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# THE CONCEPT OF PRIMACY OF COMMUNITY LAW

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| **Abstract:** | *The importance of the increasing role of Community law is given by the implications for the legal systems of the Member States of the European Union.*<br>*The European Community has evolved over the course of its history into a multi-state structure with an autonomously manifest legal order, with a system of law binding on each Member State and quasi-uniformly 'adopted' by the member states of the European Community.*<br>*The relationship between Community law and national law can be quantified as follows:1.the prioritization of the competencies of Community law in relation to those of the national law, which implies a transfer of competencies to the European Union; this transfer can be total, as is the case of the customs tariff, or partial, a situation in which there is no need for a relationship between them; 2. the alignment of the legislative provisions of the national law with Community law; 3. the reconciliation of the consequences of the legal rules making up the two legal systems; 4. the concomitance of Community law with the national law, i.e., where Community law guides the application of national rules, as in the case of competition law.* |
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**Introduction**

The relationship between Community law and national law has given rise to conflicting discussions on this question of principle in the literature[1], which have led to the following two concepts:

- *the dualist concept* – according to which the Community law and the national law should be seen as separate, equal, and independent legal rules, i.e., Community law rules do not apply to national law any more than the national law rules apply to Community law. This concept considers that to become applicable and harmonized in the national law system, Community law legal rules must be transposed into the national law legal rules.

The disadvantage of this concept is that the conversion of Community law legal rules into national law legal rules is made possible by a subsequent national law;

- *the monist concept* – according to which the Community law and the national law must be regarded as a single set of legal rules and have in common the fact that there is no need to transpose Community law rules into the national law. If the rules of Community law are more recent and conflict with the rules of national law, the former takes precedence, and it is imperative that, subsequently, the national law be brought into full conformity with the provisions of international law, guaranteeing the primacy of Community law rules.

So, we could say that the principle of primacy of Community law is the power of Community law to disapply national law in the event of a conflict with the national law. In Community law, there is no precise provision in the wording of the founding treaties concerning the pre-eminence of Community law and the way in which it is incorporated into the national legal order. In this connection, reference is made to Article 249 (2) of the EC Treaty, which stipulates that *"a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States".* It can therefore be concluded that it is not necessary to transpose the provisions of Community law into national law, as these regulations are automatically binding on all EU Member States.

Important features of Community law are to be found in the case law of the European Court of Justice (ECJ); the authority of the ECJ has been the basis of the Community legal order[2].

**The principle of the primacy of legal rules**

The direct effect of the strict and unconditional provisions of a directive is not identical in its force of manifestation/enforcement as the direct effect of the provisions contained in the treaties or regulations of the Union. The legal rules characteristic of international interstate bodies is applicable to all signatory countries as subjects of international law.

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[1] Octavian Manolache, *Drept comunitar,* Ed. a IV-a, C.H. Beck, București, 2003, p. 62

[2] *Regulations, Directives, and other legislative acts-European Union*, https://european-union.europa.eu›law, (09.08.2022)

The Community legal rules are not only addressed to subjects of international law, but in specific situations, they, guarantee rights that can be used by natural or legal persons before national courts.

The judicial practice of the Court of Justice after the above-mentioned judgment has also enshrined the fact that the primacy of Community legal rules is characteristic both of Community law deriving from the founding treaties and of the regulations, directives, and decisions[1] of the European Union, which become binding on all the Member States of the European Union, without their being able to oppose legislative provisions of national law.

The directives are part of EU secondary law. They are therefore adopted by the European Union institutions in accordance with the Treaties. Once adopted at the EU level, they are then transposed by the EU Member States into their national law for implementation. However, it is up to each Member State to draw up its own laws to determine how these rules apply.

Article 288 of the Treaty on the functioning of the European Union stipulates that a directive shall be binding for all Member States[2] (one, more, or all) as to the result to be achieved, leaving to national authorities the choice of form and methods to achieve the result. A directive is different from a regulation or a decision because: unlike a regulation, which applies directly in the Member States immediately after its entry into force, a directive does not apply directly in the Member States. It must first be transposed into the national law before it applies in each Member State; unlike decisions, a directive has general application.

The principle of the primacy of legal rules is directly linked to the principle of the autonomy of the Community legal system. The importance of the primacy of Community legal rules for the Member State's obligation to comply with Community legal acts is not linked to the fact that these Community legal acts have a direct effect since Community law enjoys primacy, but the direct effect is specific to only some of the Community rules, such as regulations and decisions. In conclusion, the effectiveness of the principle of primacy is closely related to the interaction with the direct effect.

The primacy of Community legal rules and the direct effect are two concepts that do not form a whole. It is true that both concepts affect the sovereignty of the Member States of the Union, but they are also guarantees for the fulfillment of the commitments made by the Member States at the EU level. The principle of primacy of Community law is independent of the direct effect, but the direct effect makes the principle of primacy of Community law a responsibility for the judges of the Member States so that the direct effect makes the principle of primacy of Community law led to the repeal of legislative provisions in the national law which would conflict with the Union law.

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[1] *Idem*

[2] Treaty establishing the European Community of 25.03.1957, March 25, 1957, Treaty establishing the European Economic Community - EUR-Lex (europa.eu), (12.08.2022)

According to ECJ case law, directives are subject to the principle of direct effect whenever they are not, or are incorrect, transposed into the national law and the time limit for transposition has expired[1]. Failure to do so does not affect the application of the provisions of the directive, it has consequences for natural and legal persons in the country concerned because of the national legislation adopted in the light of the directive.

It should be noted that the direct effect of the Directive is only vertical, not horizontal, i.e., the text of the Directive is addressed only to the Member States of the Union, not to natural or legal persons.

If a directive has not been transposed into the national law, the State will not be able to refer to that directive and will not be able to hold criminally liable those who fail to comply with an obligation laid down in that directive.

Article 189 of the Treaty in the third paragraph states that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"[2]. So, a directive that is correctly transposed into the national law also produces effects on natural and legal persons because of the measures taken by each individual Member State.

A particular case is that of negligence on the part of the State in correctly implementing the directive but above all ffailedto implement the directive by the date set for its implementation. In this respect, the Court, through its case law, has ruled that under Article 189 regulations are directly applicable and produce direct effects, and therefore directives can also produce direct effects, under the conditions of the third paragraph of this article.

It is for the judicial authorities of the Member States, including the courts, to interpret the rules of national law in accordance with the rules of Community law, in the light of Article 10 of the EC Treaty, which is bound by the need to ensure that the provisions of Community law are applied as a matter of priority, even where they are not sufficiently clear, so that they have direct effect. This need arising from the provisions of Article 10 of the EC Treaty must also be put into practice when dealing with a dispute between natural or legal persons which is the subject of proceedings.

Where a provision of national law cannot be interpreted in the light of Community law, national courts may not apply that provision of national law (this is particularly common in criminal cases).

Where legal persons or natural persons, based on national legal rules which contain provisions contrary to Community legal rules, have transferred sums of money to the account of the State authorities, they enjoy the legal prerogative provided for by Community law to repay the sums in question. These situations

[1] https://eur-lex.europa.eu/, (12.08.2022)

[2] Treaty establishing the European Community of 25.03.1957, March 25, 1957, *Treaty establishing the European Economic Community* - EUR-Lex (europa.eu), (12.08.2022)

will be judged by the national courts in accordance with the national procedural rules, in accordance with the principle of national procedural autonomy of the Member States of the Union, but the national procedural rules must be on an equal footing with the procedural rules of Community law and provide for reasonably stated remedies. In its case law, the ECJ has ruled that the legal prerogative to reimburse sums of money paid into the account of State authorities under national legal rules which have provisions contrary to Community legal rules derives from the provisions of Community legal rules concerning the rights of persons subject to legal proceedings.

**Liability of members of the Union for infringements of Community rules**

Under the principle constituting the "*ius commune*"[1], failure to comply with the direct effect of the Treaties is the basis for liability of the EU Member State when, for this reason, proven and serious damage has been created. Natural or legal persons who have been "victims" of the defective administration of Community legal rules by the representatives of a Member State of the Union have the possibility of bringing an action before the national courts for compensation for the prejudice suffered.

The right to compensation for the damage suffered may arise either from the failure to transpose a directive into the national law or from the application of the national law which conflicts with Community rules. The action may be brought before the national courts if the following conditions are met:

- the existence of rights for the natural or legal person conferred by the Community legal rule;
- the substance of the rights conferred by the Community legal rule is reflected in its content;
- the existence of a causal link between the defective application of the Community legal rules and the damage suffered by the applicant.

The ECT established a specific legal system that has been accepted by all the Member States of the Union and which is followed by the letter in cases brought before the national courts, ensuring the protection of citizens' rights by making judgments handed down in this area enforceable.

On the other hand, the obligation of the Member States of the Union to recover the damage caused is laid down in Article 5 of the ECT, which requires them to transpose the provisions of Community law into the law.

**The primacy of Community law established by the Costa ENEL judgment**

The Court of Justice of the European Union[2] issued the principle of the primacy of Community law in its judgment in *Costa v. ENEL* of 15 July 1964[1] in

[1] Ius communae is the principle unanimously accepted by the legal systems of all the Member States of the Union, according to which a state's failure to administer Community legal rules properly entails an obligation to make good the damage caused.

[2] The Court of Justice, Home | International Court of Justice (icj-cij.org), (15.09.2022)

circumstances where there was a conflict between the Italian national law on the nationalization of the national electricity system in force since 6 September 1962 and the provisions of the EEC Treaty. In its judgments of 24 February and 7 March 1964, the Italian Constitutional Court ruled, in the spirit of the dualist concept, in favor of the national legal rule, which was of more recent date than the Treaty, on the grounds that a Community Treaty only produces the effects which the ratifying law confers on it.

In substantiating this principle, the Court of Justice took account of the following reasoning:

- **The quality of the Community law to be implemented directly** based on the appropriateness of becoming part of the national legal system, with the argument that this implementation in the law of each Member State of legal rules which are based on a Community source, and on the letter and spirit of the EEC Treaty as a whole, is based on the ground that it prevents Member States from giving precedence against legal rules which they themselves have accepted on the basis of reciprocity, to a decision taken subsequently, arbitrarily;
- **The homogeneity of Community law,** which results in the uniformity of its implementation in practice, such that the binding nature of Community legal rules means that they do not vary in the EU Member States to the advantage of subsequent national law, so as not to jeopardize the achievement of the objectives of the EU Treaties. The doctrine considers this reasoning to be the primary element of non-discrimination in the jurisdiction;
- **The originality of legal rules deriving from the Treaty** and transmission of rights and obligations made by the EU Member States from their national law in favor of Community law, in accordance with the provisions of the Treaties, based on the irrevocable restriction of their sovereign rights, which should not be opposed by a legal rule which gives rise to obligations only for one of the parties and which would be incompatible with the idea of the European Union;
- **The exception to the provisions of the EU Treaties,** according to which EU Member States may not derogate from the provisions of the EU Treaties except by virtue of specific and express provisions.

In conclusion, the Court of Justice, in its judgment, in this case, is in line with the monist concept, prohibiting the fact that, unlike other international treaties, the Community Treaties, in this case, the European Community Treaty, create a legal system which, from the very entry into force of the EU Treaties and from the date of accession of each Member State, becomes implemented into the legal order of all Member States and is binding on the national courts. The provisions of the

[1] Case no. 6/64 – the application having been lodged to the Registry of the Justice of the Peace of Milan for a preliminary ruling and registered at the Supreme Court of Justice of the EC on 20 February 1964, EUR-Lex - 61964CJ0006 - EN - EUR-Lex (europa.eu), (16.09.2022)

national legal rules cannot be invoked before national courts against Community legal rules because the Treaties establishing the EU are independent and have an original character in the combination of Community legal rules and national legal rules, and any contradiction between Community legal rules and national legal rules will be resolved by applying the principle of primacy of the Community law.

The judgment draws the following conclusions, which have given rise to and continue to give rise to important doctrinal[1] debates, as follows:

1. Primacy is a significant feature of Community law because the achievement of the Community acquis requires the constant implementation of Community law in practice in all EU Member States, as it is essential for the Community legal system.
2. Originating in the provisions of the founding treaties, the Community law is by its very essence sui generis, being pre-eminent over the national law system of each individual EU Member State.
3. The legal system of the European Union by its sui generis essence in relation to the legal system of each member state of the Union, makes the legal rules of the European Community prevail over any national provisions, whether of a legislative, administrative, or judicial nature.
4. The principle of primacy of Community law is enshrined in subsequent rulings of the Court of Justice and is enshrined both in the relations between the States and the institutions of the Union and in the national legal system of the Member States of the Union.

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