CORTE COSTITUZIONALE DELLA REPUBBLICA ITALIANA

Constitutional Court of the Italian Republic

CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

Court of Justice of the European Union

GIORNATA DI STUDIO – *Study Meeting*

IDENTITÀ NAZIONALE DEGLI STATI MEMBRI, PRIMATO DEL DIRITTO DELL'UNIONE EUROPEA, STATO DI DIRITTO E INDIPENDENZA DEI GIUDICI NAZIONALI

Member States' National Identity, Primacy of European Union Law, Rule of Law And Independence of National Judges

CELEBRAZIONI DEL 70° ANNIVERSARIO DELLA CORTE DI GIUSTIZIA DELL'UNIONE EUROPEA

Celebrating the Court of Justice of the European Union's 70th Anniversary

ROMA, PALAZZO DELLA CONSULTA, 5 SETTEMBRE 2022

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Il presente volume raccoglie gli atti dell'incontro bilaterale tra la Corte costituzionale della Repubblica italiana e la Corte di giustizia dell'Unione europea, dedicato allo studio dei temi dell'identità nazionale degli Stati membri, del Primato del diritto dell'Unione europea, dello stato di diritto e dell'indipendenza dei giudici nazionali, secondo una visione interpretativa e sistematica. L'incontro si è svolto nell'ambito delle celebrazioni per il settantesimo anniversario della istituzione della Corte di giustizia dell'Unione europea.

This volume collects the proceedings of the bilateral meeting between the Constitutional Court of the Italian Republic and the Court of Justice of the European Union, dedicated to the issues of National identity of Member States, the Primacy of European Union Law, the Rule of law and the Independence of national judges, according to an interpretative and systematic view. The meeting took place as part of the celebrations for the 70th anniversary of the establishment of the Court of Justice of the European Union.

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THE PRINCIPLE OF PRIMACY

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Maciej SZPUNAR*

1. Premise

It is a great honour and privilege to speak to the representatives of the supreme jurisdictions of Italy. It would be difficult not to underline on this occasion the immense contribution of Italian lawyers and Italian courts (even Italian citizens) to the development of EU Law.

Indeed, the topic we are dealing with today is a case in point: it was also thanks to the resilience of Flaminio Costa when faced with an electricity bill and the subsequent courage of the Giudice Conciliatore of Milan, that the Court of Justice was in a position to rule on primacy back in 1964.

I have been asked to take part in the panel on "national identity of the member states and primacy of European Union Law". We have agreed together with judge Rossi that I would concentrate my intervention on the issue of primacy, whereas judge Rossi will focus on the national identity.

It seems to me that there is a broader issue behind the panel's title phrased in this way. To what extent Member States may invoke national identity in order to justify the non-fulfilment of obligations stemming from the treaties? In fact, the rejection of the principle of primacy is only one of many examples of such "non-fulfilment". Sometimes, "non-fulfilment" is "explained" by a simple reference either to the fact that certain competences of a Member State could not be transferred to the Union under the national constitution or to the

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fact that the institutions of the Union – while exercising their powers – went beyond the competences that have been transferred to the Union by Member States.

In fact, the potential violations of Union law by Member States are numerous. They do not always consist of a breach of the principle of primacy in the strict sense. For this reason, I would suggest to distinguish two meanings of the principle of primacy.

The first meaning is a broad one. It covers all situations where a Member State does not fulfil its obligations under the treaties: non-compliance with a judgment of the CJEU or non-implementation of a directive. One can say that such a behaviour on the part of the Member States amounts to the violation of the principle of primacy. In fact, however, such a behaviour constitutes – at the same time – violation of more specific provisions of the treaty (ex. Article 288 TFEU is violated in case of non-implementation of a directive).

One could say that the principle of primacy is violated when a judicial authority of a Member State refuses to apply a provision of EU Law endowed with direct effect, applies this provision incorrectly (ex. by ignoring its *effet utile*), does not ensure the respect of the principle of effectiveness of rights stemming from EU Law or refuses to interpret national law in conformity with EU Law in order to avoid any conflicts. Each of these situations requires a separate analysis.

The precise determination of the relationship between the principle of primacy and other principles (direct effect, effet utile, effectiveness, principle of sincere cooperation[1]) is a task for legal scholars and such considerations do not always have significant consequences for the practice of law. There is no doubt that the principle of primacy – to some extent – overlaps with other principles of EU Law.

What seems particularly interesting is the relation between primacy and direct effect. In this context one should point to a debate which is based on the

[1] See Article 4, paragraph 3, TEU. Formerly known as the principle of loyal cooperation.

distinction between so-called "invocabilité d'exclusion" and "invocabilité de substitution". The former occurs when the application of an EU norm precludes the application a national rule. This corresponds mainly to the principle of primacy. The latter means that an EU norm is invoked and applied in order to grant rights or impose obligations. This, in turn, corresponds mainly to the principle of direct effect. In my opinion, the distinction is too simplistic. These two principles, i.e. direct effect and primacy, are very closely interrelated. One cannot function properly without the other. Primacy on its own cannot exclude the application of a domestic provision without direct effect of a norm of Union law. A norm of Union law cannot effectively grant rights or impose obligations without having the effect of rendering inapplicable rules of national law which are contrary to EU law.

2. The features of the principle

In my intervention, I would like to address the principle of primacy in the strict sense of the term. It refers to the obligation to refuse to apply a national measure (provision) that is contrary to EU law[2]. This obligation is imposed on all authorities of the Member States that apply the law and it refers to the process of the application of law.

For those charged with applying the law, the principle of primacy is first and foremost a technical rule of conflict: it comes into play each time a national court – in the process of the application of law – faces a conflict between a provision of national and one of EU Law.

The principle of primacy implies that in the event of such a conflict between a Union rule and a rule of internal law, EU law must be applied.

Given that, as of COSTA/ENEL, the Court of Justice had on numerous occasions ruled on primacy and refined this principle over the years from a

[2] ECJ, judgment of 15 July 1964, *Flaminio Costa v. ENEL*, case 6/64, EU:C:1964:66.

constitutional principle to one of precise obligations for all actors applying EU law, it was only logical that the draft Treaty establishing a Constitution for Europe[3], set out to codify this principle. Article I-6 of the draft Constitutional Treaty thus read as follows: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."

We all know that this Treaty did not see the light of day. Crucially, the primacy clause was dropped with the Treaty of Lisbon. All that remains now is Declaration 17, attached to the Treaty of Lisbon, which recalls inter alia that "The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

Sometimes, the term "supremacy" is used instead of that of "primacy". Personally, I would prefer to resort to the latter. "Supremacy" may suggest that there a hierarchical relationship between EU law and the laws of Member States. In fact, the principle of primacy does not render the laws of Member States to be subordinated to Union law, but rather operates as a conflict rule: in the case of conflict, EU law applies. The difference is well articulated by the Spanish Constitutional Court in its 2004 declaration regarding the draft Treaty establishing a Constitution for Europe[4]. As the Spanish Court rightly observed, supremacy refers to a higher hierarchical status of a rule and is therefore a source of validity for lower rules, whereas primacy describes a relation between different rules, which are all valid in principle, but some of them will prevail when conflict arises[5].

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[3] As adopted by the EU heads of state and government on 29 October 2004. In the initial version, submitted by the Convention to the President of the European Council on 18 July 2003, this provision was contained in draft Article 10.

[4] 13 December 2004, DTC No. 1/2004.

[5] The distinction drawn by the Spanish Court corresponds with the one we may make between H. Kelsen's and H.L.A. Hart's models of legal system. The former is necessarily hierarchical, therefore, "lower" norms are valid if and because they comply with superior norms, whereas the latter describes a looser relation between legal rules, like the one existing between Common Law made by courts and written law adopted by the UK Parliament. Those two sources of law are originally valid in an independent manner, but when conflict arises, the law of Parliament prevails.

Most of the underlying concepts are obvious. I will mention them only in order to be able to point out issues that are still of concern to the courts of the Member States.

It seems worth recalling at this point how the principle of primacy is understood in the light of the case law of the Court of Justice. A number of indisputable assertions can be drawn in this regard.

1. The principle of primacy does not derive from the constitutional rules of the Member States, but has its source in the Treaties themselves. This means that the primacy of Union law is independent of how a state's constitution regulates the relationship between international law and domestic law. It is in this sense an autonomous concept.

We all know that the relationship between EU Law and national law is regulated differently in the national constitutions. It is also evident that national courts, especially constitutional ones, must seek legitimacy in their own constitutions for applying Union law, if only from the point of view of preserving the coherence of their legal system. Nevertheless, from the perspective of EU law, it is irrelevant what method a given Member State uses in order to provide a basis for primacy, provided of course that Union law actually will be given precedence over domestic law. It is obvious since otherwise there would be no uniformity of the application of EU law! A lack of uniformity of application would eventually lead to inequality between the Member States and between individuals invoking EU law before the courts of Member States.

2. The principle of primacy operates from the moment of the entry into force of the Union norm. It is irrelevant whether the conflicting national provision is prior or subsequent to the Union norm[6].

[6] ECJ, *Costa v. ENEL*, *cit.*, and judgment of 9 March 1978, *Amministrazione delle Finanze v. Simmenthal*, case 106/77, EU:C:1978:49.

3. The principle of primacy also applies to national provisions of all levels, including constitutional norms of a Member State[7].

4. A conflict between a domestic provision and a Union norm does not invalidate the domestic provision, but only precludes its application[8]. Nevertheless, Member States should, for reasons of legal certainty, repeal such a provision – to the extent that it contravenes the Union law.

5. The obligation to apply the Union legal rule and to disregard the conflicting domestic provision rests with each authority of the Member State responsible for applying the law, including administrative bodies[9].

6. Each authority of a Member State applying the law must have the independent power to refuse to apply a domestic provision contrary to the Union law. Its competence to do so cannot depend on the decision of another body (e.g. a constitutional court). Moreover, the decision to refuse to apply the conflicting domestic provision is independent from any other obstacles to apply this provision, e.g. its unconstitutional character[10].

Having outlined these points, we have to wonder which the essential elements of the principle of primacy are. First, it is essential to identify that there is a conflict. The national court must ascertain that in given circumstances, the provision of EU law has direct effect. Otherwise, this provision would be not capable in itself of rendering a domestic provision inapplicable. In Popławski II[11], the Court clarified that the duty to set aside provisions of national law is restricted to those provisions of Union law that

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[7] ECJ. judgments of 17 December 1970, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, case 11/70, EU:C:1970:114, and *Amministrazione delle Finanze v. Simmenthal*, *cit.*

[8] ECJ, *Costa v. ENEL*, *cit.*, and *Amministrazione delle Finanze v. Simmenthal*, *cit.*

[9] ECJ, judgment of 22 June 1989, *Fratelli Costanzo SpA v. Comune di Milano*, case 103/88, EU:C:1989:256.

[10] ECJ, judgment of 4 April 1968, *Lück v. Hauptzollamt Köln-Rheinau*, case 34-67, EU:C:1968:2, and CJEU, judgement of 19 November 2009, *Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, case C-314/08, EU:C:2009:719.

[11] See CJEU, judgment of 24 June 2019, *Popławski v. Openbaar Ministerie*, case C-573/17, EU:C:2019:530.

have direct effect. Otherwise, the obligations imposed upon national courts may be restricted to interpret national law in conformity with EU law.

Secondly, in order to identify the existence of a conflict, it is necessary to identify properly the scope of application of each of the two provisions. This concerns the temporal scope, the personal scope and the substantive scope (if the scopes do not coincide, we are in the presence of a fake conflict). Obviously, when it comes to a provision of Union law, the interpretation of its scope of application is ultimately decided by the CJEU.

3. The domain of fundamental rights and international law

This identification of the scope of application is particularly important in the domain of fundamental rights and international law.

The scope of the fundamental rights enshrined in the Charter is determined by Article 51 according to which the Charter is addressed to the EU institutions and to the Member States, but when they implement EU law. There is a whole body of the Court's case-law that interprets this provision. A national rule may be assessed in the light of the Charter only if the requirement stemming from Article 51 is fulfilled. Otherwise, there would be no conflict since the Charter does not apply in a particular set of circumstances.

Similar problems may arise in relation to fundamental rights and general principles of law as far as their personal scope of application is concerned. For example, in recent years, the Court was called upon to ascertain whether certain fundamental rights (or general principles of law) may impose obligations on individuals (ex. the principle of non-discrimination by a private employer). Again, if the Court finds that a given right does not bind individuals, the conflict between a domestic provision and EU law may be avoided.

The identification of the scope of application is particularly important in the case of international law. Here it must be emphasised that the principle of primacy applies, as a rule, to conflicts between EU law and international law (the role of Italian courts is particularly important in this regard!). Let me phrase a few concluding remarks:

First, the Union itself may conclude international agreements. These agreements are part of EU law with all its consequences. This implies that the principle of primacy applies to the conflicts between obligations stemming from these agreements and the domestic law of the Member States. In the CJEU's jurisprudence, we find numerous examples of judgments interpreting international law that was part of Union law, where the courts of Member States were in doubt as to the compatibility of national law with this international law.

Second, in the case of international agreements which do not form part of Union law but which bind a Member State concerned, a conflict may arise between the implementation of such agreements by this Member State and Union law. The principle of primacy may apply in such situations as well.

In general, Article 351 TFEU regulates these kind of conflicts. It is a provision governing conflicts between treaties, which distinguishes international obligations pre-existing or posterior to the entry into force of Union law.

Furthermore, it distinguishes between international obligations towards third countries and towards other Member States. In the second scenario (international obligations towards another Member States), the principle of primacy should apply. Member States may not enter into international obligations towards each other which would contravene Union law.

In the case of an international agreement to which only Member States are parties, the situation is relatively easy. One has to analyse carefully the scope of application of this agreement and the relevant provision of EU Law. If this scope of application coincides and there is a conflict, then the principle

of primacy applies, i.e. such an international agreement cannot be applied[12]. In particular, in the domain of bilateral investment treaties between Member States it is typical that one of the initially concluding states was not a Member State of the EU at the time of concluding the treaty. Hence the application of Article 351 TFEU to such situations with the ensuing principle of primacy.

The situation becomes more complicated in the case agreements to which both the Member States and third countries are parties. If these agreements are contrary to EU law, the essential question is whether the obligations that the Member States undertook towards each other can be separated from the obligations undertaken by the Member States towards third countries. If this is the case, the principle of primacy applies[13].

4. Concluding remarks

I will conclude citing the Italian Constitutional Court. It is difficult not to note how that Court understands the relationship between the principle of primacy and the principle of sincere cooperation. The 67th judgment of 8 February 2022 contains a formulation which, in my opinion, should be included in every textbook on Union law in all Member States:

"Therefore, the principle of the primacy of EU law and Article 4, paragraphs 2 and 3, TEU are the cornerstone on which the community of national courts rests, held together by convergent rights and duties. This Court has consistently upheld that principle, affirming the value of its driving effects with regard to the domestic legal system. Within this system, the centralized review of constitutionality enshrined in Article 134 of the Constitution is not an alternative to the widespread mechanism for implementing European law

[12] See CJEU, judgment of 6 March 2018, *Slowakische Republik v. Achmea BV*, case C-284/16, EU:C:2018:158.

[13] See CJEU,judgment of 2 September 2021, *République de Moldavie v Komstroy LLC*, case C-741/19, EU:C:2021:655.

(Judgment No. 269 of 2017, points 5.2 and 5.3 of the Conclusions on points of law and Judgment No. 117 of 2019, point 2 of the Conclusions on points of law), but rather merges with them to build an increasingly well integrated system of protections".


CVRIA