No Member State is More Equal than Others

The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties

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As its national anthem states, Germany is firmly committed to upholding the values of respect for unity (*Einigkeit*), the law (*Recht*) and freedom (*Freiheit*). Those values are not only shared and cherished by Germany but also by each and every European State that has joined – and wishes to remain a member of – the European Union (the 'EU').[1] They are pan-European values that have been incorporated into the EU legal order and form part of our common heritage.

Whilst respecting their cultural diversity, the EU seeks to *unite* the Member States and their peoples in a common quest for peace, prosperity and justice. In so doing, the EU seeks to establish a government not of men but of *laws*. Both the Member States and the European institutions must respect the 'rules of the game' as interpreted by the Court of Justice of the European Union (the 'Court of Justice'), since no one is above the law. Last but not least, by conferring on individuals directly effective rights that protect a sphere of *freedom* against public or, as the case may be, private interference, EU law puts individuals centre stage in European integration. It is the ongoing and reciprocal commitment of Member States and their peoples to upholding those values that makes European integration move forward.

Needless to say, neither unity, nor respect for the rule of law, nor freedom can be secured without *equality before the law*. In the EU legal order, this is made crystal clear by Article 4(2) TEU which states that '[t]he Union shall respect the equality of Member States before the Treaties'.[2] That Treaty provision means, in essence, that all provisions of EU law are to have the same meaning and to be applied in the same fashion throughout the EU. That is so regardless of conflicting provisions of national law.

In my view, three direct implications flow from the principle of 'equality of the Member States before the Treaties'. First, the uniform interpretation and application of EU law are key for guaranteeing that equality. Second, the uniform interpretation of EU law needs to be ensured by one court and one court only, i.e. the Court of Justice. Third and last, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court of Justice – is 'the supreme law of the land'[3] as primacy (*Anwendungsvorrang*) guarantees that normative conflicts between EU law and national law are resolved in the same fashion. Primacy thus guarantees that both the Member States and their peoples are equal before the law.

Moreover, those three implications are deeply intertwined: one cannot exist without the two others. Without uniformity, there is no equality of the Member States before the law. Without the Court of Justice, there is no uniformity. Without primacy, there is no uniformity and thus, no equality. It is only by the judicial enforcement of uniformity and primacy of EU law that European citizens find equal justice under

[1] Judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paras 62 and 63.

[2] L.S. Rossi, 'The Principle of Equality Among Member States of the European Union' in L.S. Rossi and F. Casolari (eds), *The Principle of Equality in EU Law* (Berlin/Heidelberg, Springer, 2017), at 3-43. That equality has admittedly two dimensions, namely the one expressed in Art. 4(2) TEU and which thus forms part of EU law itself, and another one in public international law, resulting from the fact that the EU builds upon treaties concluded by the Member States (see, on that distinction, C.D. Classen, 'Die Gleichheit der Mitgliedstaaten und ihre Ausformungen im Unionsrecht', *EuR*, 2020/3, at 255-269). The present essay focuses on the former only.

[3] Expression borrowed from Article VI, Clause 2, of the US Constitution.

that law. Let us now look somewhat more deeply into those three implications by exploring the transnational dimension of primacy and the role that the Court of Justice plays in guaranteeing the equality of the Member States before the Treaties.

I. The Transnational Dimension of Primacy

A number of national constitutional courts, as well as some scholars, have examined the principle of primacy from a two-dimensional perspective, i.e. as a means of solving a bilateral conflict between a national legal order and EU law.[4] However, in developing their case law or academic arguments, they do not take into account the adverse effects that the persistence of such a conflict may bring about in the 26 other national legal orders, that is, when the primacy of EU law is called into question.

By contrast, it is precisely the imperative need to avoid such 'transnational' adverse effects that provides the principle of primacy with its normative foundation in the EU legal order. It goes back to the seminal ruling of the Court of Justice in *Costa v ENEL*, in which the principle of primacy was announced for the first time, well over fifty years ago.

In that case, the Court of Justice set out three justifications for the primacy of EU law.[5] First, it stressed the fact that EU law is not 'foreign law' but that it is rather by its very nature and in its own right 'the law of the land' in each Member State.[6] It follows that EU law is our common law as Europeans. EU law is German law as it is Greek, Slovenian, Dutch, Swedish, Spanish, French, Italian, Polish law – and so on. EU law must prevail over conflicting provisions of national law because it is the law that is common to all Member States. In order for EU law to remain fully effective as the '*common law*' of Europe, it must prevail over conflicting provisions of national law. It follows that the primacy of EU law has a transnational dimension that seeks to guarantee that all provisions of EU law are to have the same meaning and to be applied in the same fashion throughout the EU.

Second, the Court of Justice grounded the principle of primacy in the twin ideas of reciprocity and non-discrimination, which are both embedded in the principle of equality of Member States before the Treaties. It did so by highlighting the tension between reciprocal commitments and unilateral action. The primacy of EU law guarantees that all Member States remain reciprocally committed to fulfilling the obligations imposed by that law.[7] It would be contrary to the logic underpinning the EU legal order for a Member State to select unilaterally the commitments that it wished to fulfil, whilst disregarding those that it did not. Primacy goes hand in hand with the principle of equality of Member States before the law, since it rules out 'cherry-picking' that may serve individual national interests. It thus means that all Member States in the EU have no choice but to take the bitter with the sweet.

Third and last, the Court of Justice invoked two textual arguments. It noted that '[w]herever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions'. The Treaties rule out 'implied opt-outs'. It also referred to the nature of EU regulations as provided for by Article 288 TFEU, which are 'binding' and 'directly applicable' in all Member States.

> *'That [Treaty] provision which is subject to no reservation', the Court of Justice wrote, 'would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure*

[4] For two notable exceptions, see F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States' (2015) 16 *German Law Journal* 1003, and V. Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' (2020) 21 *German Law Journal* 1006.

[5] See, in this regard, I. Pernice, '*Costa v ENEL* and *Simmenthal*: Primacy of European Law' in M. Poiares Maduro and L. Azoulai (Eds.), *The Past and Future of EU Law*, Oxford: Hart Publishing, 2010, at 47.

[6] See Judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66, at 593, where the Court of Justice held that 'on the entry into force of the Treaty, '[EU law] became an integral part of the legal systems of the Member States'.

[7] In the key passage of the judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66, at 593-594, the Court of Justice ruled that '[t]he integration into the laws of each Member State of provisions which derive from the [EU], 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' (emphasis added).

> *which could prevail over [EU] law'. (Costa v ENEL at 594)*

In the light of the foregoing observations, the Court of Justice came to the conclusion 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 [EU] law and without the legal basis of the [EU] itself being called into question'.[8]

Over the last 50 years, the Court of Justice has consistently confirmed its findings in *Costa v ENEL*. It has expressly stated that EU law may prevail over administrative regulations, legislative statutes and even constitutional provisions that are incompatible with EU law. As the Court of Justice ruled in *Winner Wetten*, '[r]ules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law'.[9]

Notably, this means, building on the parallel judgments of the Court of Justice in *Melloni* and *Åkerberg Fransson*, that where the EU legislator has fully harmonised the level of protection of a fundamental right, the compatibility of a national measure with such a right is to be examined in the light of EU law, and not according to national standards. If such a measure is incompatible with EU law, that measure is, by virtue of the principle of primacy, to be set aside. Conversely, where there is no such harmonisation, national standards that are higher than those guaranteed by the EU Charter may apply, provided that 'the primacy, unity and effectiveness of [EU] law are not thereby compromised' (*Åkerberg Fransson*, at 29). It is worth noting that the Bundesverfassungsgericht (BVerfG) has endorsed and faithfully applied that case law in the context of two recent orders concerning the so-called right to be forgotten (*Recht auf Vergessen I* and *Recht auf Vergessen II*). In one of those two parallel orders, it held that, when German authorities apply legal provisions that are fully harmonised under EU law, the relevant standard of review does not derive from German fundamental rights as provided for by the Basic law, but solely from EU fundamental rights (*Recht auf Vergessen II*at 42). In those circumstances, by virtue of the principle of primacy (*Anwendungsvorrang*), the Bundesverfassungsgericht will, in close cooperation with the Court of Justice, directly examine whether the German authorities have complied with EU fundamental rights.

To date, no Treaty provision has expressly recognised the principle of primacy. There is no Supremacy Clause similar to that set out in Article VI of the US Constitution.[10] Arguably, the incorporation of such a clause would be a positive development, as it would give more visibility to the principle of primacy.[11] However, when it comes to the Member States' commitment to respecting the primacy of EU law, such incorporation is both irrelevant and redundant.

It is irrelevant because the primacy of EU law over national law 'cannot rely on a simple textual provision, but must be justified through a deeper argument'.[12] Moreover, the Member States have never sought to overrule, nuance or reform the principle of primacy – as interpreted by the Court of Justice – by the adoption of a Treaty amendment. Accordingly, the 'Masters of the Treaties' have consistently endorsed the primacy of EU law as interpreted by the 'Umpire of the Treaties', i.e. the Court of Justice.

This demonstrates that the Member States remain committed to respecting that principle. That ongoing commitment finds concrete expression in Declaration 17 annexed to the Final Act of the Treaty of Lisbon. That declaration states that

> *'[t]he 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'.*

Most importantly, by codifying the principle of equality of Member States before the Treaties in Article 4(2) TEU, the Treaty of Lisbon has given new impetus to the principle of primacy as interpreted by the Court of Justice. Since there is an unbreakable link between the equality of the Member States before the Treaties, the

uniform interpretation of EU law and the primacy of that law, it is now safe to say that the principle of primacy has found its way into the Treaties. In effect, Article 4(2) TEU is to be read as already containing a Primacy Clause. The incorporation of a Treaty provision containing an additional Primacy Clause would thus be, to some extent, redundant.

II. The Role of the Court of Justice

As already said, in order for EU law to apply uniformly, one court – and one court only – must have the final say as to what the law of the EU is. That is not something new, nor unique to the EU legal order. It is a feature of legal systems that adhere to the rule of law within democratic societies across the world. Constitutional courts have the final say as to what the Constitution means. In the same way, the highest court within the judicial order of a Member State has the final say as to the meaning of legislative texts. In multilevel systems of governance, the Federal Supreme Court has the final say as to what federal law means, whilst State Supreme Courts provide the definitive interpretation of State law.

The fact that at the end of the day, a court will have the final say regarding the interpretation of the law clearly stems from the constitutional traditions common to the Member States. All legal disputes must be resolved for good by a competent court that has the final say about the applicable law. This ensures legal certainty. In accordance with those constitutional traditions, the authors of the Treaties vested the Court of Justice with the ultimate authority to say what the law of the EU is.

It is worth noting that, according to historians, the German delegation played a '*hegemonic*' role in defining the Court of Justice as the supreme interpreter of EU law. As Morten Rasmussen points out, when discussing the role that the Court of Justice was to play in the future ECSC,

> *'[the] head of [the German] delegation, Hallstein, supported by the delegate from the Foreign Ministry, Ophüls, wanted to create a Federal Court similar to the new German Bundesverfassungsgericht that would ensure the development of a European Rechtsstaat. Over time they believe a Federal Court would create a European consciousness and thus play a role similar to the American Supreme Court. Therefore, the German delegation insisted on the need to develop a uniform jurisprudence with the Court holding exclusive rights to interpret the Treaty'.*[13]

Whilst it is true that the Court of Justice is not equivalent to the US Supreme Court (nor does it intend to be), the views of the German delegation found support among the other delegations which also insisted on the need to ensure the rule of law within the EU by bestowing upon the Court of Justice the ultimate authority to interpret the Treaties. Those views are crystallised in what is now Article 19 TEU. It states that the Court of Justice 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Ensuring that the law is observed entails the duty for the Court of Justice to achieve the uniform interpretation of EU law. Such uniform interpretation requires the Court of Justice to have *the final say* in this

[8] Judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66, at 594. Some scholars have drawn on this passage of the judgment in order to examine the principle of primacy from a 'Hamiltonian perspective'. See, e.g., J. Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment' (2020) 21 *German Law Journal* 1032. To that end, that author cites the following passage of the Federalist No. 33: 'But it is said that the laws of the Union are to be the *supreme law* of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY'. See A. Hamilton, 'Federalist No 33' in A. Hamilton, J. Madison, and John Jay, *The Federalist Papers*, Oxford, Oxford University Press, 2008, at 157. In accordance with such a perspective, primacy would not only be a *means* to ensuring the equality of the Member States before the Treaties but most importantly an *end* in itself as it defines the specific nature of EU law.

[9] Judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, para. 61 (referring to judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, para. 3).

respect, and even *the only say* when it comes to declaring provisions of that law invalid.

In the same way, the Bundesverfassungsgericht has consistently recognised and respected the role that the Court of Justice is to play in the EU legal order. In *Solange II* and the relevant cases thereafter, the Bundesverfassungsgericht held that

> *'Article [267 TFEU] accords the Court of Justice the conclusive authority in relation to the courts of [Member] States to make decisions on the interpretation of the Treaty and on the validity and interpretation of instruments of [EU] law derived therefrom. That judicial monopoly for the European Court (embodied for the purposes of [EU] law in Article [267 TFEU]) as regards the sphere of competence allotted to it exclusively under the Treaty gives it the character to that extent of a statutory court within the meaning of Article 101(1), second sentence, of the [Basic Law]'.*[14]

Therefore, in the EU legal order, the Court of Justice is *gesetzlicher Richter*.[15]

III. Concluding Remarks

The principle of primacy is not just a means of solving bilateral conflicts between two legal orders, but is rather, first and foremost, a grounding principle securing that all Member States – regardless of their size, policy views or economic power – are treated equally before the law. Moreover, as the 'Umpire of the Treaties', the Court of Justice has the final say as to what the law of the EU is. The Court of Justice – and only the Court of Justice – may guarantee that a provision of EU law has the same meaning throughout the EU.

If a Member State calls into question the primacy of EU law as interpreted by the Court of Justice and engages in a unilateral course of action, it shows disrespect towards the other Member States and their peoples that continue to honour the Treaties on a reciprocal basis. Such a unilateral course of action also sends the message that EU law does not apply with the same force throughout the EU and that 'some Member States are more equal than others'.[16] However, there is no place for unilateralism in the EU, since it stands in the way of upholding the values of respect for unity (*Einigkeit*), the law (*Recht*) and freedom (*Freiheit*) to which we Europeans are all reciprocally committed.

[10] Article VI, Clause 2, of the US Constitution states that '[t]his Constitution, and the Laws of the United States 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'.

[11] That was perhaps the intention of the authors of the Draft Treaty Establishing a Constitution for Europe. Article I-6 thereof, entitled 'Union law', stated that 'The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States'.

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[12] F. Fabbrini, above note 4, at 1019-1020. See also A. Hamilton, above n 10, at 157 (who posited that the Supremacy Clause of the US Constitution is declaratory in nature).
[13] *M. Rasmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice' (2008) 14 Journal of European Integration History 77, at 83-84.*
[14] *BVerfG, order of 22 October 1986, Solange II, 2 BvR 197/83, para. 78. For the English Translation, see [1987] 3 CMLR 225, 251.*
[15] BVerfG, order of 22 October 1986, *Solange II*, 2 BvR 197/83, para. 75. See, more recently, order of 14 May 2020, 2 BvR 993/15 and 2 BvR 858/16, para. 62.
[16] Paraphrasing the famous words written by G. Orwell in *Animal Farm* (Secker & Warburg, 1945).