2/13 (Accession of EU to the ECHR), 18 December 2014, EU:C:2014:2454, paras. 174-176.

that *it is necessary to make a further reference to the Court* before giving judgment in the main proceedings. A national court or tribunal of last instance must make such a reference when it encounters difficulties in understanding the scope of the judgment of the Court (para. 38)¹². Therefore, a second question is not only possible, but may even be desirable. This is, for example, what occurred in the Taricco II case. Following the Taricco 1, judgement, on one side, the Corte suprema di cassazione (Court of Cassation) considered that, in compliance with the rule stated in the Taricco judgment, it should disapply the limitation period laid down in the provisions of the Criminal Code at issue and give judgment on the substance of the cases, while the Corte costituzionale (Constitutional Court) expresses doubts as to whether that approach is compatible with the overriding principles of the Italian constitutional order and with observance of the inalienable rights of the individual¹³.

Second, when a serious question appears, such as a constitutional court being confronted with a plea of "national identity", a preliminary question always needs to be asked. In the RS judgment of 22 February 2022, the Court held that "if a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, *infringes the obligation to respect the national identity of that Member State*, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid" (emphasis added)¹⁴.

The Court went further and ruled that of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU *and with the principle of the primacy of EU law*, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law¹⁵. Thus, primacy and national identity are not questions of domestic constitutional law, but questions of EU law which are to be addressed by the Court of Justice of the European Union.

As a very short conclusion, it should be stated that primacy is not a matter of "hierarchy" or even "hierarchy of norms". It is not inherent to a pyramid of norms, specific to the positivist doctrine which may be taught in constitutional law. Primacy relies on dialogue, accomplished mainly through the preliminary reference procedure. It is thus inherent to the efficiency of the jurisdictional system of the EU. It also relies on the unique feature of the EU law: the fact that the national judges are "the judges of the EU law", thus guaranteeing themselves effective judicial protection within the EU together with the Court of Justice of the European Union.

¹² Judgment of 6 October 2021, *Consorzio Italian Management e Catania Multiservizi*, C-561/19, EU:C:2021:799, para. 38.

¹³ Judgment of 5 December 2017, *MAS and MB*, C-42/17, EU:C:2017:936, paras. 12 and 13. The "repeated" question was a follow-up to the Judgment of 8 September 2015, *Taricco e.a.*, C-105/14, EU:C:2015:555.

¹⁴ Judgment of 22 February 2022, *RS*, C-430/21, EU:C:2022:99, para.71.

¹⁵ *Ibid.*, para. 78.