The primacy of European Union law
Abstract

This study, commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs of the European Parliament, explains the principle of primacy of European Union law and its practical consequences, as established by the Treaty system and developed by Court of Justice case-law since 1964. It explains how and subject to which limits Member State courts accept, interpret and apply the principle.
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<tr>
<td>Case</td>
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<td>Art.</td>
<td>Article</td>
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<tr>
<td>BVerfGE</td>
<td>Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Federal Constitutional Court)</td>
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<td>v</td>
<td>Versus</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union (Court of Justice of the European Communities prior to 1 February 2003)</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>OJ</td>
<td>Official Journal of the European Union</td>
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<td>para.</td>
<td>Paragraph</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>EU</td>
<td>European Union</td>
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EXECUTIVE SUMMARY

Background

Primacy is one of the basic principles of European Union law, and one of the defining features that has always made EU law unique and unprecedented. The principle of primacy of EU law has been specified over time by the case-law of the Court of Justice of the European Union. It is not enshrined in the EU Treaties, although a declaration concerning primacy is annexed to the Treaty of Lisbon. However, despite its unique nature and the fact that most legal stakeholders have largely accepted the principle, primacy is still sometimes a sensitive issue. Given that the principle has to be applied in domestic law by national authorities over which the EU institutions have no direct power, it is vital that those authorities accept and respect the principle. In the last two years, in various Member States (such as Germany, Poland, Romania, Hungary, etc.), court decisions have questioned and challenged the principle of primacy of EU law.

Objective

This study analyses the following points, among other related issues:

- The principle of primacy of EU law, as set out by the Treaties and Court of Justice case-law, starting with the 1964 Costa v E.N.E.L. judgment.

- Has the principle remained the same since it was set out in the Costa v E.N.E.L., Internationale Handelsgesellschaft and Simmenthal judgments, or has it changed?

- Examples of how the principle of primacy of EU law has been interpreted in recent Member State case-law (Germany, Poland, Hungary, Romania, etc.). What are the similarities? What are the differences? What was the context and its importance?

- After examining the above issues, the study makes policy recommendations to the European Parliament.
1. GENERAL INFORMATION

KEY CONCLUSIONS

Primacy is not expressly enshrined in the Treaties, but is recognised by the Member States through Declaration 17 annexed to the Treaty of Lisbon.

The Court of Justice clarified the meaning of primacy in its *Costa v E.N.E.L.* judgment of 15 July 1964.

Primacy has specific practical consequences for the Member States, and is covered by the system of sanction specific to the European Union, which guarantees its effectiveness.

Member State institutions are bound by the *pacta sunt servanda* principle in different ways, depending on whether or not their constitutions give precedence to the Treaties over domestic law.

Primacy is recognised and applied by all Member State courts, but there are some limitations on its consequences in some instances. This is because, in specific legal cases, there is a divergence between a domestic legal rule and an EU legal rule.

As a matter of prevention, some constitutional or supreme courts have developed theories relating to the limitations that fundamental rights or constitutional principles, and the constitutional identity of the Member States, can impose on the consequences of primacy.

In a few, but significant, cases, the constitutional or supreme courts of Germany, Denmark, Hungary, Poland and Romania have openly defied the Court of Justice by expressly refusing to apply its decisions.

- Primacy is the consequence of the *pacta sunt servanda* principle with regard to the European Union Treaties
- Primacy is not expressly enshrined in the Treaties, but is recognised by the Member States through Declaration 17 annexed to the Treaty of Lisbon
- The Court of Justice clarified the meaning of primacy in its *Costa v E.N.E.L.* judgment of 15 July 1964
- Primacy has specific practical consequences for the Member States, and is covered by the system of sanction specific to the European Union, which guarantees its effectiveness

The term ‘primacy’ (*primauté* in French, *primacia* in Spanish, *primato* in Italian, and *primazia* in Portuguese, for example) was not officially dedicated until the Final Act of the 2007 Intergovernmental Conference which adopted the Treaty of Lisbon. Previously, different terms had been used in the English and Latin languages (*precedence* or *supremacy* in English, the verb ‘prévaloir’ or the noun ‘prééminence’ in French, and *prevalezza* or *supremazia* in Italian, for example), whereas the Germanic languages always used just one term, which literally meant ‘priority’: *Vorrang* in German, *voorrang* in Dutch, *forrang* in Danish and *företräde* in Swedish. In our opinion, this variety of terms, particularly the often unwise use of the term *supremacy* in English or *supremazia* in Italian, has sometimes muddied the debate around primacy, and led to more extreme positions, despite the principle not in itself being extraordinary, given that it stems from the *pacta sunt servanda* principle, which is a general principle of the law of treaties. It is not the principle of primacy in itself that is original, but rather the institutional and procedural context of the EU Treaties – the ‘Treaty system’ according to the expression frequently used by the Court of Justice of the European Union – which guarantees its effectiveness in a way that has no parallel in other international treaties.

2.1. Primacy as consequence of the *pacta sunt servanda* principle

States must respect and apply the treaties that they sign. This principle is as long-standing as the practice of international treaties, and is often expressed by the Latin phrase *pacta sunt servanda*. This phrase is actually the title of Article 26 of the Vienna Convention on the Law of Treaties (cf. box 1), in which the customary rules and principles applied by states for centuries were codified in 1969. Under this principle, a state cannot invoke its internal law, whatever its form or rank (constitution, law, court judgment, etc.), to avoid the obligation to apply a treaty that it has signed (Article 27).

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1 The French version of the fifth paragraph of the preamble to the ECHR states: ‘Résolus, en tant que gouvernements d’États européens animés d’un même esprit et possédant un patrimoine commun d’idéal et de traditions politiques, de respect de la liberté et de prééminence du droit, à prendre les premières mesures propres à assurer la garantie collective de certains des droits énoncés dans la Déclaration universelle’, with the English version, which uses the term ‘rule of law’, reading as follows: ‘Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the *rule of law*, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’ (emphasis added).

2 In the French version of the *Costa v E.N.E.L.* judgment (cf. section 2.3.1 below), the term *prééminence*, rather than *primauté*, is used; it was only later that the word ‘primauté’ was added as a keyword in the tables of the European Court Reports, and then in the digital version of the judgment, which can still be found on EUR-Lex: [https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61964CJ0006](https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A61964CJ0006), viewed on 15 April 2022.
There is only one exception to this principle: the case where a treaty has been signed in violation of a rule of internal law regarding competence to conclude treaties. However, the rule invoked in this respect must be of fundamental importance, and the violation must be manifest: for example, in the case where a treaty has been signed or ratified by an authority lacking the power to do so (a minister, an elected representative or an official who has not been mandated by the head of state or government or the minister for foreign affairs), or where authorisation has not been requested from parliament, where such authorisation is required for ratification. It is not enough for a government, parliament or court to find a violation for this to meet the criteria of Article 46: the violation must be manifest and evident, according to terms that relate to the practice of international law.

Box 1: Vienna Convention on the Law of Treaties of 23 May 1969

<table>
<thead>
<tr>
<th>Article 26 PACTA SUNT SERVANDA</th>
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<td>Every treaty in force is binding upon the parties to it and must be performed by them in good faith.</td>
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<th>Article 27 INTERNAL LAW AND OBSERVANCE OF TREATIES</th>
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<td>A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.</td>
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<th>Article 46 PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES</th>
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<tr>
<td>1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.</td>
</tr>
<tr>
<td>2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.</td>
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The originality of the principle of primacy of EU law lies in the fact that the founding Treaties provide for institutions and specific procedures designed to guarantee the application of EU law in a much more effective way than with most international treaties and in the same way for all States party to the treaties. Since the Treaty of 18 April 1951 establishing the ECSC, participation in the European Communities and in the European Union automatically means that Member States accept the jurisdiction of the Court of Justice, unlike with the United Nations Charter, for example, which does not entail the obligation to accept the jurisdiction of the International Court of Justice. An even more original aspect is that the Commission, independent of the Member States, has the power to find that a Member State has failed to fulfil its obligations under the Treaties and secondary legislation. It can bring proceedings before the CJEU for failure to fulfil an obligation, which can lead to a judgment against the Member State, with the possibility, since the Maastricht Treaty, of a financial penalty (Articles 258 and 260 TFEU). Moreover, the preliminary ruling mechanism under the Treaties of Rome (Article 267 TFEU) allows a court in a Member State before which an individual – citizen, association, business, etc. – has brought a case to ask the CJEU to decide how EU law should be interpreted and applied in the Member State. In most cases, the international courts are not only limited to hearing cases brought against states that have accepted their jurisdiction, but are in fact limited to hearing
cases brought by other states party to the treaty, meaning that cases cannot be referred by an independent body or ordinary citizen (with the exception of the ECtHR in relation to Europe). The CJEU case-law on the direct effect (or direct applicability) of the Treaties and secondary legislation, and on primacy, stems from this original ‘Treaty system’.

2.2. **Primacy in the European Union Treaties**

2.2.1. No reference to the principle of primacy in the current Treaties

The principle of primacy does not appear in the European Union Treaties. When the ECSC Treaty established a supranational High Authority whose acts applied in the Member States, it was evident to its authors that the participating states could not be released from their obligations. That was the main reason why the British Government, led by Clement Attlee, with whom Jean Monnet kept negotiating until just before the Schuman Declaration in May 1951, ultimately refused to participate in the European Coal and Steel Community project, as it wanted to remain free to implement the Labour Party’s nationalisation plan. That was also the reason why the debates in the parliaments of the six future Member States on ratifying the Treaty resulted in tense and complex discussions. The ECSC Treaty stipulated that unanimity among the Member States was required only to adopt the most important acts; the Member States were protected from any abuse by the High Authority by the possibility of bringing annulment proceedings, as is still the case now with Article 263 TFEU.

The question of what would happen in the event of conflict between a rule in the Treaties or secondary legislation and the domestic law of the Member States was discussed in legal circles, particularly after the Treaties of Rome entered into force on 1 January 1958. An eight-year transitional period was established, during which regulations, directives and decisions could be adopted only by unanimous agreement of the Member States in the Council. After that period, the Council was to decide by a qualified majority in most areas, and it was therefore to be expected that legislation would be adopted against the will of a Member State. The most contentious issue was whether the possibility of proceedings being brought by the Commission against a Member State for failing to fulfil its obligations would be sufficient to guarantee the application of Community law in the same way in all Member States. It was against this background that the *Costa v E.N.E.L.* judgment was made in 1964, which enshrined the principle of primacy.

2.2.2. Implicit acceptance of the principle of primacy by the Member States

The *Costa v E.N.E.L.* judgment was criticised politically, notably by Michel Debré when he was French Minister for Foreign Affairs from 1968 to 1969. However, no Member State ever took advantage of the opportunity of a treaty revision to propose introducing a clause limiting primacy: not while negotiating the Merger Treaty signed on 8 April 1965 and applicable from 1 July 1967, nor on the occasion of the Single European Act in 1986, the Maastricht Treaty in 1992, the Treaty of Amsterdam in 1997 or the Treaty of Nice in 2001, and not on the occasion of the accession treaties of the new Member States.

The United Kingdom in particular set out the consequences of the case-law on primacy in the European Communities Act 1972 to ensure the effectiveness of Community law. Following the referendum on 2 June 1992 in Denmark, when voters rejected ratification of the Maastricht Treaty, the government did

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not propose adopting any declaration concerning primacy among the acts that it considered might allow for a new referendum. The case-law that developed from the 1970s onwards in Germany and Italy on the limits of primacy in the event of conflict with their fundamental rights or constitutional principles (cf. section 3.3 below) also did not result in specific proposals being made during negotiation of the revision treaties. It is worth noting that, in other cases, the Member States agreed on amendments designed to limit the effects of CJEU case-law, for example in relation to the article of the Treaty of Amsterdam on the status of the outermost regions (Article 355 TFEU).

It can therefore be said that, up to the European Convention of 2002-2003, the governments of the Member States implicitly accepted the case-law of the Court of Justice, and that they subsequently explicitly accepted this case-law when they signed the Constitutional Treaty of 2004 and agreed to the declaration concerning primacy annexed to the Treaty of Lisbon in 2007. This has not prevented certain courts, since the 1970s onwards, from expressing reservations about the application of the principle of primacy, as we will see in the second part of this study.

2.2.3. Codification of the principle of primacy by the Constitutional Treaty of 2004

The draft Treaty establishing the European Union, which was adopted by the European Parliament on 14 February 1984, contained the first attempt to codify the principle of primacy, as also the principle of direct applicability. Article 42 of the draft, entitled ‘The law of the Union’, stated as follows: ‘The law of the Union shall be directly applicable in the Member States. It shall take precedence over national law. Without prejudice to the powers conferred on the Commission, the implementation of the law shall be the responsibility of the authorities of the Member States. An organic law shall lay down the procedures in accordance with which the Commission shall ensure the implementation of the law. National courts shall apply the law of the Union’ (emphasis added). This grouping of rules and principles deriving from the Treaty system was not a significant innovation: it was just a clear and relatively simple expression of the existing law. A number of the provisions in the draft treaty which did represent significant innovations were subsequently taken over by the Maastricht Treaty and the Treaties of Amsterdam and Nice.

It was not until 18 years later that, with the aim of clarifying the existing law, the European Convention of 2002-2003 explicitly set out in the draft Constitutional Treaty a large number of principles that already existed implicitly and that had often been developed by the case-law of the Court of Justice, including primacy. The codification of this principle was discussed by the Praesidium of the Convention after the report of the working group on complementary competences was presented at the plenary session of 7 and 8 November 2002; the report stated that ‘the future constitutional treaty should include a title dealing with competence as a whole’.

It was proposed to insert, at the beginning of this future title on competence, an article containing the text that subsequently became Article I-6 of the Constitutional Treaty (cf. box 2). In the Convention’s draft submitted to the President of the European Council on 18 July 2003, this provision formed the first paragraph of Article I-10 ‘Union law’, just after Article I-9 ‘Fundamental principles’. The draft Convention therefore followed the model of the German Basic Law, in which Article 30, which lays down the general rule of the division of competences between the Federation and the Länder, is immediately followed by Article 31, which lays down that ‘Bundesrecht bricht Landesrecht’ (which translates as ‘Federal law shall take precedence over Land law.’). The second paragraph of Article I-10

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contained the wording that was already present in Article 5, first sentence, of the Treaty of Rome, now Article 4, paragraph 3, second sentence of the TEU: ‘The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.’ Article I-6 therefore particularly highlighted that primacy was the consequence of the *pacta sunt servanda* principle; however, this correlation was no longer apparent in the Constitutional Treaty itself, in which Article I-6 was reduced to its first sentence. It immediately followed Article I-5 on relations between the Union and the Member States (which became Article 4, paragraphs 2 and 3 TEU) and preceded Article I-7 on the legal personality of the Union.

6 This change in position was advocated by the group of legal experts of the Intergovernmental Conference which drafted the Constitutional Treaty of 2004 and which simply said: ‘It is suggested that Article I-10 paragraph 1 would be better placed here’. Cf. in this respect, Bribosia, H., ‘De la simplification des traités au traité constitutionnel’, in Amato, G., Bribosia, H., De Witte, B., *Genèse et destinée de la Constitution européenne*, Bruylant, Brussels, 2007, p. 213, and Bribosia, H., ‘Subsidiarité et répartition des compétences entre l’union et ses états membres’ in Amato etc., op. cit., p. 429.

Box 2: Treaty establishing a Constitution for Europe of 29 October 2004

**Article I-6 Union law**

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.

2.2.4. Declaration (17) concerning primacy

The absence of the principle of primacy from the Treaties following the entry into force of the Treaty of Lisbon did not change anything in legal terms, but a number of governments and the Council Legal Service felt that not including this article posed a risk, particularly if courts – especially constitutional or supreme courts – decided to interpret this absence as a way of arguing that the Member States did not recognise the primacy of EU law.
In order to address this risk, at its meeting of 21 and 22 June 2007, the European Council decided that the future treaty, to be drafted by the Intergovernmental Convention that was convened a short time later, would be accompanied by a clarifying declaration, which became Declaration (17) concerning primacy (cf. box 3). In its judgment of 22 February 2022 on recent case-law of the Romanian Constitutional Court, the CJEU clarified that: ‘Those essential characteristics of the EU legal order and the importance of complying with that legal order, as required, were, moreover, confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, the Treaty of Lisbon. When that treaty was adopted, the conference of representatives of the governments of the

Box 3: Declaration (17) concerning primacy

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 has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

“Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641[1] there was no mention of primacy in the treaty. It is still the case today. 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.

[1] “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.”

Member States was keen to state expressly, in its Declaration No 17 ‘. . .’, and that ‘Following the entry into force of the Treaty of Lisbon, the Court has consistently confirmed the earlier case-law on the principle of primacy of EU law’.

Declarations adopted by the intergovernmental conferences revising the Treaties are not binding in themselves, unlike the text of the Treaties and Protocols, but they nonetheless have substantial legal effect. According to the principles of public international law, such declarations are formal evidence of the legal opinion of the signatory states, which, in this case, is all the states signing the Treaty of Lisbon, and all the states that have since acceded to the European Union.

Declaration 17 also established the vocabulary: from that point onwards, the terms ‘primacy’, primauté, primacía, primato, etc. has to be used in those languages in which the case-law and legal opinion used a variety of terms. In particular, in English the term supremacy had often been used, which was an implicit reference to the very formal wording of Article VI, second paragraph, of the Constitution of the United States of America, according to which ‘This Constitution, and the Laws of the United States

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which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The term *supremacy* therefore implicitly referred to a federal state.

The term ‘primacy’, rather than ‘supremacy’, emphasises that the Treaties and EU law are not intrinsically superior to the constitutions of the Member States. Primacy simply means that, in the event of a difference in content on a particular issue between the law of a Member State and EU law, it is EU law that must be applied to solve that specific issue, pending amendment or repeal of either the domestic law or EU law rules to solve the contradiction. If the government of a Member State is no longer content with a provision of the Treaties, secondary legislation or CJEU case-law, it can try to reach agreement with the other Member States to revise that provision, including provisions that form the basis of contested case-law.

In other words, unlike the situation with domestic law where there is a hierarchy of rules with the constitution at the top, followed by the laws and then the decrees, there is no hierarchy between EU law and domestic law.

Declaration 17 also, quite unusually, refers to an opinion of the Council Legal Service, which contains a summary of the *Costa v E.N.E.L.* case-law, to which it explicitly refers.

### 2.3. Primacy in the case-law of the Court of Justice of the European Union

#### 2.3.1. The *Costa v E.N.E.L.* judgment: obligation for Member States not to apply a national law that is contrary to EU law

It was the CJEU that first enunciated the principle of primacy, on 15 July 1964, in response to a question from an Italian court, which had been called upon to settle a dispute between an individual (M. Costa) and the company that held the monopoly over electricity generation (E.N.E.L.). The court asked whether certain provisions of the EEC Treaty prohibited the nationalisation of electricity that had been implemented by a law of 6 December 1962. The Italian Constitutional Court had already ruled on a similar question asked by the same court. It had found that the nationalisation law postdated the 1958 law implementing the EEC Treaty in Italian law, and that it did not have the authority to accord precedence to an earlier law over a later law. The Italian government maintained that, either way, the Court of Justice could not answer the request for a preliminary ruling because, in the event of a conflict between Italian law and the Treaty, it was the Commission which should, if necessary, ask Italy to amend its law. In this particular case, the CJEU found that the EEC Treaty did not prohibit nationalisation such as that implemented in Italy. In its explanation, it rejected the Italian government’s argument because it would have impeded the CJEU not answer the question from the Milan court.

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8 It should be recalled, however, that there is a hierarchy of rules within EU law, between the Treaties on the one hand, and the regulations, directives and decisions on the other hand, which must conform to the Treaties, just as national laws and decrees must conform to the constitution of a state.
The *Costa v E.N.E.L.* judgment does not state that Community law prevails over domestic law; it states that domestic law cannot prevail over EU law: there is no primacy of domestic law. The judgment argues very strongly for primacy, by expressly referring to the EEC Treaty (cf. box 4 – emphasis added).

**Box 4: Judgment of 15 July 1964, Costa v E.N.E.L., Case 6-64**

… By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.

Source: Judgment of the Court of Justice of 15 July 1964, Costa v E.N.E.L., 6-64, ECLI:EU:C:1964:66, p. 585

In his opinion delivered on 25 June 1964, Advocate General Maurice Lagrange had also highlighted that primacy was not based on a hierarchy between Community law and national law (cf. Box 5 – emphasis added). Lagrange was a member of the French Council of State who had been involved in drafting the first version of the ECSC Treaty in 1950-1951, and who had been appointed as a Court of Justice judge in 1954 on a proposal of the French government.

It is clear that the judges followed Lagrange’s opinion, although the judgment was less detailed than the latter. The opinion shows that the central point of the *Costa v E.N.E.L.* case-law, rather than being the assertion of the principle of primacy deriving from the *pacta sunt servanda* principle, is the obligation for Member State authorities not to apply a domestic law that is contrary to EU law, pending the conflict between that domestic law and an EU law being resolved by amending the domestic law, or possibly the EU law.
The primacy of EU law / Study

Box 5: Opinion of Advocate General Lagrange in the Costa v E.N.E.L. case

I must first dispose of the second objection, that infringement of the Treaty by a subsequent domestic law which conflicts with the Treaty can only be pleaded under the procedure for a finding of default by a Member State as laid down in Articles 169 to 171, a procedure which is not open to individuals and which does not affect the validity of the impugned law until it has been finally repealed following a judgment of the Court declaring its incompatibility with the Treaty. In fact, that is not the problem; it is that of the coexistence of two opposing legal rules (as a hypothesis) which both apply to the domestic system, one deriving from the Treaty or the Community institutions, the other from the national legislature and institutions: which must predominate until such time as the conflict is resolved? This is the real problem.

Without recourse to legal theory upon the nature of the European Community (which is too open to controversy) and without taking sides between ‘Federal Europe’ and ‘the Europe of Countries’, or between the ‘supranational’ and the ‘international’, the court (and indeed such is its function) can only consider the Treaty as it is. But – and it is indeed a simple observation – the Treaty establishing the European Economic Community, as well as the other two ‘European Treaties’, creates its own legal system which, although distinct from the legal system of each of the Member States, by virtue of certain precise provisions of the Treaty, which bring about a transfer of jurisdiction to the Community institutions, partly replaces the internal legal system.


The Costa v E.N.E.L. judgment was subsequently supplemented by numerous other judgments forming settled case-law. It would be wrong to think that the development of this case-law in any way changed the Court’s positions in the 1964 judgment. The case-law developed simply because the Court usually answers questions that are put to it through a request for a preliminary ruling, or through an action for failure to fulfil obligations, at the time when the question is asked.

2.3.2. Subsequent clarifications made by case-law: 1. Primacy applies to any provision of domestic law, including the constitution

The judgment most often cited is the judgment of 17 December 1970 in the Internationale Handelsgesellschaft case, sometimes because it is one of the first in chronological terms to have expressly clarified a very important point concerning primacy, but also and in particular because this point concerns the primacy of EU law over the constitutions of the Member States.

The Administrative Court in Frankfurt took the view that certain provisions of the Community regulations on the common organisation of the market in cereals and on import and export licences were contrary, in particular, to the principles of freedom of action and disposition, economic freedom and proportionality resulting, primarily, from Articles 2(1) and 14 of the Basic Law of 1949. The German court considered that there was no need to ask the CJEU if an unwritten caveat in favour of the constitutions of the Member States and, more particularly, the fundamental rights recognised by those constitutions could be deduced from the EEC Treaty, or whether the Community Treaties provided for subjective, similar or equivalent rights to the fundamental rights generally recognised in the Member States or laid down by the ECHR, because the CJEU had, according to the German court, accepted on a number of occasions that the principle of proportionality also applied in the context of the Community.
The Court of Justice responded by recalling that primacy also applied to national constitutional provisions; however, it decided to examine whether the disputed regulatory provisions were contrary to any principles of EU law other than the principle of proportionality, which it felt had not been called into question by the disputed provisions of the regulations (cf. box 6 – emphasis added).

Box 6: Judgment of 17 December 1970, Internationale Handelsgesellschaft, Case 11-70

3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.

Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.


It is worth emphasising that, following this 1970 judgment, the CJEU was keen to ensure the protection of fundamental rights, and did not therefore wait for the Solange I judgment of the German Federal Constitutional Court (cf. section 3.3 below) to do so.

The CJEU’s position was reiterated with regard to Italy in the judgment of 9 March 1978 in the Simmenthal case (cf. box 7 – emphasis added). The Court was asked for a preliminary ruling by an Italian court which had to decide on an action brought by the Simmenthal company, asking for the reimbursement of sanitary control fees that it had been required to pay even though it regarded these as contrary to the ban on taxes with equivalent effects to the customs duties prohibited by the EEC Treaty. The court wanted to know whether it should wait for the legislature to amend Italian law or for the Constitutional Court to declare the unconstitutionality of these fees, or whether it could immediately order their refund. The Italian government took the view that the request for a preliminary ruling was seeking to obtain an answer from the CJEU on a question of Italian law, which was not its role.
This judgment is particularly significant because it underlines that primacy applies with regard to any provision of a national legal system, which also implies the provisions of the constitution. This meant that, in this particular case, the Italian court did not need to wait for the Constitutional Court to rule, even though the Italian Constitution states that only the Constitutional Court has the right to repeal a law.

It is worth noting, in particular, the reference to ‘any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law’. This wording therefore includes not only laws and all inferior regulatory provisions, but also the constitution, which is superior to laws. It also includes the application and interpretation of national law by the courts and authorities.

It should also be noted that it was only possible for individuals to seek a judicial review of the constitutionality of laws in two Member States out of the six (Germany and Italy) until Denmark’s accession on 1 January 1973, and that it was only at the end of the 1970s that systems for the judicial review of constitutionality were developed in the other Member States, except for the Netherlands and the United Kingdom. This is often forgotten when the history of the case-law concerning primacy is retraced.
As is particularly evident from the *Costa v E.N.E.L.* judgment, primacy applies both with regard to domestic law pre-dating EU law and with regard to subsequent domestic law; this was later clarified by the 1978 judgment in Case 83/78 *Pigs Marketing Board*9, although this simply explained something that had been evident since 1964.

### 2.3.3. Subsequent clarifications made by case-law: 2. Primacy of all EU law: primary legislation, international agreements and secondary legislation

Both before and after the 1978 *Simmenthal* judgment, as questions were put to it, the CJEU explained the implications to those wanting to correctly interpret the *Costa v E.N.E.L.* judgment. When the transitional period established by the EEC Treaty ended on 1 January 1970, the number of references for a preliminary ruling started to increase compared with the previous period, with the successive enlargements from 1973 leading to a further increase. This is the main reason why most of the judgments that clarify the *Costa v E.N.E.L.* case-law date from the 1970s and 1980s.

- The provisions of the EU Treaties and their Protocols take precedence over national law, as apparent from many cases, starting with Case 6-64 *Costa v E.N.E.L.* in 1964.
- The same is true for regulations, as clarified by the judgments of 1971 in Case 43-71 *Politi*10 and 1972 in Case 84-71 *Marimex*11.
- This is also the case with directives, as noted by the 1981 judgment in Case 158/80 *Rewe*12 and numerous other judgments.
- This is also true for decisions, as noted by the 1987 judgment in Case 249/85 *Albako*13.
- This is also the case with international agreements concluded by the EU, as noted in the 1975 judgment in Case 38-75 *Nederlandse Spoorwegen*.

It also became evident that primacy meant that CJEU judgments which had become final took precedence over the law of the Member States; this is also apparent from the text of the Treaties (cf. box 8).

**Box 8: Article 280 TFEU**

**Article 280 (ex Article 244 ECT)**

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

The conditions laid down in Article 299 TFEU are simply procedural clarifications that have no relevance to the principle of primacy. The CJEU itself has stressed the obligation of Member State courts to apply its judgments, particularly those judgments responding to a request for a preliminary ruling.

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Numerous commentators have pointed to the publication of a press release following the judgment of the German Constitutional Court of 5 May 2020 (cf. box 9).

Box 9: Press release No 58/20 of 8 May 2020

The Directorate for Communication of the Court of Justice received many enquiries concerning the judgment delivered by the German Constitutional Court on 5 May 2020 regarding the European Central Bank’s PSPP programme.

The departments of the institution never comment on a judgment of a national court.

In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created.

The institution will refrain from communicating further on the matter.


It is not so much the content of the press release that is remarkable, because it simply refers to the settled case-law, but rather the fact that it was published while noting that ‘The departments of the institution never comment on a judgment of a national court’.

2.3.4. Subsequent clarifications made by case-law: 3. Primacy and direct effect

One of the most important aspects of primacy is that it is a corollary of the other main principle of EU law, namely the principle of direct effect (or direct applicability\textsuperscript{14}), as established since the judgment of 5 February 1963 in Case 26-62 \textit{van Gend en Loos}, which the CJEU noted in particular in opinion 1/91 on the European Economic Area (cf. box 10).

\textsuperscript{14} Contrary to some legal opinion by scholarship, the author of this study does not consider it necessary to distinguish between ‘applicability’ and ‘effect’. This difference may be significant in educational terms in a course or manual on EU law, but it has not been consistently confirmed by case-law, if we take the time to compare the different language versions of judgments.
The main aspects of the debate over the relationship between Community law or EU law and national law, which has vigorously continued in both case-law and legal opinion since the Treaty of Lisbon, were already fully present in the famous Van Gend en Loos judgment of 5 February 1963. The Van Gend en Loos transport company challenged the increase in customs duties on certain products imported from Germany to the Netherlands before a Dutch administrative court, the Amsterdam Tariefcommissie. It asked the CJEU the following question: 'Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the article in question, lay claim to individual rights which the courts must protect'. If that were the case, under the Dutch Constitution, the court should apply the Treaty and, since Article 12 prohibited increases in customs duties between Member States, it should refuse to apply the new Dutch law and therefore maintain the previous rate of duty. The CJEU replied that 'Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect', and clarified the criteria for direct applicability (cf. box 11 – emphasis added).

Under the Van Gend en Loos case-law, as supplemented over the years by many other judgments, where an EU legal rule is sufficiently clear, precise and unconditional that it can be applied by public authorities, whether courts or administrative authorities, that rule must be applied in the relevant cases without the intervention of the national legislature or regulatory authority being necessary.

… With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges.

This provision is found at the beginning of the part of the Treaty which defines the ‘foundations of the Community.

It is applied and explained by Article 12. The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law.

The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.
It was evident from the opinion of Advocate General Roemer of 12 December 1962\(^{15}\) that the direct applicability of EU legal provisions could result in a contradiction with a domestic legal rule of a Member State. Following the \textit{Costa v E.N.E.L.} judgment, it could be inferred, by combining these two pieces of case-law, that it was only in the presence of a directly applicable written rule – in primary legislation, secondary legislation, an EU international agreement or a CJEU judgment having become final – that primacy could be invoked against domestic law, in other words that the authorities must set aside the domestic rule in favour of the European rule.

In cases where the conditions for direct applicability were not met, through its case-law dating from its judgment of 10 April 1984 in the \textit{von Colson}\(^{16}\) case, the CJEU gradually developed the obligation to interpret national law in conformity with EU law. This means that, where a national legal rule may have a number of interpretations, which is often the case, Member State authorities must apply an interpretation that avoids contradicting EU law. Those authorities must use all possible methods of interpretation, including those that are not commonly used in their country, albeit with one key limit: the \textit{contra legem} interpretation, in other words an interpretation that is contrary to the precise wording of the national law, is not possible. It is therefore only after having checked that there is no possible interpretation in conformity with EU law that the national authority must set aside the national rule in favour of the EU rule, if that is directly applicable.

With the judgment of 24 June 2019 in the \textit{Poplawski} case, the CJEU clarified, for the first time, that the obligation to interpret national law in conformity with EU law was itself also a consequence of primacy. This case involved a request for a preliminary ruling from an Amsterdam court in relation to applying a European arrest warrant. The court found that there was a contradiction between Dutch law and Framework Decisions 2002/584/JHA and 2008/909/JHA on the European arrest warrant. However, since the creation of this category of acts by the Maastricht Treaty, framework decisions had been expressly devoid of direct effect under the Treaty. The court therefore asked the Court of Justice: ‘If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the primacy principle, disapply those national provisions not in conformity with that framework decision?’ The CJEU reiterated the principle established by case-law, after giving a wider definition than previously of the effects of primacy (cf. box 12 – emphasis added).

\(^{15}\) ECLI:EU:C:1962:42.

2.4. Primacy: consequences and sanction

The result of all the above is not just that primacy is one of the most important general principles of European Union law: in the opinion of the author of this study, its specific consequences and sanction are even more important than the general principle itself. It is actually those consequences and sanction that distinguish primacy from the more general pacta sunt servanda principle.

As frequently reiterated by CJEU case-law, as well as by the Commission and other EU institutions, primacy means that, in the event of divergence between a rule or principle of EU law on the one hand and a rule or principle of Member State law on the other hand, the authorities of the Member State in question must do whatever is necessary to eliminate that divergence.

This issue usually arises in disputes before a court, or where an authority has to make an implementing decision, because a situation has to be resolved within the scope of EU law, as defined by the Treaties. It should not arise in relation to statements of principle. This type of divergence is by nature temporary: it can be eliminated either by the legal rules or principles of the Member State being adapted by a change in the regulation, law, case-law or constitution, or by the legal rules or principles of the EU being adapted by a change in secondary legislation, case-law or the Treaties, whether on the initiative of the EU institutions or the Member States.

Until such an adaptation is made, all the institutions of the Member State at central, regional or local level, whether authorities, courts or the legislature, must do whatever is necessary to ensure that the divergence is resolved in favour of EU law, in particular through an interpretation of the national law that is in conformity with EU law. If that is not possible, in the case where the EU legal rule meets the
direct effect conditions, in other words where it is clear, precise and unconditional, that rule must be applied to the situation in question, instead of the national rule. If there is any doubt about the direct effect of the rule, the national court hearing the case must refer to the CJEU for a preliminary ruling, and must apply the solution indicated by the Court.

If the institutions of the Member State do not comply with the obligations that have just been reiterated, the usual sanction under EU law apply. That system of sanction forms a much better guarantee of the effectiveness of EU law than the usual sanction international law. Under international law, the sanction depends on the relationships between states and is essentially based on reciprocity: if a state fails to comply with the obligations imposed by a treaty, the other states party to the treaty are exempt from applying the same obligations with regard to the defaulting state. Reciprocity between states never applies under EU law, because the Member States always have the option of the Court of Justice resolving a dispute through the action for failure to fulfil obligations (Article 259 TFEU).

Moreover, the Commission always has the option of opening an infringement procedure against a Member State that has failed to fulfil the obligations resulting from primacy, with the possibility of bringing an action for failure to fulfil obligations before the CJEU (Article 258 TFEU). Where the Court finds in favour of the Commission or Member State having brought such an action, if the Member State against which judgment is given fails to comply with the Court’s judgment, the Commission can then ask the Court to impose a lump sum or penalty payment (Article 260 TFEU). Such a lump sum or penalty payment constitutes an enforcement order which can give rise to direct enforcement (Article 299 TFEU).

However, it should be noted that the infringement procedure is in no way automatic and that the Commission is perfectly free to decide whether or not to open such a procedure, and to close it where it is satisfied with the explanations given by the Member State government or where it sees no benefit in referring the matter to the CJEU. As we will see in the next part of this study, to date, in specific cases where supreme courts have expressly refused to apply the consequences of primacy (cf. section 3.5 below), the Commission either has not opened an infringement procedure – against the Czech Republic in the Landtová case or against Denmark in the Ajos case – or has been satisfied with the government’s explanations – the German government in the PSPP case. As this study is being written, it is too soon to know whether, in the infringement procedure opened on 22 December 2021 against Poland due to the rulings of 14 July 2021 and 7 October 2021 of its Constitutional Tribunal, the Commission will be brought to refer the matter to the CJEU, as this will depend in particular on the responses from the Polish government.

There is another standard sanction of EU law, which is often forgotten in discussions concerning primacy: if EU law is violated by the institutions of a Member State, whether the government, authorities, legislature or courts, the individuals who are the victims of that violation can invoke the liability of the State in question before its competent courts.

This was reiterated by the CJEU in a judgment of 18 January 2022 in the Thelen Technopark case (cf. box 13 – emphasis added).

Box 13: Judgment of 18 January 2022, Thelen Technopark, Case C-261/20

EU law must be interpreted as meaning that a national court, when hearing a dispute which is exclusively between private individuals, is not required, solely on the basis of EU law, to disapply a piece of national legislation which, in breach of Article … of Directive 2006/123/EC … 12 December 2006 on services in the internal market, … without prejudice, however, to, first, the possibility for that court to disapply that legislation on the basis of domestic law in the context of such a dispute, and, second, the right of a party which has been harmed as a result of national law not being in conformity with EU law to claim compensation for the ensuing loss or damage sustained by that party.


However, it should be noted that this involved a very specific case of the principle set out previously in the aforementioned Popławski judgment, because it concerned a dispute between private individuals and not against a Member State.
3. INTERPRETATION AND APPLICATION OF PRIMACY BY MEMBER STATE COURTS

- Member State institutions are bound by the *pacta sunt servanda* principle in a variety of ways depending on whether or not their constitutions give precedence to the Treaties over domestic law.
- Primacy is recognised and applied by all the Member State courts, but there are some limitations on its consequences in certain specific cases. This is because, in specific legal cases, there is a divergence between a domestic legal rule and an EU legal rule.
- As a matter of prevention, some constitutional or supreme courts have developed theories relating to the limitations that fundamental rights or constitutional principles, and the constitutional identity of the Member States, can impose on the consequences of primacy.
- In a few, but significant, cases, the constitutional or supreme courts of Germany, Denmark, Hungary, Poland and Romania have openly defied the Court of Justice by expressly refusing to apply its decisions.

3.1. The problem resulting from the coexistence within each Member State of two systems of law

The key issue posed by the primacy of EU law was identified with particular clarity by Advocate General Lagrange in his opinion of 25 June 1964 in the *Costa v E.N.E.L.* case (see section 2.3.1 above). Rather than paraphrasing his opinion, it is worth reproducing its key passages because they show that, during the deliberations leading to the judgment of 15 July, the CJEU was fully aware of this issue (cf. box 14 – emphasis added). This means in particular that the Court has not changed its position over time, but has in fact always followed the same approach on primacy, as we stated in the previous part.


Box 14: Opinion of Advocate General Lagrange in the *Costa v E.N.E.L.* case

… we cannot avoid the *problem which results from the coexistence within each Member State of two systems of law*, domestic and Community, each operating in its own sphere of competence, nor can we avoid the question what sanction should follow the encroachment by one into the sphere of competence reserved to the other.

Lagrange then made a distinction between situations in which the domestic rule pre-dates the Community rule, in other words on the entry into force of the Treaty or on the entry into force of an act of secondary legislation.

… in what circumstances must such courts exercise their *control* and, in particular, apply the self-executing provisions of the Treaty or the Community regulations duly adopted, *when they conflict with a national law*? If the national law came into force prior to the Treaty or to the publication of a Community regulation, *the doctrine of implied repeal must dispose of the matter*.

In his opinion, there is no difficulty in situations where the national law in question pre-dates the EU law. The cases set out below have, however, shown that the doctrine of implied repeal differs from one Member State to another. In particular, in countries where only a constitutional court or a supreme court has the power to overturn a law – which is equivalent to its repeal – other courts do not have this
power. This is the situation that the CJEU faced in the Simmenthal case (cf. section 2.3.2 above) and to which it found a solution that has become settled case-law.

In the Costa v E.N.E.L. case, the electricity nationalisation law postdated the law that introduced the EEC Treaty into Italian law. Lagrange examined this situation in particular.

… in such cases, however, there are real difficulties only when the domestic regulation has been passed by the legislature, because, if it is merely an ordinary administrative act or even a regulation, the action to quash it, or at least a plea of illegality (in those countries which do not fully admit a direct action for the annulment of regulations) must suffice to nullify the effects of a domestic measure to the advantage of the Community rule. In the case of a rule passed by the legislature, however, one is inevitably confronted with a constitutional problem.

The issues when applying primary that have sometimes led to clashes with constitutional or supreme courts have concerned either domestic legislative provisions or constitutional provisions.

If it happened that the constitutional court of one of the Member States, possessed of its full jurisdiction, felt bound to acknowledge that such a result cannot be achieved within the framework of the constitutional rules of its own country – for instance, as regards the possibility that ordinary national laws, contrary to the Treaty, might prevail against the Treaty itself without any court (not even the constitutional court) having the power to stop their application, so that they could only be repealed or modified by Parliament – such a decision would create an insoluble conflict between the two legal systems and would undermine the very foundations of the Treaty. For not only could the Treaty not be applied under the conditions envisaged in it, within the country concerned, but, as a result, the Court would have to apply it in a way that was contrary to its own constitutional rules.

This was precisely the situation in the Costa v E.N.E.L. case.

In such circumstances, there would be only two courses of action open to the State concerned: either to amend its Constitution to make it compatible with the Treaty or to renounce the Treaty itself. By the signature, the ratification and the deposit of the instruments of ratification, that State has bound itself with regard to its partners and could not remain inactive without disclaiming its international obligations. One can easily understand therefore why the Commission which, by virtue of Article 155, was entrusted with the task of supervising the application of the Treaty, has noted in its observations to this Court its ‘serious concern’ at the judgment of 24 February 1964 [of the Italian Constitutional Court].

This point was reiterated clearly and precisely 40 years later by the Polish Constitutional Tribunal in its judgment of 27 April 2005 on the compatibility of the European arrest warrant with the constitutional ban on the extradition of nationals. The judgment explained that, given the contradiction between the Polish Constitution, which bans the extradition of its citizens, and the requirements of Framework Decision 2002/584/JHA, which, where necessary, provide for a citizen to be handed over to another Member State, there were four steps to be taken.

First, the Tribunal should check whether an interpretation in conformity with EU law was possible. If that were not possible, the government should ask for the Framework Decision to be amended. If that were not possible, Poland should amend its Constitution. And if that were not possible, the only remaining option was to implement Article 50 TEU and leave the EU. In this particular case, although an interpretation in conformity with EU law was not possible, the Tribunal did, however, set a time-limit within which it considered that the handover would be possible, although in theory contrary to the Constitution, in order to allow the constituent power the time to adopt the necessary amendment.
Some commentators see in this judgment a refusal of primacy, but that was not the case, as underlined by the judgment itself, which clearly established the link between primacy and the *pacta sunt servanda* principle (cf. box 15 – emphasis added) by finding that the article of the Polish Code of Penal Procedure intended to implement the Framework Decision should continue to apply.

BOX 15: Judgment of the Polish Constitutional Court, 27 April 2005. N P 1/05

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5.5. *Article 9 of the Constitution is not only a grandiose declaration addressed to the international community, but also an obligation of state bodies, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland.* Apart from appropriate changes in the national legal order, the implementation of this obligation may require the bodies of public administration to undertake specific actions within the scope of their assigned competencies. Therefore, both due to the effect of deferral (consisting of the maintenance of the binding force), as well as owing to Article 9 of the Constitution, it should be concluded and recognised that the courts are temporarily obliged to continue to apply Article 607t § 1 of the Code of Penal Procedure.

Source: [https://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf)

3.2. **Acceptance of primacy and its consequences**

Contrary to the impression given by some commentaries on the most recent judgments in which certain constitutional or supreme courts have strongly opposed the CJEU, it is wrong to think that primacy is not accepted by many Member State courts. On the contrary, the number of requests for a preliminary ruling in which a court has asked the CJEU whether an EU legal rule prohibits the application of a national rule in a specific case clearly shows significant deference: since the *Costa v E.N.E.L.* judgment of 15 July 1964, there have been only a very small number of cases in which a court has refused to draw the consequences of a judgment, bearing in mind the thousands of requests for a preliminary ruling, which have numbered between 200 and 400 per year in recent years. Moreover, in the most significant case, namely the *PSPP* judgment of 5 May 2020, the German Constitutional Court was keen to stress its respect for primacy, while basing its refusal to apply the CJEU judgment on the argument that the Court of Justice had exceeded its jurisdiction (cf. section 3.3).

This deference on the part of the Member State courts is particularly well illustrated by the judgment of 24 May 1975 of the French Court of Cassation in the *Jacques Vabre* case (cf. box 16 – emphasis added).

Most commentators point to the fact that the Court of Cassation used the wording in the CJEU case-law referring to the specific nature of the EU’s legal system, and that it therefore accepted the same basis for the consequences of primacy as the CJEU. This ignores the fact that the judgment expressly cites Article 55 of the French Constitution, according to which validly concluded treaties have a higher status than laws.
Box 16: Judgment of the French Court of Cassation, 24 May 1975, Jacques Vabre

… whereas the Treaty of 25 March 1957, which, under [Article 55] of the Constitution, has a higher status than laws, establishes its own legal system which is incorporated into that of the Member States; whereas, due to this specific nature, the legal system that it has created is directly applicable to nationals of those States and is binding on their courts; whereas, therefore, the Court of Appeal rightly decided, without exceeding its powers, that Article 95 of the Treaty should be applied in this case, to the exclusion of Article 265 of the Customs Code, although the latter came later;

Source: https://www.legifrance.gouv.fr/juri/id/JURITEXT000006994625/

It is clear from a comparative examination of the law that the national courts mainly use the constitution of their state, which is binding on them, as the basis for primacy. In cases where the constitution expressly gives precedence to international treaties over domestic law, as was the case in 1964 with France, Luxembourg and the Netherlands, there is no issue. However, in the absence of such a clause in the constitution, as was the case for the other three founding states, and as is still the case for many Member States, the situation is more complex. In most cases, however, the national supreme courts avoid clashing with the CJEU.

One of the most interesting decisions has been ‘declaration’ DTC No 1/2004 of the Spanish Constitutional Court of 13 December 2004 on the ratification of the 2004 Constitutional Treaty, in particular because it confirms the compatibility between primacy of EU law and supremacy of the Constitution (cf. box 17 – emphasis added).

Box 17: Judgment of the Spanish Constitutional Court, 13 December 2004, DTC No 1/2004

Primacy and supremacy are principles that apply in different contexts. The first involves the application of valid rules, whereas the second relates to procedures for developing rules.

Supremacy is based on the higher hierarchical status of a rule and is therefore a source of validity for lower rules, which are therefore invalid if they violate the content of the higher rule.

Primacy, on the other hand, is not necessarily based on hierarchy, but on the distinction between different levels of application of rules, which are all in principle valid, but where one or more of those rules has the capacity to set aside other rules as a result of their preferential or prevalent application for one reason or another.

…

The supremacy of the Constitution is therefore, in this case, compatible with implementing regimes which grant preference to applying the rules of a legal system other than the national legal system whenever the Constitution provides for this … In summary, Article 93 of the Constitution accepted the primacy of EU law in the area of application of this law, as expressly confirmed by Article I-6 of the Treaty.

3.3. **Precautionary indication of possible limits on primacy: controlimiti, Solange and constitutional identity**

In its judgment No 14 of 7 March 1964 in the *Costa v E.N.E.L.* case, the Italian Constitutional Court refused to review the conformity of the 1962 nationalisation law with the EEC Treaty because it postdated the Treaty. This did not mean that it was disputing the principle of primacy – which had been discussed in legal circles for some years – but that it considered that it was not empowered by the Constitution to draw the consequences that would be drawn a few months later by the CJEU. In its judgment of 2 December 1973 in the *Frontini*\(^{18}\) case, the Italian Court changed its position and agreed to review the legislature’s compliance with EU law. However, it added that, ‘under Article 11 of the Constitution, limitations on sovereignty have been accepted only with a view to achieving the objectives set out in that article; the possibility of those limitations ... in any way conferring on the EEC bodies unacceptable power to violate the fundamental principles of our constitutional order and the inalienable rights of the human person must therefore be ruled out’. Limitations on sovereignty are therefore overridden by counter-limits (controlimiti) in relation to these rights and principles. It should be noted that the concept of ‘inalienable rights of the human person’ does not cover all the fundamental rights protected by the Italian Constitution, and that the concept of fundamental principles of the constitutional order does not cover the entire Constitution (cf. section 3.1.4 below).

More recently, since the entry into force of the Treaty of Lisbon, the Italian Constitutional Court has used the term ‘constitutional identity’ rather than ‘fundamental principles’, without this involving a substantive difference.

The *Solange* legal theory of the German Federal Constitutional Court (*Bundesverfassungsgericht*) is comparable to the controlimiti theory. Through the *Solange* case-law (*Solange* means ‘as long as’), the German court has developed a legal theory regarding what it considers may override the application of the consequences of primacy. In a judgment of 29 May 1974, referred to as *Solange I*\(^{19}\), the Constitutional Court accepted jurisdiction to rule on a conflict between Community law and the German Constitution. It stated that the German Basic Law should take precedence as long as a level of protection of fundamental rights equivalent to the level offered by German constitutional law was not guaranteed by EU law. In a second judgment of 22 October 1986, referred to as *Solange II*\(^{20}\), it refused to carry out a review as long as the applicant failed to show that the protection of fundamental rights under EU law did not correspond to the protection guaranteed by the Basic Law. In its judgment of 12 October 1993 on the law ratifying the Maastricht Treaty\(^{21}\), the Constitutional Court added that any review could also include the issue of an extension of the competences of the Union, which was not the case before 2009. In summary, according to this case-law theory, the Constitutional Court accepts the principle of primacy asserted in the *Costa v E.N.E.L.* judgment, and considers that there is a presumption of compatibility between EU law and the German Constitution as long as it is not proven that an EU rule is contrary to the fundamental rights protected by the Basic Law of 1949, or Article 79(3), which in particular prohibits any threat to the division of the Federation into Länder and the participation of the latter in federal legislation. The Constitutional Court has gradually extended the scope of the constitutional principles that may override the consequences of primacy beyond Article 79 of the Basic Law, and has started to use the concept of the ‘constitutional identity’ of Germany, which is echoed by Article 4(2) TEU as worded by the Treaty of Lisbon.

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\(^{19}\) BVerfGE 37, 271.

\(^{20}\) BVerfGE 73, 339.

\(^{21}\) BVerfGE 89, 155 of 12 October 1993.
Gradually, on various occasions, a number of other courts – constitutional or supreme courts – have developed comparable case-law.

This has been the case with the French Constitutional Council. For a long time, the Council was called upon to rule only on the need, if any, for the Constitution to be revised prior to the ratification of a revision treaty, as it had confirmed in 1975 that it was for the judicial or administrative courts to review the conformity of laws with international treaties (cf. section 3.2 above). More recently, it has stated on a number of occasions that the Council alone can check whether a law implementing EU law is contrary to the constitutional identity of France, this being the wording used since the Decision of 27 July 2006, which replaced the expression ‘an express provision of the Constitution’, used between 2004 and 2006. It was not until 2021 that the Council gave a practical example of a ‘principle inherent in the constitutional identity of France’, in a decision of 15 October 2021. The Council inferred from Article 12 of the 1789 Declaration of the Rights of Man and of the Citizen that ‘administrative policing powers inherent in the “law enforcement” needed to safeguard rights could not be delegated to private persons’. In the case referred to it, the relevant Directive did not imply that French law should allow such a delegation, so there was no real issue at stake. Some legal commentators suggested that this represented a warning to the EU institutions, but the view can also be taken that the Council chose this case to show that it was capable, when necessary, of vigilance, without this preventing deference to CJEU case-law.

The same thoughts apply to an obiter dictum (literally ‘something said in passing’) of the Belgian Constitutional Court, made in a judgment of 28 April 2016. That obiter dictum stated, without this having any effect on the case in question, that ‘Article 34 of the Constitution under no circumstances permits a discriminatory infringement of the national identity inherent in the fundamental, political and constitutional structures or in the fundamental values of the protection that the Constitution gives to subjects of law’. It is also notable that the Belgian Court (and its predecessor the Court of Arbitration before it) was one of the first to refer for a preliminary ruling to the CJEU and that it has always applied the latter’s decisions.

It is equally notable that, in its judgment of 6 December 2016 in the Ajos case (cf. section 3.5.2 below), the Supreme Court of Denmark (Højesteret) did not refer to the concept of constitutional identity, but simply found that the law ratifying Denmark’s accession treaty did not allow for the development of a dynamic interpretation like that of the CJEU – which would also apply to the ECtHR – in order to refuse to give effect to a judgment of the latter.

It would therefore be quite wrong to say that the majority of the constitutional or supreme courts in the Member States consider that there are limits on applying the consequences of primacy. The number of courts having expressly ruled on this point is, in fact, very limited. It is undoubtedly because the courts that have ruled on this are constitutional or supreme courts in the three most populous founding states that this case-law particularly attracts attention, and because the German

Constitutional Court has significant influence over the doctrine of other countries and some of their courts, especially in those states which have established a review of constitutionality following the return to a multi-party democracy.

The comparison between these case-laws must be made very carefully, because each time the context is different. It depends on what the constitution says, or does not say, about the European Union and international treaties; it also depends very significantly on the procedures for the review of constitutionality. It is also essential to take account of the rules for revising the constitution. Where revision is not difficult, as is the case in most Member States, invoking limits on the effects of primacy means that any adaptation of national law to EU law must be made through a constitutional revision, and not simply by amending the law. This therefore involves a time-limited tempering of the effect of primacy, and not an absolute limit on the principle. By contrast, where such a revision is more difficult, as is particularly the case with Article 79 of the German Basic Law, it poses a significant obstacle, which in Germany can be overcome only by a comprehensive revision of the Constitution subject to a referendum.

The common factor in most of these case-laws is that they are conditional in nature, which is particularly well demonstrated by the use of the term Solange in German. The decisions in question do not refuse to draw the consequences of primacy in a specific case; rather, they state, as a precautionary measure, in which cases those consequences might not be drawn due to a contradiction with certain fundamental rights or principles inherent in the constitutional identity. They therefore represent a message to the EU institutions to take account of these aspects in their legislative, regulatory or judicial activities. It is for the Member State governments to point out to the Commission, the Council and the European Parliament, during the drafting of EU acts, where this problem exists. However, it is not clear whether the position of the national courts is entirely known, understood and supported by the governments in all cases where a problem might arise, which explains some of the difficulties that have emerged over time, as in the case of the Landtová decision of 31 January 2012 of the Czech Constitutional Court (Ústavní soud) (cf. section 3.5.1).

In contrast to the two previous cases, with regard to the Constitutional Courts of Hungary, Poland and Romania, the reference to constitutional identity has not seemed to be in any way precautionary and hypothetical, but rather has been specifically made in order to refuse to draw the consequences of primacy, and in particular of the CJEU judgments (cf. section 3.5.2).

### 3.4. Dialogue between the national courts and the Court of Justice

One of the key characteristics of the EU’s ‘Treaty system’, which, as stated previously, explains the particular consequences of primacy, is the reference for a preliminary ruling mechanism under Article 267 TFEU. This mechanism was established by the Treaty of Rome which extended its scope beyond the preliminary ruling procedure in the ECSC Treaty, as that procedure concerned only the validity of acts of the High Authority. This mechanism allows for unparalleled direct dialogue between a national court and the Court of Justice: it is open to all courts in all the Member States, unlike the mechanism introduced by Protocol No 16 to the ECHR, which is open only to supreme courts in those states having ratified the Convention. In quantitative terms, the procedure is mainly used by courts of first instance or appeal. The main constitutional courts have started to use this mechanism only recently: the Italian Constitutional Court in 2008, the French Constitutional Council in 2013, and the German Federal Constitutional Court in 2014, although the Belgian Court of Arbitration was using it previously. Other supreme courts use the reference mechanism much more frequently, for the simple reason that, for a long time, they have been hearing cases in which the application of EU law is a central issue. The dialogue between the national courts and the Court of Justice is not as problematic as it might appear
from the response to certain recent decisions, particularly those in which the German Federal Constitutional Court and the Constitutional Courts of Hungary, Poland and Romania have openly defied the CJEU.

It is worth noting that a number of courts have avoided clashing with the CJEU in cases where the national rule contrary to EU law had its roots in a law, by citing the fact that they were not authorised to conduct a review of the constitutionality of the law. This was the case with the French courts until 1975 when the Constitutional Council, in its decision of 15 January 1975 on the law on the voluntary termination of pregnancy26, found that, under Article 55 of the Constitution, it was for the ordinary courts, and not the Council itself, to review the conformity of laws with the Treaties. The first consequence of that decision was the Jacques Vabre judgment of the Court of Cassation (cf. section 3.2 above). However, it was not until the Nicolo judgment of 28 October 198927 that the French supreme administrative court, the Council of State (Conseil d’État), started to draw the consequences of primacy.

The Council of State has long avoided any confrontation by interpreting EU law on its own initiative, and therefore by applying the ‘acte clair’ interpretative theory, which the CJEU case-law on the conditions of application of Article 267 confirmed in the Cilfit judgment of 6 October 1982. In that judgment, it was ruled that there was no obligation to request a preliminary ruling where ‘the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’28. It is difficult to work out whether the use of the ‘acte clair’ theory is the result of an intentional tactic, or simply the result of an error of interpretation on the part of the national court. In any event, for a long time, the application of the ‘acte clair’ theory by the Council of State has been questionable. More than once the Commission has brought an infringement procedure in such a case, as recently occurred with the judgments of the Council of State of 10 December 201229, which the Commission considered had not correctly applied the CJEU’s response to a request for a preliminary ruling on this issue. With the CJEU having ruled against France30, some commentators consider that the Council of State acted in bad faith and deserved the adverse ruling, but this is a difficult assertion to prove. More recently, in its French Data Network31 judgment of 21 April 2021, the Council of State expressly said that it would draw the consequences of a CJEU decision made in response to its previous request for a preliminary ruling. However, numerous commentators have pointed out that the Council of State’s interpretation of this judgment is questionable, basing themselves on the opinion of the rapporteur public (equivalent to the CJEU Advocate General).

To our knowledge, there has been no systematic study of the requests for a preliminary ruling made by all the supreme or constitutional courts in all the Member States, and even less so of the way in which the judgments delivered by the CJEU have then been applied; however, in our opinion, only very exceptionally have there been real difficulties in this dialogue. Cases where such difficulties have arisen have clearly been widely discussed by legal commentators, and sometimes by politicians and the media.

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26 Decision No 74-54 DC of 15 January 1975 – Decision on the voluntary termination of pregnancy.
It is highly significant that the Vice-President of the French Council of State – in its position as Chairman of the supreme administrative court – described this dialogue as follows in a speech on ‘The authority of EU law – a view from Constitutional and Supreme Courts’\(^{32}\). This dialogue can be coarse (rugueux) and frank. However, it must result in convergence and concord. Because we are judges, it is our responsibility to respect the hierarchy of rules to which we are subject, the mandate given to us by the founding texts creating our institutions, democratic legitimacy, as we apply the laws that form the expression of the people’s sovereignty. Because we are judges, we are also wise men, or we should endeavour to be so. Consequently, we cannot be expected to resolve head-on collisions, and we should do everything we can to preserve the achievements of European integration to which we judges have made an outstanding contribution’.

This point of view is particularly well illustrated by what has become known as the Taricco Saga between the Italian Constitutional Court and the CJEU. In this case, the CJEU received a request for a preliminary ruling from an Italian court of first instance concerning the prescription regime laid down by the Italian Criminal Code. The CJEU responded to the request in a judgment of 8 September 2015\(^{33}\), which some Italian courts applied without any issues, whereas others felt that it contradicted the Italian Constitution, and therefore referred the matter to the Italian Constitutional Court. The latter in turn requested a preliminary ruling from the CJEU, indicating why it considered that not applying the provision of the Italian Criminal Code would be contrary to respect for the controlimiti. In response to this request, the CJEU accepted, in a judgment of 5 December 2017\(^{34}\), that the provision of the Italian Criminal Code could be applied under the principle of legal certainty, which it itself recognised as a general principle of EU law. A number of commentators felt that the Italian court’s order adopted a hostile tone towards the CJEU, which was not, however, apparent in the text of the requests themselves. In any event, the two courts reached an agreement and the Taricco Saga is now regarded as an example of effective dialogue between the courts.

In the aforementioned French Data Network judgment, the French Council of State expressly disassociated itself from the position adopted by the German Constitutional Court in the PSPP case (cf. section 3.5.1 below), by stating ‘it is not for the administrative court to ensure respect, through the secondary legislation of the European Union or through the Court of Justice itself, for the division of competences between the European Union and the Member States. It cannot therefore review the conformity with EU law of decisions of the Court of Justice and, in particular, deprive such decisions of their binding force, as laid down in Article 91 of the Court’s Rules of Procedure, on the grounds that the Court may have exceeded its competence by giving a principle or an act of EU law a reach exceeding the scope laid down by the Treaties’\(^{35}\).

### 3.5. Clashes with the Court of Justice

**3.5.1. Clash between the German Federal Constitutional Court and the CJEU: review of ultra vires acts**

In September 2008, a campaign against the CJEU was launched by an article entitled Stoppt den EuGH

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\(^{33}\) Judgment of the Court of Justice of 8 September 2015, Taricco, C-105/14, ECLI:EU:C:2015:555.

\(^{34}\) Judgment of the Court of Justice of 5 December 2017, M.A.S. and M.B., C-42/17, ECLI:EU:C:2017:936

(Stop the CJEU!)\(^{36}\), signed by Roman Herzog, former President of the Federal Republic of Germany, of the Federal Constitutional Court, and of the Convention that drafted the Charter of Fundamental Rights of the European Union in 2000. It was a manifest that in particular denounced the judgment of 22 November 2005 in the \textit{Mangold}\(^{37}\) case. This article clearly shows the confusion made by its authors, as by many lay persons, between the EU’s lack of specific competence in an area (in this case, regulations on retirement age) and the fact that a case falls within the scope of EU law (in this case, the free movement of workers), which involves applying the general principles of EU law (in this case, the ban on age discrimination). Far from being an isolated case, this type of reasoning is common among many constitutional law experts in many countries, which sometimes results in a stand-off between the courts. The key issue, which often arises, is the fact that the CJEU sometimes reasons its judgments in a way that is not understandable to legal experts accustomed only to the case-law of the courts in their country, bearing in mind that the CJEU consists of judges from all the Member States. A judgment that seems highly questionable in one Member State will be regarded as entirely acceptable in another. In our opinion, this explains why the German Constitutional Court, following a series of decisions that could simply be viewed as messages or warnings to the CJEU (in particular its first request for a preliminary ruling of 14 January 2014\(^{38}\)), refused to apply a CJEU judgment delivered on its own request through a decision of 5 May 2020 in the \textit{PSPP}\(^{39}\) case. This led to a great deal of comment, not only among legal scholarship, but also in the media, and eventually resulted in the Commission opening an infringement procedure against Germany. If truth be told, the German court was not actually questioning the primacy of EU law, but rather felt that the CJEU and the European Central Bank had acted beyond the competences (\textit{ultra vires}) given to them by the Treaties.

In the opinion of the German court, constitutional courts not only have a right, but also a duty, to help ensure that the EU institutions respect their competences, and not just by referring to the CJEU for a preliminary ruling on legality – which is entirely in accordance with the Treaties and the case-law of the CJEU itself – but also by substituting themselves for the latter if the CJEU does not sufficiently justify the refusal to annul an EU act, which is, however, contrary to the Treaties. In the \textit{PSPP} case, the German court considered that the CJEU had misapplied the principle of proportionality, as it had not applied this principle as the German courts, in particular, would have done, which was clearly questionable\(^{40}\). This reasoning, defended by some commentators on German public law, was rejected by most legal scholars in the other Member States, and by those German scholars specialising in EU law.

3.5.2. Clash between the Danish Supreme Court and the Czech Constitutional Court, and the CJEU

Previously, there had been only one case in which a constitutional or supreme court of a Member State had espoused the long-standing theory set out by the German court in previous judgments, in which it had not yet refused to apply a CJEU judgment. This involved the Czech Constitutional Court (\textit{Ústavní

\(^{36}\) Published in \textit{Frankfurter Allgemeine Zeitung} on 9 September 2008.


soud) and the judgment of 31 January 2012 in the Slovak pensions\textsuperscript{41} case, in which it refused to apply the judgment delivered in response to a request for a preliminary ruling made by the Czech Supreme Administrative Court\textsuperscript{42}. However, the clash in the PSPP case was more significant, because the German Constitutional Court refused to apply the judgment delivered six months previously in response to its own request for a preliminary ruling, unlike in the Slovak pensions case. In both cases, the constitutional courts should have taken the same approach as the Italian Constitutional Court in the Taricco case, namely, refer the matter for a preliminary ruling, which would have enabled them to obtain a satisfactory response from the CJEU.

In a judgment of 6 December 2016\textsuperscript{43} in the Ajos case, the Danish Supreme Court also refused to apply a CJEU judgment delivered eight months previously in response to its own request for a preliminary ruling\textsuperscript{44}. Its reasoning was slightly different: it based its decision on the law authorising the ratification of Community Treaties, which did not explicitly refer to the general principles of law, in order to find that the CJEU judgment could not be applied as it was rightly based on a general principle of law, and not on an explicit provision of the Treaties.

3.5.3. Clash between the Romanian, Hungarian and Polish Constitutional Courts and the CJEU

At the end of 2021, three judgments concerning Hungary, Poland and Romania revived the political debate around primacy and the risks of clashes between constitutional courts and the Court of Justice. Although these three judgments are often mentioned together in the media and legal scholarship, they are actually very different from one other.

The Romanian case involved a CJEU judgment of 21 December 2021\textsuperscript{45} on the case-law of the Romanian Constitutional Court (Curtea Constituțională) and the Romanian law on panels specialising in anti-corruption matters. Other Romanian courts had asked the CJEU for preliminary rulings on a series of questions relating, in particular, to the constitutional case-law that had refused to apply the consequences of the primacy of EU law. The Constitutional Court had reiterated in a press release of 9 November that it would not amend its decision No 390 of 8 June 2021, which was the subject of an infringement procedure launched by the Commission. As the judgment has been published only in the Romanian language, we do not feel able to set out its reasoning. However, it is worth noting that, in a press release of 23 December 2021\textsuperscript{46}, the Constitutional Court indicated that the CJEU, in its judgment of 21 December 2021, had recognised the binding nature of decisions of the Constitutional Court, but that national courts were obliged to disapply national regulations or practices that were contrary to a provision of EU law. The Constitutional Court clarified in this respect that this CJEU judgment could have effect only after the revision of the current Constitution, which, however, could not be achieved through a law, but only on the initiative of certain subjects of law, according to the procedure and


\textsuperscript{42} Judgment of the Court of Justice of 2 June 2011, Landtová, C-399/09, ECLI:EU:C:2011:415.


\textsuperscript{44} Judgment of 19 April 2016, Ajos, C-441/14, ECLI:EU:C:2016:278.

\textsuperscript{45} Judgment of the Court of Justice of 21 December 2021, PM and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034.

\textsuperscript{46} https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/, viewed on 2 May 2021 with the aid of an online machine translation tool.
conditions laid down by the Romanian Constitution itself. Since then, further requests for a preliminary ruling of the same type have been made by Romanian courts. All these cases concern a law adopted by the Romanian legislature providing for the possibility of disciplinary action being brought against judges who request a preliminary ruling. They therefore fall within the more general issue of compliance with the rule of law guaranteed by Article 2 TEU, with regard to which the Court of Justice has set out increasingly detailed case-law since 2018. The political-legal context of these Romanian decisions illustrates both the recognition of primacy by the ordinary courts and the resistance of the Constitutional Court. It would therefore be unwise to liken the position of the Romanian Constitutional Court to that of the German Constitutional Court, which conducted an ultra vires review.

The Hungarian case involved judgment X/00477/2021 of 7 December 2021 of the Constitutional Court (Alkotmánybíróság), delivered on a request for the interpretation of certain provisions of the Hungarian Basic Law, made by the government following the CJEU judgment of 17 December 2020 in the context of an action for failure to fulfil obligations brought by the Commission on 21 December 2018 due to the incompatibility of Hungarian legislation on the right of asylum with EU law. Hungarian legal scholarship seems to offer differing interpretations of the judgment itself, and of the potential political consequences. However, it should be noted that the Hungarian Constitutional Court did not state that the CJEU judgment should be disapplied, but that, under its own case-law, the consequences of primacy are limited, as an exception, to cases in which the essence of a fundamental right, its constitutional identity or Hungarian sovereignty are violated, which would result in a review of the ultra vires act. It is undeniable that the Hungarian Constitutional Court was inspired by the principles of the Solange and ultra vires case-law of the German Constitutional Court, but in a very different context, marked by both the limited independence of judges, due to their method of appointment, and, seemingly, by an attempt by those judges not to blindly accept the demands of the government.

The Polish case is different again, and is certainly the one which saw the most significant clash with the Court of Justice and all the EU institutions. This involved decision K-3/21 of the Polish Constitutional Tribunal (Trybunał Konstytucyjny) of 7 October 2021 on the assessment of the conformity with the Polish Constitution of certain provisions of the Treaty on European Union. The first point to make is that the reasons of the judgement have still not been published in Polish (and therefore obviously not in translation) more than six months after the decision, which seems to have frequently occurred in recent years with the case-law of the Trybunał, contrary to the practice of all other courts in Europe. All commentators are therefore limited to giving an opinion based on the press release, which has no authentic value and does not sufficiently allow the reasoning of the Trybunał to be understood. What is more, the press release is very short and, for a proper understanding, reference needs to be made to

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47 In particular, by the Curtea de Apel Pitești (Romania) on 5 January 2022, C-13/22, OJ C 191/9, 10.5.2022.
the text of the government’s request, which has only been published in Polish. The second point is that the majority of the judges (there are two separate opinions, neither of which has been published) seem to support, without hesitation, the theories of the government, which was seeking to obtain a blanket refusal from the Trybunals to apply the CJEU judgments ruling against Poland for its failure to comply with the rule of law, particularly on the issue of the independence of judges. The third point is that, in assuming the government’s position, the Trybunals has refused not only certain consequences of primacy, but also its very principle, by finding that several provisions of the Treaties are contrary to the Polish Constitution. These are Article 1, first and second paragraphs (in combination with Article 4(3)), Article 19(1), second subparagraph, and Article 19(2) TEU, i.e. refusal of the power of other Polish courts to apply EU law in the event of contradiction with the Constitution. The main argument put forward by the press release can be seen as an attempt to apply Article 46 of the Vienna Convention (cf. section 2.1 above), by stating that Poland would not have given its consent to these provisions because Article 1 provides that: ‘This Treaty marks a new stage in the process of creating an ever closer union’, which was inserted in the TEU, by the Treaty of Lisbon, after Poland’s accession. This argument is clearly weak, not only because Poland signed and ratified the Treaty of Lisbon – notably when the president and government, as well as the majority in Parliament, were all from the party in power in 2021 – but also because this wording of Article 1 was, in any event, already present in the Maastricht Treaty, and partly in the preamble to the Treaties of Rome.

4. RECOMMENDATIONS

In discussions on primacy, it must be stressed that it is not the principle itself that is original in European Union law, because it is simply an application of the pacta sunt servanda principle, but rather its consequences due to the Treaty system and, in particular, the obligation for Member States to accept the competence of the European Union, the infringement procedure that can be brought by the Commission entirely independently of the Member State governments, and the reference for a preliminary ruling procedure that allows private individuals – citizens, associations, businesses, etc. – to access the Court of Justice, and that also allows all Member State courts at any level to conduct a dialogue with the CJEU.

If the Treaties were to be revised again, it would be advisable to codify primacy and its consequences more precisely than is currently the case with Declaration 17. It should be anticipated that some Member States will attempt to oppose this, but it would be natural for the European Parliament to reiterate that acceptance of these consequences by the courts, as well as by all administrative authorities, governments and parliaments, is vital to safeguarding the rights afforded by the Treaties to individuals, and equality between Member States.


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This study, commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs of the European Parliament, explains the principle of primacy of European Union law and its practical consequences, as established by the Treaty system and developed by Court of Justice case-law since 1964. It explains how and subject to which limits Member State courts accept, interpret and apply the principle.