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EQUALITY OF MEMBER STATES AS A NEW RATIONALE FOR THE PRINCIPLE OF PRIMACY – AND ITS SIGNIFICANCE FOR THE CONSTITUTIONALISATION OF EU LAW**

Abstract: *In its recent jurisprudence the Court of Justice of the European Union (CJEU) has indicated new grounds for the principle of primacy of EU law: the equality of Member States before the Treaties. This reflects the view that the principle of primacy should not be perceived within a bilateral framework – as a means of resolving conflicts between two legal orders (EU and national) – but in a multilateral context, where uniformity, equality and primacy are strongly intertwined. The aim of this paper will be to analyse and assess the CJEU stance on this new foundation of the principle of primacy. It will be argued that the CJEU seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, is expected and justified after the Treaty of Lisbon and in the face of the current threats to the values embedded in Art. 2 of the Treaty on European Union. It is crucial for further strengthening of the processes of constitutionalisation of EU law. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU.*

Keywords: equality of Member States, primacy of EU law, constitutionalisation of EU law

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INTRODUCTION

The principle of primacy is a distinguishing feature of the EU legal order. It is the central instrument to guarantee the effectiveness of EU law at the national level.[1] Proclaimed in the jurisprudence of the Court of Justice of the European Union (CJEU), in the seminal judgment in *Costa*,[2] it establishes the pre-eminence of EU

[1] On the principle of primacy, from among synthesising approaches *see*: B. de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in: P. Craig, G. de Búrca (eds.), *The Evolution of EU law*, Oxford University Press, Oxford: 2021, pp. 188–192, 205–227; B. de Witte, *Direct Effect, Primacy and the Nature of the Legal Order*, in: P. Craig, G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford: 2011, pp. 323–362; M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford: 2006, pp. 97–117; K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe,* Oxford University Press, Oxford: 2001; P. Craig, G. de Búrca, *EU Law*, Oxford University Press, Oxford: 2020, pp. 303–352; A. Arena, *The Twin Doctrines of Primacy and Pre-emption*, in: R. Schütze, T. Tridimas (eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Vol. 1*, Oxford University Press, Oxford: 2018, pp. 300–349; R. Schütze, *European Constitutional Law*, Oxford University Press, Oxford: 2021, pp. 193–224; K. Lenaerts, P. van Nuffel, *Union Law and its Effects in the National Legal Systems*, in: K. Lenaerts, P. van Nuffel, T. Corthaut (eds.), *EU Constitutional Law*, Oxford University Press, Oxford: 2022, pp. 632–639; M. Bobek, *The Effects of EU Law in the National Legal Systems*, in: C. Barnard, S. Peers (eds.), *European Union Law*, Oxford University Press, Oxford: 2017, pp. 161–167; J. Kranz, *Supremacy over Primacy...? Reflections on Legal Controversies between Poland and the European Union (2015–2023)*, 43 Polish Yearbook of International Law 13 (2023); C. Rauchegger, *Four Functions of the Principle of Primacy in the Post-Lisbon Case Law of the European Court of Justice*, in: K.S. Ziegler, P.J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe*, Edward Elgar Publishing, Cheltenham: 2022.

[2] *See* Case C-6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66. The Court further elaborated on the primacy principle in its subsequent jurisprudence, see in particular judgments in the following cases: C-11/70 *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* EU:C:1970:114; C-106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49; Joined Cases C-10/97 and C-22/97 *Ministero delle Finanze v. IN.CO.GE.'90 Srl et al.*, EU:C:1998:498; C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*, EU:C:2001:368; Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, EU:C:2010:319; C-409/06 *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, EU:C:2010:503; C-314/08 *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, EU:C:2009:719; C-378/17 *The Minister for Justice and Equality and The Commissioner of An Garda Síochána* v *Workplace Relations Commission*, EU:C:2018:979; Joined Cases C-83/19, C-127/19, C195/19, C-291/19, C-355/19 and C397/19 *Asociaţia 'Forumul Judecătorilor din România' and Others v. Inspecţia Judiciară and Others*, EU:C:2021:393; C-824/18 *A.B. and Others v. Krajowa Rada Sądownictwa and Others*, EU:C:2021:153; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C840/19 *Criminal proceedings against PM and Others*, EU:C:2021:1034; C-430/21 *RS*, EU:C:2022:99; C-204/21 *Commission v. Poland*, EU:C:2023:442. See also the case law analysed in Craig, de Búrca, *supra* note 1, pp. 304–316.

law over the law of the Member States (MSs). The nature and implications of the principle of primacy involve many issues of fundamental importance, in view of both the nature of EU law and its effectiveness in national legal systems.[3] Although it might be considered one of the central subjects of EU legal scholarship, many of the characteristics of that principle still remain underexplored. The principle of primacy is still astonishingly undertheorized.[4] Crucially, some central issues of the primacy doctrine have only been explained by the CJEU in the recent years. Among those is the justification of the principle of primacy. In the hitherto CJEU case law the primacy principle was justified mainly in functional terms, as an instrument to ensure the effectiveness of EU law. In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of MSs before the Treaties. This reflects the view that the principle of primacy should not be perceived within a bilateral framework – as a means of resolving conflicts between two legal orders (EU and national) – but in a multilateral context, where uniformity, equality and primacy are strongly intertwined. The CJEU's position has led some commentators to conclude that it is now safe to say that the principle of primacy has found its way into the Treaties: Article 4(2) of the Treaty on European Union (TEU) is to be read as already containing a primacy clause. The aim of this article is to analyse and assess the CJEU's stance on this new foundation of the principle of primacy. It is argued that the Court seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, is expected and justified after the Treaty of Lisbon and in the face of the current threats to the values embedded in Art. 2 TEU. It is crucial for the further strengthening of the processes of constitutionalising EU law. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU.

1. NORMATIVE GROUNDS FOR THE PRIMACY PRINCIPLE

The principle of primacy has been proclaimed in the case law of the CJEU, yet has no explicit basis in the Treaties. There was an attempt to include it in the text of primary law during the work on the Treaty establishing a Constitution for Europe (Constitutional Treaty). In the Treaty of Lisbon, it was decided not to include a clause on the primacy of EU law; instead, only Declaration No. 17 on primacy was adopted, stating 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

[3] *See* the literature cited in fn. 1.

[4] M. Leloup, L.D. Spieker, *Rethinking Primacy's Effects: On Creating, Avoiding and Filling Legal Vacuums in the National Legal Systems*, 61 Common Market Law Review 913 (2024).

the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law." This declaration also referred to the opinion of the Council Legal Service on primacy.[5]

The primacy principle appears in the jurisprudence of the CJEU in the seminal judgment of *Costa*.[6] It was supported by the Court with two main arguments. The first referred to the specific character of the Community legal order and the nature of Community law, while the second referred to the objectives of the integration process taking place within the Community. In this first respect, the CJEU emphasised the autonomous nature of the Community legal order. The proclamation of the principle of primacy of Community law was a consequence of the autonomous nature and specificity of the Community legal order.[7] The EU legal system's self-referential nature meant that the criteria for determining the boundaries of the system and the scope of its norms were located within it.[8] The second argument justifying the principle of primacy of Community law over national law was teleological (functional) in nature. In the *Costa* judgment, the CJEU referred to the "spirit of the Treaty" and the need to ensure that its objectives are achieved. The Court stated that the Treaty aims of integration would be jeopardised if a MS unilaterally refused to give effect to an EU law that should bind all uniformly. In addition, in the early years of the Community, reference was also made to the egalitarian argument.[9] It follows from the CJEU's reasoning that if MS law could unilaterally take precedence over EU law, it would lead to discrimination in the application of EU law as between the MSs. It would also entail a MS enjoying the benefits of EU law without accepting all the burdens.[10] Lastly, the CJEU referred to what is now Art. 288 of the Treaty on the Functioning of the European Union (TFEU), which provides that regulations are directly applicable, and concluded that this provision would be meaningless if a MS could nullify its effects by means

[5] Opinion of the Council Legal Service of 22 June 2007, as set out in 11197/07 (JUR 260).

[6] *See* fn 2 above. For the origin of the case *see* A. Arena, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL*, 30(3) European Journal of International Law 1017 (2019).

[7] As has been stated by the Court: "By contrast with ordinary international treaties, the EEC Treaty created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply [...]. 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."

[8] *See* R. Barents, *The Precedence of EU Law from the Perspective of Constitutional Pluralism*, 5(3) European Constitutional Law Review 421 (2009), p. 426.

[9] *See* Craig, de Búrca, *supra* note 1, p. 305.

[10] *Ibidem*.

of a legislative measure which could prevail over Community law.[11] The doctrine points to the "bidimensional" nature of the principle of primacy, i.e. the fact that although it is defined by the CJEU, its full acceptance depends on its being incorporated into the constitutional orders of the MSs and affirmed by their supreme courts,[12] which generally seek its legal basis in national constitutional regulations.[13] This fact distinguishes the EU principle of primacy from analogous principles in federal systems. In federal systems, the relationship between the federation and its constituent parts is regulated by federal law. National courts respect the primacy of federal law on the basis of express provisions contained in the federal constitution. The situation is different in the EU – the justification developed by the CJEU in relation to the principle of primacy referring to the autonomy of the EU legal order is not generally shared by the courts of the MSs, which in principle treat their national constitutions as the *fons et origo* of the law applicable on the national territory.[14] In this context, the CJEU's argumentation regarding the foundations of the principle of primacy gains particular significance. It is an expression of the strengthening of the constitutionalisation processes taking place in the EU, which at the same time clash with tendencies threatening the uniformity of EU law, such as threats to the rule of law.

2. THE EQUALITY OF MSs BEFORE THE TREATIES AS NORMATIVE GROUNDS FOR THE PRINCIPLE OF PRIMACY IN THE RECENT JURISPRUDENCE OF THE CJEU

In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of MSs before the Treaties. The latter principle, introduced by the Lisbon Treaty in Art. 4(2) TEU, was recognised by the Court in the 1970s,[15] but then rarely relied on. Recently, it was invoked in a dispute where the authority of EU law was questioned. In an unprecedented press release,[16] the CJEU reacted to the PSPP judgment of the German Federal Constitutional Court

[11] As has been noted, that argument is of limited efficacy since Art. 288 TFUE refers only to the direct applicability of regulations, while the Court sought to establish the supremacy of all binding EU law.

[12] J. Weiler, *The Community System: The Dual Character of Supranationalism*, 1(1) Yearbook of European Law 267 (1981), pp. 275–276.

[13] de Witte, *supra* note 1, pp. 361–362.

[14] *Ibidem*, p. 362; Claes, *supra* note 1, passim.

[15] *See* Case C-39/72 *Commission v. Italy*, EU:C:1973:13; Case C-231/78 *Commission v. UK*, EU:C:1979:101; Case C-128/78 *Commission v. UK*, ECLI:EU:C:1979:32.

[16] Press release following the judgment of the German Constitutional Court of 5 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed 30 June 2025).

of 8 May 2020.[17] In a succinct manner the CJEU summarised its well-established case law on the foundational doctrines of EU law.[18] It is in the last two sentences where a new claim was made: national courts have to ensure the full effect of EU law since this is the only way of ensuring equality among the MSs.[19] The reasoning of the press release can therefore be reconstructed as follows: the EU law's primacy and the CJEU's authority to determine "what EU law is" serve to ensure a uniform interpretation of EU law, which in turn is crucial to ensuring equality among the MSs. As can be argued, such reasoning underpinned the position expressed by the Court in its judgment from a year and a half later, in the *Euro Box Promotion* case.

The judgment in *Euro Box Promotion* came as part of the CJEU's case law on changes to the judicial system in Romania and the problems of combating fraud and corruption, events which received only minor public attention compared to those in Poland and Hungary.[20] In May 2021, in the ruling of *Asociația "Forumul Judecătorilor din România"*,[21] the CJEU found Romanian laws concerning the personal liability of judges and prosecutors as well as disciplinary measures that undermined the independence of the judiciary to be incompatible with EU law. In its ruling, the Court emphasised the support given by EU institutions in

[17] Bundesverfassungsgericht [Federal Constitutional Court], judgment of 5 May 2020, 2 BvR 859/15, available at: http://www.bverfg.de/e/rs20200505_2bvr085915en.html (accessed 30 June 2025).

[18] Though without mentioning any of the words "autonomy", "direct effect", "supremacy" or "primacy". *See* 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*, 21(5) German Law Journal 1032 (2020), p. 1033. *See also Editorial Comments*, 4 Common Market Law Review 1 (2022).

[19] The full version of the press release reads as follows: "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 (Case C-446/98, *Fazenda Pública v. Câmara Municipal do Porto*, EU:C:2000:691, para. 49). 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 (Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, EU:C:1987:452, paras. 15 and 17). Like other authorities of the MSs, national courts are required to ensure that EU law takes full effect (Case C-212/04 *Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443, para. 122). That is the only way of ensuring the equality of Member States in the Union they created."

[20] *See* P. Filipek, M. Taborowski, *Decoding the Euro Box Promotion case: Independence of Constitutional Courts, Equality of States, and the Clash in Judicial Standards in View of the Principle of Primacy Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion and Others, Judgment of the Court (Grand Chamber) of 21 December 2021, EU:C:2021:1034*, 61(3) Common Market Law Review 831 (2024); D. Călin, *Constitutional Courts Cannot Build Brick Walls between the CJEU and National Judges Concerning the Rule of Law Values in Article 2 TEU: RS, Case C-430/21, RS, Judgment of the Court (Grand Chamber) of 22 February 2022 EU:C:2022:99*, 60(3) Common Market Law Review 819 (2023); F. Weber, *The Identity of Union Law in Primacy: Piercing Through Euro Box Promotion and Others*, 7(2) European Papers 749 (2022).

[21] Case C-83/19 *Asociația "Forumul Judecătorilor din România"*, EU:C:2021:393.

establishing an independent judiciary in Romania, and it affirmed – against the Romanian Constitutional Court – that the primacy of Union law also prevails against constitutional norms interpreted by the latter.[22] Following the judgment in *Asociația "Forumul Judecătorilor din România"*, the Romanian Constitutional Court prohibited national courts from examining the compatibility with EU law of national provisions that had already been declared compatible with the Constitution.[23] That was addressed in turn by the CJEU in the *RS* judgment,[24] where the ECJ confirmed that national rules or practices under which the ordinary courts of a MS have no jurisdiction to examine the compatibility with EU law of national legislation are incompatible with the essential requirements of EU law. That case concerned legislation which the Constitutional Court had found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

In *Euro Box Promotion*, the disputes concerned criminal proceedings in which the High Court of Cassation and Justice had convicted several individuals, including former parliamentarians and ministers, of tax fraud, corruption and abuse of office, particularly in connection with the management of EU funds.[25] Then, the Romanian Constitutional Court overturned these decisions on the grounds of unlawful court composition. The rulings of the Romanian Constitutional Court posed a systemic risk of impunity for fraud and corruption affecting the EU's financial interests, as the court proceedings would have to be repeated, despite already being lengthy, complex and thus unlikely to be completed before the statutory limitation period expired. Such a situation would undermine the objectives of EU law to effectively deter and punish such offences, and would be contrary to the MS's obligations.[26] In the preliminary proceedings the referring courts asked the CJEU whether, under EU law, they can disapply certain decisions delivered by the Curtea Constituțională (Constitutional Court).

The CJEU confirmed that the principle of primacy of EU law precludes national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot disapply, on their own authority, the case law established in those decisions, even though they are of the view, in the light of a judgment of the CJEU, that that case law is contrary to the provisions of EU law.[27] The Court reasoning referred to issues crucial for the EU

[22] *Ibidem*, paras. 49-51, 179 ff., 219, 222, 239 ff. and 242–252.

[23] Constitutional Court, decision of 8 June 2021, No. 390/2021; *see* Călin, *supra* note 20, pp. 821–822.

[24] Case C-430/21 *RS*, EU:C:2022:792.

[25] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034.

[26] *See* Filipek, Taborowski, *supra* note 20, p. 832; Weber, *supra* note 20, pp. 750–752.

[27] It should be noted that following the CJEU judgment, the Romanian Constitutional Court released a public statement in which it refused to recognise its effect, pretending that its own decisions "remain

legal order: effective judicial protection, the rule of law, judicial independence and the proper composition of courts. The important part of the judgment concerned the principle of primacy. In this respect the CJEU invoked its fundamental rulings of the early years of accession, recalling that the establishment of the Community's own legal system – accepted by the MSs on the basis of reciprocity – means that they cannot accord precedence to a unilateral and subsequent measure over that legal system, nor can they rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question.[28] The CJEU recalled that in its Opinion 1/91,[29] it found that the EEC Treaty, although it takes the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law, and that the essential characteristics of the Community legal order thus established are its primacy over the law of the MSs and the direct effect of a whole series of provisions which are applicable to their nationals and to the MSs themselves.[30] At the same time, the CJEU alone has the jurisdiction to give the definitive interpretation of EU law. In the exercise of that jurisdiction, it is ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law. To that end, the procedure for preliminary rulings provided for in Art. 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the CJEU and the courts of the MSs, having the object of securing the uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy, as well as, ultimately, the particular nature of the law established by the Treaties.[31] As a result, the principle of primacy requires the national court to give full effect to the requirements of EU law in disputes brought before it by disapplying any national rule or practice that is contrary to a directly effective provision of EU law, without being requested and without waiting for that national rule or practice to be set aside by legislative or other constitutional means.[32] Any rule or practice

generally binding". *See* Press release, 23 December 2021, available at: https://www.ccr.ro/en/press-release-23-december-2021/?utm_source=chatgpt.com; *see also* B. Selejan-Gutan, *Who's Afraid of the 'Big Bad Court'*?, Verfassungsblog, 10 January 2022, available at: https://verfassungsblog.de/whos-afraid-of-the-big-bad-court/ (both accessed 30 June 2025). It added that any power of domestic courts to disapply national legislation contrary to the provisions of EU law first requires revision of the Constitution.

[28] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 246.

[29] First Opinion of the EEA Agreement of 14 December 1991, EU:C:1991:490.

[30] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 247.

[31] *Ibidem*, para. 254.

[32] *Ibidem*, para. 252.

of domestic law that withholds from the court the power to disregard a national rule or practice which might prevent EU rules from having full force and effect is incompatible with the requirements which are the very essence of EU law.[33] The reasoning of the Court constituted a concise, yet rich summary of its case law on the principle of primacy. What was novel was the reference to the equality of MSs before the Treaties as the justification of that principle.

In *Euro Box Promotion* the CJEU stated that "[it] must be added that Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties. However, the Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature."[34] The reference to the equality of MSs before the Treaties as the normative basis of the primacy principle was strengthened in subsequent cases. In *RS*[35] the phrase "it should be added"[36] disappeared. In *Commission v. Poland* the equality argument was stated even more clearly. The ECJ treated compliance with the primacy principle as "necessary in particular in order to ensure respect for the equality of Member States before the Treaties."[37] This statement was confirmed in its further jurisprudence.[38] It is also worth noting that in *Euro Box Promotion*, as well as in the cases cited above, the subject of the CJEU rulings was issues related to the rule of law, in particular the independence of courts – issues fundamental to the EU legal order. It was in the framework of these cases, in the Romanian and Polish contexts, that the CJEU developed a new justification for the principle of primacy.

3. CONSTITUTIONAL SIGNIFICANCE OF THE EQUALITY ARGUMENT FOR THE PRINCIPLE OF PRIMACY

The CJEU's position, as expressed in its recent jurisprudence, can be construed as corresponding to the views presented in the literature that the principle of primacy is not just a means of resolving bilateral conflicts between two legal orders – the EU's and MSs' – but is first and foremost a grounding principle ensuring that all

[33] *Ibidem*, para. 258.

[34] *Ibidem*, para. 249.

[35] Case C-430/21 *RS*, EU:C:2022:792, para. 55.

[36] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 249.

[37] Case C-204/21 *Commission v. Poland*, para. 77. *See* C. Krenn, *Warum Unionsrecht Vorrang hat: Zur aktualisierten Begründung des Vorrangprinzips in den Urteilen Euro Box Promotion und R.S.*, 1 Europarecht, Beiheft 59 (2024), p. 64.

[38] Joined Cases C-615/20 and C-671/20 *YP and Others*, EU:C:2023:562, para. 62; C-123/22 *Commission v. Hungary*, EU:C:2024:493, para. 122.

MSs are treated equally before the law.[39] Such views were elaborated by Frederico Fabbrini and Koen Lenaerts. Fabbrini was the first to propose the (principle of) equality of MSs as the normative basis of the principle of primacy. He justified this view with an argument referring to a multilateral perspective. As he explained, the struggle for the primacy of EU law should not be interpreted within a bilateral framework – opposing the CJEU to the highest court of a single MS. It should rather be perceived in a multilateral context, where action by one MS (its highest court) also affects the other MSs (and their courts). From this perspective, it stems that only the primacy of EU law can guarantee the equality of MSs before the law.[40] Fabbrini justified the principle of equality of the MSs as the basis of the principle of primacy in the context of the Court judgment in *Costa v. Enel*,[41] where the Court emphasised that "[t]he integration into the laws of each Member State of provisions which derive from the [EU] [...] 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*."[42] Another foundational judgment of the CJEU which justifies the principle of equality of the MSs as the basis of the principle of primacy, according to Fabbrini, is the Court judgment in *Commission v. Luxembourg and Belgium*.[43] In this case, the Court rejected any use by the MSs of general international law instruments of "self-help", such as retaliation and counter-measures, against another MS which failed to respect EU law. It is because the EU has supremacy over national law – and the contracting parties abide by this rule – that the MSs are not entitled to tit-for-tat retaliation for violations of EU law. Hence, a MS (its highest court) should not be allowed to undermine the primacy of EU law, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them.[44]

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[39] K. Lenaerts, *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*, Vefassungsblog, 8 October 2020, available at: https://verfassungsblog.de/no-member-state-is-more-equal-than-others/ (accessed 30 June 2025). *See also* F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) German Law Journal 1003 (2015); V. Perju, *Against Bidimensional Supremacy in EU Constitutionalism*, 21(5) German Law Journal 1006 (2020); K. Lenaerts, *L'égalité des* États *membres devant les traités: la dimension transnationale de la primauté*, 4 Revue du droit de l'Union Européenne 7 (2020); K. Lenaerts, J. Gutierrez-Fons, S. Adam, *Exploring the Autonomy of the European Union Legal Order*, 81(1) Zeitschrift für ausländisches *öffentliches* Recht und Völkerrecht 47 (2021), p. 70.

[40] Fabbrini, *supra* note 39, p. 1005. Fabbrini uses the term "supremacy" which is used here interchangeably with the term the "primacy".

[41] Case C-6/64 *Flaminio Costa v. ENEL*, EU:C:1964:66, para. 585.

[42] *See* Fabbrini, *supra* note 39, p. 1015.

[43] Joined Cases 90/63 and 91/63 *Commission v. Luxembourg and Belgium*, EU:C:1964:80.

[44] *See* Fabbrini, *supra* note 39, pp. 1015–1016.

Three implications of "equality of the Member States before the Treaties" have been emphasised by Lenaerts.[45] Firstly, the uniform interpretation and application of EU law are key for guaranteeing that equality. Secondly, the uniform interpretation of EU law needs to be ensured by one court only, i.e. the CJEU. Thirdly, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court – is "the supreme law of the land", 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 MSs and their peoples are equal before the law. As it is emphasised, those three implications are deeply intertwined.[46] Without uniformity, there is no equality of the MSs before the law. Without the CJEU, there is no uniformity. Without primacy, there is no uniformity, and thus no equality. It is only by the judicial enforcement of uniformity and the primacy of EU law that European citizens find equal justice under that law.[47] According to Lenaerts, since there is an unbreakable link between the equality of the MSs 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."[48]

At the same time, it is worth noting that equality as the principle behind the primacy of EU law can be understood in broader terms than is currently present in the CJEU case law. According to the views presented in the legal scholarship, it is not only the equality of MSs before the Treaties, but also the equality of European citizens that justifies the principle of primacy as determining the relationship between national and EU law.[49] As Ingolf Pernice has underscored when commenting on the Court's judgment in *Costa*, the supremacy of EU law is connected with the principle of non-discrimination. For every individual, the trust in the full respect of equally applicable terms of law by all the others justifies its own obedience. There cannot be privileges nor discrimination. It is ultimately the reciprocity of such mutual trust among citizens as among their MSs which allows a legal system to function.[50] It will

[45] Lenaerts, *supra* note 39.

[46] *Ibidem*.

[47] *Ibidem*.

[48] *Ibidem*. *See also* the interview with the President of the Court of Justice K. Lenaerts – C. de Gruyter, *President Koen Lenaerts: "Europese Hof komt meer center stage"*, NRC, 17 May 2020, available at: https://www.nrc.nl/nieuws/2020/05/17/president-koen-lenaerts-europese-hof-komt-meer-center-stage-a4000000 (accessed 30 June 2025), cited after the translation of Lindeboom, *supra* note 18, pp. 1033–1034.

[49] That argument has been developed by Marcus Klamert. *See* M. Klamert, *Supremacy, the Uniformity of EU Law, and the Principle of Equality*, 9(1) Austrian Law Journal 82 (2022). *See also* Fabbrini, *supra* note 39, p. 1015. Lenaerts, *supra* note 39.

[50] *See* I. Pernice, *Costa v ENEL and Simmenthal: Primacy of European Law*, in: M. Maduro, L. Azoulai (eds.), *The Past and Future of EU Law*, Hart Publishing, Oxford: 2010.

be interesting to see whether this line of argumentation, grounding the principle of primacy not only in the equality of MSs, but also in the equality of EU citizens, shall be developed in the further jurisprudence of the CJEU.

As can be argued, the concept of linking the primacy principle to the principle of equality has profound implications for the status of the former in the EU's constitutional order and for the relationship between EU and national law. Some commentators point out that the new concept reflects a Kelsenian rather than a Hamiltonian perspective for the structure of the legal order.[51] According to Lindeboom, the CJEU's argument on the linkage between primacy and equality is virtually a copy of Kelsen's argument in favour of the primacy of international law, and the shift in the Court's jurisprudence is inconsistent with its previous case law, which fitted rather the Hamiltonian model of the federal legal order.[52] However, as can be argued, the crucial difference from the Kelsenian paradigm is the EU orientation on values.[53] From this perspective, one may argue that by grounding the primacy principle in the principle of equality, the unique architecture of the EU's constitutional structure and the relationship between EU law and national law are further strengthened and developed. Such new foundations reaffirm the primacy principle in the legal order of the EU. Linking the structural, systemic principle of primacy to equality – a substantive, fundamental principle of the EU – reveals a new development in the process of the constitutionalisation of EU law. In this new architecture the principle of effectiveness does not seem to be the grounding (meta)principle for the primacy principle, but rather the concept inherent within the primacy claim.[54] The functionalist approach to constitutionalism seems to be replaced by the turn to values which provide the foundations for the integration process.

However, the CJEU's stance – grounding the primacy principle on the principle of equality – is not free of controversy. The main argument in favour of the view that equality among the MSs provides the legal basis for the primacy principle has been the lack of an exception of non-performance in the system of EU law.[55] This

[51] *See* Lindeboom, *supra* note 18, pp. 1042–1044.

[52] *Ibidem*.

[53] For the value-based conception of equality, *see* K. Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, 54 Common Market Law Review 805 (2017).

[54] That would correspond to the conception of law which includes the primacy claim within it. *See* J. Raz*, The Authority of Law*, Clarendon Press, Oxford: 1979, ch. 2. In other words, to claim the primacy of law means to claim that it ought to be effective. For more on this point, *see* Lindeboom, *supra* note 18, p. 1044.

[55] *See* the Joined Cases 90/63 and 91/63 *Commission v. Luxembourg and Belgium*, EU:C:1964:80 as referred to by Fabbrini, in which the Court rejected any use of inter-state countermeasures for the enforcement of European obligations.

absence is justified by the primacy of EU law. It follows that the MSs should not be allowed to undermine the primacy of EU law, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them.[56] Such reasoning has been questioned be legal scholars.[57] As has been argued, the exception of non-performance is entirely irrelevant to both primacy and equality among the MSs, and the correlation is wrong both ways. Firstly, the doctrine exists in international law notwithstanding the latter's primacy over national law. Secondly, the reason that the doctrine does not exist in EU law is because it has a system of judicial protection which delegates the task of enforcement to national and EU courts.[58] That stems from the ECJ's judgment in *Commission v. Luxembourg and Belgium*.[59] The absence of an exception of non-performance is crucial to the full effect of EU law, but to link it to EU law primacy is to mistake the latter for the modalities of enforcement which the legal order employs.[60]

To address the above argument it seems appropriate to recall the conclusions of recent research on the history of European integration, which are supported by the analysis of scholarly publications by CJEU judges and scholars, both in the 1960s and later.[61] The findings of such research is that three fundamental decisions of the early years of the European integration – *Van Gend en Loos*, *Costa* and *Luxembourg and Belgium* – should be acknowledged as profoundly interconnected, in that applying European obligations in national courts should be understood as a substitute for enforcing European obligations through inter-state countermeasures. Importantly, *Van Gend en Loos* and *Costa* must be understood not just as a vehicle for individual rights, but at least as importantly as an instrument of inter-state law and politics, and that each of these three famous Court's decisions must be studied in the context of its relationship with the other two. The argument goes that the rejection of enforcement through inter-state countermeasures, as set out in *Luxembourg and Belgium*, was premised on the MSs' acceptance of national court enforcement of European law obligations – that is to say, the doctrines of direct effect, as set out in *Van Gend en Loos*, and supremacy, as set out in *Costa*.[62]

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[56] *See* Fabbrini, *supra* note 39; Lenaerts *supra* note 39.

[57] *See* Lindeboom, *supra* note 18, pp. 1032–1044.

[58] *Ibidem*, p. 1037.

[59] Joined Cases 90/63 and 91/63 *Commission v. Luxembourg & Belgium*, EU:C:1964:80, at 631 ("[The Treaty] establishes a new legal order which governs the powers, rights and obligations of the said persons, *as well as the necessary procedures for taking cognizance of and penalizing any breach of it*. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands") [italics added by Lindeboom].

[60] *See* Lindeboom, *supra* note 18, p. 1037.

[61] *See* W. Phelan, *Supremacy, Direct Effect and Dairy Products in the Early History of European Law*, 14(1) International Journal of Constitutional Law 6 (2016).

[62] *Ibidem*, pp. 7, 25.

In view of the above findings, one may defend the view that a link can be construed between the role of primacy in EU law and the absence of an exception of non-performance. That conclusion may lead to construing a link between the primacy of EU law and the equality of MSs. However, the question remains: can the above explanation of the legal/political context of the three fundamental decisions from the early years of European integration (*Van Gend en Loos*, *Costa* and *Luxembourg and Belgium*) serve to exclude the possibility of the MSs performing *ultra vires* control? Such an assumption seems to be inherent in the views of the proponents of the new rationale for the principle of primacy. As has been pointed out in the literature,[63] there are arguments to deny this conclusion: the *Costa* judgment should not be read as rejecting the possibility of *ultra vires* control by the MSs. This judgment refers to unilateral, subsequent measures of the MSs – prohibited by the Court, which should not be equated with *ultra vires* control of the MSs.[64] This perspective suggests that the above-mentioned trio of cases cannot justify formulating the principle of equality in such a way as to exclude *ultra vires* control.[65] However, with respect to such a stance, and the interpretation of the *Costa* judgment in particular, one may construe the counterargument that what is crucial to reconstructing the significance of this case is the notion of autonomy of EU law inherent there. The notion of autonomy implies what was subsequently clearly articulated in the CJEU jurisprudence: the Court alone is competent to determine EU law. In the exercise of that jurisdiction, it is ultimately for the CJEU to clarify the scope of the principle of the primacy of EU law in the light of its relevant provisions; that scope cannot turn on the interpretation of provisions of national law or on a national court's interpretation of EU law which is at odds with that of the Court.[66] By virtue of the principle of the primacy of EU law, a MS's reliance on rules of national law, even of a constitutional nature, cannot be allowed to undermine the unity and effectiveness of EU law.[67] As can be argued, such a position of the CJEU excludes the *ultra vires* control by the MSs, which could undermine the primacy of EU law, and the arguments to reject such a conclusion should not be derived from the textual reading of the *Costa* judgment. There is no doubt that the case law of the Court, when interpreted in the context of its subsequent evolu-

[63] *See* J. Kokott, D. Hummel, *Der Vorrang des Unionsrechts als Ausdruck des Gleichheitsprinzips? zu einem neuartigen Begründungsansatz der Einschränkung einer Ultra-vires Kontrolle durch die Gerichte der Mitgliedstaaten*, 51(1–9) Europaische Grundrechte Zeitschrift 1 (2024), p. 2, referring to the ECJ judgment in *Costa*: "the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws" *also* "the Member States have limited their sovereign rights, albeit within limited fields".

[64] *Ibidem*.

[65] For arguments against challenging *ultra vires* control, *see ibidem*, pp. 4–7.

[66] Joined Cases C-357/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:1034, para. 254 and the case law cited therein.

[67] *Ibidem*, para. 251.

tion, necessitates that the MSs acknowledge the absolute principle of primacy and accept that the CJEU determines the limits of EU law. In this sense, the principle of primacy – which is intrinsically linked to the autonomy of EU law as affirmed and developed through the CJEU's case law – takes on the function of a federalising principle. The principle of primacy is perceived not only as a conflict rule, but also as a principle which excludes *ultra vires* control by the MSs. In its reasoning the CJEU also included this second aspect of this principle,[68] and the strengthening of its justification expressed in its recent jurisprudence is consistent with and supports such an understanding of this principle.

However, the understanding of the principle of primacy developed in the jurisprudence of the CJEU may encounter counterarguments based on constitutional pluralism or the idea that the legitimacy of the EU legal order is derived primarily from national constitutions. It can be argued that the new rationale for the principle of primacy does not invalidate these old arguments, which point, for instance, to the limited scope of the transfer of competences to the EU, or to the fact that the Court's assertion of its exclusive authority to determine EU law cannot prevent national courts, acting within the framework of *ultra vires* review, from interpreting *national law* in a manner that may conflict with the interpretation of EU law provided by the CJEU. The dispute over the ultimate authority within the EU legal framework thus remains unresolved. The only viable path to preventing potential conflicts appears to lie in developing a mutual willingness to cooperate between the CJEU and the highest courts of the MSs.[69] In this context, maintaining the principles of judicial dialogue[70] and acknowledging the existence of certain "red lines" – above all, respect for liberal democratic values – seems essential. From this standpoint, the recognition of *ultra vires* review cannot serve to justify positions such as that taken by the Polish Constitutional Tribunal in its dispute with the CJEU.[71]

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[68] It is worth noting that the principle of equality of the MSs as a justification of the principle of primacy appeared for the first time in the press release issued after the ruling of the German Constitutional Court of 5 May 2020 (*see* fn 19).

[69] *See* Kokott, Hummel, *supra* note 63, pp. 5–7; Krenn, *supra* note 37, pp. 59–69. This presupposes a willingness on the part of national courts to submit preliminary references to the ECJ in cases of potential conflict and, on the part of the Court itself, a readiness to thoroughly and carefully consider such questions, within the framework of open, substantive dialogue that takes due account of the constitutional sensitivities of the MSs (Kokott, Hummel, *supra* note 63, p. 7).

[70] *See e.g.* the conceptualisation of the relationship between the ECJ and the national courts in M.P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in: N. Walker (ed.), *Sovereignty in Transition*, Oxford University Press, Oxford: 2003, pp. 501–538; M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1(2) European Journal of Legal Studies 137 (2007).

[71] For more on this point, *see* A. Sołtys, *The Court of Justice of the European Union in the Case Law of the Polish Constitutional Court: The Current Breakdown in View of Polish Constitutional Jurisprudence Pre-2016*, 15 Hague Journal on the Rule of Law 19 (2023).

While the normative weight of the equality-based argument for resolving the dispute over final authority in EU law may be subject to criticism, its persuasive force should nonetheless be acknowledged and appreciated. As has been observed in the literature on the subject, for a decade now the CJEU has been complementing and indeed overwriting its long-standing functionalist approach to constitutionalism. A new, a principled constitutionalism is emerging that draws from the first nineteen articles of the EU Treaties and activates the potential of the EU's constitutional core.[72] The search for new grounds of the primacy principle can be perceived as a part of this process.

CONCLUSIONS

In its recent jurisprudence the CJEU has indicated new grounds for the principle of primacy of EU law: the equality of the MSs before the Treaties. That stance was built on a vision of the EU legal order where the equality of the MSs before the Treaties, the uniformity of EU law and the primacy of that law are strongly intertwined, and it is the CJEU that guarantees them. It has been argued here that the Court, in its case law, seeking justification for the principle of primacy in arguments of an axiological nature, not only functional ones, can be justified in the post-Lisbon architecture of the EU legal order. Moreover, it is to be expected, given the current threats to values embedded in Art. 2 TEU. However, controversy may arise from the views that such new argumentation on the rationale of the primacy principle already resolves the competing claims of final authority in the EU. As can be argued, the strengthening of the justification of the primacy principle furthers the processes of constitutionalisation of EU law, though it does not override the reservations concerning the absolute primacy principle or the claim that the CJEU is the sole authority to answer the question of Kompetenz-Kompetenz – reservations articulated from the perspective of constitutional pluralism or concepts that derive the legitimacy of the EU legal order primarily from national constitutions. It can nevertheless be argued that this new line of reasoning articulated by the CJEU carries significant persuasive weight in the ongoing debate that is crucial for the future direction of EU integration. The axiological justification of the principle of primacy reinforces its status as a constitutional principle of the EU legal order. It can be perceived as a part of a broader process in which, for over a decade now, the CJEU has been complementing and indeed overwriting its long-standing functionalist approach to constitutionalism.[73] At the core of this process appears

[72] *See* J. Bast, A. von Bogdandy, *The Constitutional Core of the Union: On the CJEU's New, Principled Constitutionalism*, 61 Common Market Law Review 1471 (2024).

[73] As to this process *see ibidem*.

to be the shaping of the EU's constitutional identity. Any confrontation with the principle of primacy, built on such foundations, by the MSs (or their constitutional courts) will inevitably have to take into account these new normative frameworks and justifications.