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THE SPECIFICITY OF EUROPEAN UNION'S LEGAL SYSTEM – ASPECTS RELATED TO THE PRINCIPLES OF PRIMACY AND DIRECT EFFECT

Abstract

The main mechanism for the creation of the norms of international law is the development of multilateral treaties, respecting the fundamental principle known as "pactasuntservanda". There is no dispute that the European Union (EU) law has its origins in international public law. However, even if the EU acts and institutions invariably proclaim the establishment of the internal market – an area of free movement of persons, goods, services and capital – and notwithstanding the gradual strengthening of the elements that demonstrate political and not just economic integration between the Member States, the EU is, strictly speaking, a sui generis international organization. Consequently, EU as organization and its legal system have numerous important specificities. The objective of this paper is to analyse two of those specificities that may be considered as fundamental: its aptitude to prime over the national legal norms of the Member States (Chapter 1 – the principle of primacy) and its general ability to produce a direct effect for physical and legal persons in Member States' domestic legal systems (Chapter 2 – the principle of direct effect).

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Introduction

The originality of the European Union's legal system is mainly due to the innovative solutions introduced by the founders of the Community,[1] which made possible to conceive and run a political entity unprecedented by its institutional structure, internal functioning and competencies. However, the founding treaties have established an institutional and legal system whose all characteristics were not immediately known; it was the European Court of Justice (after the adoption of the Lisbon Treaty: Court of Justice of the European Union) which has progressively defined the fundamental principles of the Community law, in a manner that the current doctrine agrees that "the controversy over the determination of the legal nature of the Community legal system (...) largely faded".[2]The existence of the Community was, in many ways, dependent on the relationship between the law it produced and the national laws of its Member States; in other words, the objectives set by the founding treaties would have been unimaginable without the principle of primacy of the Community/EU law[3]over the

[1] Even though the European Community legally ceased to exist after the adoption of the Lisbon treaty, in this Article we will – in order to put the emphasis on the progressive development of both principles of primacy and direct effect – use both denominations: Community and Union. Moreover, for the Court of Justice of the European Union (as it is officially called after the adoption of the Lisbon Treaty) shall also be used its previous denomination Court of Justice of the European Communities, as well as the acronym ECJ (European Court of Justice). For the Treaty of Lisbon amending the Treaty on European Unionand the Treaty establishing the European Community, signed on December 13, 2007 and entered into force on December 1, 2009, see Official Journal of the EuropeanUnion (OJEU) C 306 of December 17, 2007, p. 1-271; for the consolidated versions of the Treaty on European Unionand the Treaty on the Functioning of the European Union, see OJ C 115 of May 9, 2008, p.13-199.

[2]Blumann & Dubouis, 2008, p. 416.

[3] Of course, this rule can only concern the legally binding EU acts; in addition, the classical constitutional doctrine and the national courts have difficulties to accept that the primacy of the EU law can play against the national constitution, see chapter 1.

national legal norms. In addition, a significant number of EU's legal norms must be capable to directly create rights and obligations for individuals. Therefore, as the European Court of Justice (ECJ) underlined in a synthetic manner, "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law [...] Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States, but also their nationals [...] The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".[4] Consequently, we will first examine the aptitude of the EU law to prime over the national legal norms of the Member States (Chapter 1 – the principle of primacy), before putting some more light on its general ability to produce a direct effect for physical and legal persons in the internal legal systems of the Member States (Chapter 2 – the principle of direct effect).

1. The principle of primacy

The principle of primacy, beyond being one of the fundamental elements defining the character of the EU law, is the legal basis for the functioning of the institutions of the Community/Union[5] as a new political organization. Even if the ECJ has established the principle "very quickly (and) in unequivocal terms"[6], it remains that its judicial consecration was progressive, since the jurisprudence of the ECJ has made important steps for the permanent improvement of the content of the rule which prohibits "the law stemming from the Treaty […] be overridden by domestic legal provisions".[7]

The primacy of the EU law, in spite of its logical and functional relationship with the principle of the primacy of international law over internal legal acts, does not have the same consequences in EU law and classical international law. More specifically, "the difference lies in [...] the requirement that all national authorities, primarily the judge, should not

[4]ECJ, opinion of December 14, 1991 (1/91), p. 21, Col. p. I-6079.
[5] See footnote 1.
[6]Joël 2006: 913.
[7]ECJ, judgment *Flaminio Costa v. ENEL* of July 15, 1964 (case 6/64) Col. p. 1160.

only abstain to apply a national provision contrary to the Community law, but should give the full effect to the legal norm of the Community".[8] In addition, it was also the jurisprudence of the ECJ that has gradually defined the essential elements of this aspect of the EU's legal system. Therefore, our examination of the principle of primacy will be done in two stages: we will first analyse the emergence and continued development of the principle (1.1.), before focusing on the examination of the consequences of the principle and its application in the national legal systems (1.2.).

1.1. The emergence and continued development of the principle

The sources of the EU law of the conventional origin (the founding treaties and their numerous adaptations and modifications before the adoption of the Lisbon treaty)[9] contain no provision which aims to set out *expressisverbis* the principle of primacy of Community law in relation to the national laws of the Member States. Certainly, the "intergovernmental reflex" pushed the founding fathers of the European Economic Community (EEC)[10] to remove the explicit mention of such a principle in the Treaty of Rome, as the classic politico-legal doctrine has always considered that the sovereignty of States opposes the primacy of international law.[11] Even though it was far from clear at the time of the creation of the EEC, the European construction, in the meantime, become an international organization *sui generis*, and therefore, the law adopted by its institutions continually loses its footprint of classical international law.[12] Beyond the political importance of the matter, it is clear that "the methods of resolving

[8]Blumann&Dubouis 2008: 417.

[9]For the purposes of this paper, reference texts will be consolidated versions of the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), published in the Official Journal of the European Union (OJEU) C 321E of December 29, 2006.

[10] The denomination „European Community" replaces the „European Economic Community" since the 1st of November, 1993. The adjective „economic" was removed from its name by the Maastricht Treaty in 1992.

[11]The Lisbon Treaty includes a short declaration (Declaration No 17 on the primacy) which states that "the Conference recalls that, according to 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".

[12]Similarly: Eckert & Kovar (eds.) 2007, p. 18.

conflicts between Community law and Member State law adopted within the various national legal systems still leave much to be desired and are far from uniform".[13]Nevertheless, two draft acts, failed for different reasons and under different conditions, have provided an explicit clause of primacy of the Community law.[14] In the current state of the law and understanding that "the executive force of Community law cannot vary from one State to another […] without jeopardizing the attainment of the objectives of the Treaty [...] and giving rise to the discrimination,"[15] the principle of primacy was to be introduced through the back door. In the silence of the founding treaties and in absence of the capacity of unilateral acts of the Community institutions to establish such a basic rule, it was only the Court of Justice that was able to solve the legal deficiency that threatened the viability of European construction. The first step towards the judicial recognition of the principle of primacy was the ECJ's judgment *Costa v. ENEL*.

The preliminary ruling procedure provided for in Article 267 of the Treaty on the functioning of the EU (TFEU, ex-Article 234 of the TEC) allows the national courts of Member States to ask the ECJ on the validity and interpretation of the Community law. The ECJ judgments– under the preliminary ruling mechanism, originally designed as a technical legal tool whose objective is to ensure the uniform application and interpretation of the Community law – were, well beyond being the mean to ensure that "in all circumstances (Community) law is the same in all Member States", a true source of law. As *P. Pescatore* has appropriately remarked, "it was sufficient to release the Community judicature of multiple barriers existing in international courts to reveal its dynamism and extraordinary fertility".[16] In this case, there was a conflict between an Italian 1962 law on nationalization of electricity and certain provisions of the EEC Treaty.[17]

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[13] Isaac & Blanquet, 2001, p. 202.

[14]This was the case of the draft Treaty on European Union (adopted by the European Parliament on February 14, 1984) and the draft Treaty establishing a Constitution for Europe (published in the OJ C 310 of December 16, 2004); the second attempt to adopt an EU's supreme act (known in the theory as the "Constitutional Treaty") in its Article I-6, under the title "the law of the Union" stated that "the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of Member States".

[15]ECJ, judgment *Flaminio Costa v. ENEL* supra, Col. p. 1159.

[16]Pescatore1972, p. 78.

[17]Since it was the judgment from 1963, here will be used the old numbering of the Treaty establishing the EEC.

The Italian court, wanting to obtain the interpretation of Articles 102, 93, 53 and 37 of the EEC Treaty, stayed the proceedings and ordered the transfer of the case to the ECJ. In its judgment of July 15, 1964, the Court has very skilfully laid the foundation for the rule, and from that date began the long process of its development, deepening and branching. In order to successfully base its reasoning, while remaining within the limits of its jurisdiction, the ECJ stated that "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".[18]In addition, the obligations of States have a legal specificity compared with other conventional interstate commitments, given that "by contrast with ordinary international treaties, the EEC Treaty has 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".[19]After carefully motivated and strengthened this statement, the ECJ was able to declare, in an extraordinarily vigorous and frequently cited formulation, 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 a Community law and without the legal basis of the Community itself being called into question".[20] The Community law was created with the intention to construct an internal market and its primacy is mainly the result of an economic[21] requirement: the unity of the rules on the whole territory.

Despite the strength and accuracy by which the ECJ has introduced the rule of primacy in its landmark judgment of July 15, 1964, many doubts remained about the relationship between various sources of domestic law and Community law. In addition, the ECJ has not the power to annul the national legal norm contrary to the EU law, which is directly opposite to the typical prerogative of a supreme/constitutional courts in federal states, where a constitutional provision ensures the existence of a procedure of the

[18]ECJ, judgment *Flaminio Costa v. ENEL* supra, Col. p. 1159.
[19] Ibid p. 1158.
[20] Ibid p. 1160.
[21]To take the example of the industrial property law, the first Directive of December 21, 1988 to approximate the laws of Member States relating to trade marks in recital 1 states: "the laws that currently apply to marks in the Member States have disparities which may impede the free movement of goods and freedom to provide services and may distort competition within the common market".

verification of compliance of a rule adopted in states with federal rules, supplementing this procedure with a possibility of cancellation of such an act. The only similar procedure (provided for in the founding Treaties)[22]available to the Member States was the action for failure to fulfill obligations. Soon after the impact caused by the decision of the Court in its judgment *Costa v. ENEL*, it was not necessary to wait too long for another ECJ's valuable precision (brought by another judgment in the case *Internationale Handelsgesellschaft*)[23]: Community law prevails over constitutional laws of the Member States. It is certainly not necessary to illustrate how the wording "the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter […] the principles of a national constitutional structure"[24] represented a true revolution for national constitutional courts (in the States having this institution).[25] In other words, following the reasoning of the ECJ, the principle of primacy concerns the entire Community law and applies to all legal norms of the Member States, regardless of their place in the internal legal hierarchy. As final and irrevocable it appears in the reasoning of the ECJ judges, this rule is neither absolute nor functional without the consent and cooperation of institutions of the Member States. European legal and political construction is in constant mutation and progress of the EU law is remarkable in its form, as well as in its contents. Nevertheless, the EU is a particular form of political organization, whose legal system is a dynamic synthesis between international law of an intergovernmental organization and the internal law of a single market. The coexistence of national legal systems and the EU's legal system is more based on coordination than on hierarchy.

1.2. The consequences of the principle and its application in the national legal systems

Even though it was introduced and systematically motivated in the decisions of the Court of Justice of the European Communities, the principle of primacy would have remained a dead letter without the

[22] Articles 226-228 of the TEC.

[23]ECJ, judgment *Internationale Handelsgesellschaft GmbH v. Einfuhr-und fürVorratsstelleGetreide und Futtermittel* of December 17, 1970 (case 11-70), Col. p. 532.

[24]Ibid, point 3, Col. p. 533.

[25] For example, in Finland, one of the committees of the *Eduskunta* (Finnish National Assembly) plays the role of the constitutional court.

precision of its consequences. In addition, the ability to specify the consequences of supranational rules in national legal system remains an important specificity of the EU law in relation to classical international law. More precisely, the EU law is "an integral part of [...] the legal order applicable in the territory of each of the Member States"[26] and this to such an extent that the obligation to uphold the EU legal norm also weighs on Member States' local authorities. As for the national executive authorities, there is no doubt that their "natural instinct" is to apply their national law; however, as the EU law is "an integral part" of the internal legal order (in which it is in the position of primacy over the national legal norms), the national executive authorities are obliged to refuse to apply the national rules, would they be of a legislative character. Therefore, the most important consequence of the principle of primacy, which required a dedication from the ECJ, is the inapplicability of the national legal norm contrary to the EU norm that has a direct effect[27]; as the Court specified, it is "a prohibition […] against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied".[28]

Given the fact that the national courts tend to automatically use the legal remedies and procedures of their domestic law, there is a serious risk of the difference in treatment of the rights or obligations derived from the same provision of EU law in different Member States, or simply a risk that the national judge could apply (to the same facts) one national provision and another (potentially) contrary EU provision. In addition, national courts are more often faced with this kind of problem than national governmental or local authorities. As the ECJ has clearly stated in its judgment *Simmental* of March 9, 1978, "rules of Community law must be fully and uniformly

[26]ECJ, judgment *Finance Administration of the State v. Simmental* of March 9, 1978 (case 106/77), p. 17, Coll. p. 609.

[27]In the general theory of the EU law, it is believed that this is the consequence of the primacy of directly applicable EU norms; of all sources of EU's secondary law, the exemplary act having a direct effect is the Regulation. Therefore, the sources of the EU law that have no direct effect would also be deprived of an automatic primacy. Without entering here in the delicate question of direct effect of Directives, it should be noted that the ECJ admitted, under special conditions, the possibility of direct effect of a Directive (see 2.2).

[28]ECJ, judgment *European Communities v. Italian Republic* of July 13, 1972(case 48-71) point 7, Col. p. 529.

applied in all the Member States from the date of their entry into force and for so long as they continue in force".[29]Therefore, the mission and the freedom of the national court must be framed to ensure the effectiveness of the internal primacy of the EU law. This framework, defined brilliantly by the ECJ, is summed up in the principle that the national courthas to avoid the application of its internallegal norm contrary to the EU law on his own authority, without waiting for its elimination by national legislation or cancelation through the appeal procedure before the national supreme court. In any event, the result of the principle of primacy is a real limitation of the possibility of returning to the national procedural autonomy. In an ideal situation of full compliance with the EU law by all state authorities, the analysis of the consequences of the principle of primacy could (without any concern for the completeness and consistency of our research) stop here.

Nevertheless, the situation where all the national authorities respect and apply the EU law in its entirety is purely imaginary and represents an unattainable ideal. Moreover, besides the fact that the activity of central authorities can affect relations EU– Member State, any other nationalauthority may also cause damage to the individual by non-compliance of the national law with Community law. Article 10 of the Treaty establishing the European Community was clear and unconditional concerning the obligation of Member States "to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community," but it remained silent regarding the question of whether it also comprise the obligation to repair the damage caused by non-fulfilment or incomplete fulfilment. In order to answer to this question, it was, again, necessary to wait for the ECJ; in its judgment *Francovich and Bonifaci*[30] the Court developed a clear answer to which it continues to contribute. In this case, the problem was non-transposition of a Community Directive into national legal system and the situation was specific from two points of view:

1) there was a proceedings involving individuals and Italian Republic, in which the issue was not a national rule explicitly contrary to the Community law and, therefore, the principle of primacy which consists

[29]ECJ, judgment *Finance Administration of the State v. Simmental*supra, p. 14, Coll. p. 629.

[30]ECJ, judgment *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* of November 19, 1991 (cases C-6/90 and C-9/90), Col. p. 473.

of "prohibition to apply a national rule recognized as incompatible" could not be applied as such;

2) by reason of its nature, the Directive in question was not endowed with direct effect, so it was necessary to precise the cases when it can be invoked by individuals.

Regarding point 1, the principle laid down by the ECJ was clear: Member States are obliged to repair the damage (for which they are responsible) caused to individuals by the breach of Community law. Therefore, the conditions[31]under which the Member State can be responsible for the damage caused to its nationals for non-transposition of a Directive clearly show that this is a judicial definition of the consequences of the principle of primacy. As indirect, conditional and "minimal"[32] it may be, it is clear that this judgment states that the principle of primacy of Community law is as applicable to individuals as it is for the relationship between national and EU legal systems. In ECJ's posterior decisions, this applicability has been repeatedly refined and enriched.

The Member State has the obligation to repair the damage caused to the individual by non-compliance of national legal norms with Community law, even if it is attributable to the national legislature,[33] the local authorities,[34] the public body independent of the State[35] or the national supreme court.[36] The importance of this last judicial assertion becomes even clearer when one considers that the judgment in case *Köbler* was adopted in ECJ's plenary session; beyond its symbolic weight, that judgment is also exemplary for the answers it brings about the relationship between the national legal systems and the EU law. As regards the liability for the

[31] Those conditions are: 1) the result envisaged by the Directive entails the grant of rights to individuals; 2) the content of these rights is defined by the Directive and 3) there is a causal link between the breach of Community law and the damagecaused to the individual.

[32]For Isaac and Blanquet, in this case a "the primacy resulted in a minimal right to invoke", op. cit, p. 206-207.

[33]ECJ, judgment *Brasserie du pêcheur SA v. Bundesrepublik Deutschland and The Queen against Secretary of State for Transport, ex parte Factortame Ltd and Others* of March 5, 1996 (cases C-46/93 and C-48/93).

[34]ECJ, judgment *Klaus Konle v. RepublikÖsterreich* of June 1, 1999 (case C-302/97).

[35]ECJ, judgment *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* of July 4, 2000 (case C-424/97).

[36]ECJ, judgment *Gerhard Köbler v. Republik Österreich* of September 30, 2003 (case C-224/01).

breach of an international obligation, the classical doctrine of the international law on the unity of the State (as a logical counterpart of its constitutional and procedural autonomy) must, *a fortiori*, be applicable in the EU law.[37] Moreover, the invocation by the national courts of the principle of *res judicata* to refutethe review of their decisions cannot be accepted because "the applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage"[38] and, secondly, because "the principle of State liabilityinherent in the Community legal order requires such reparation, but not revision of the judicial decision."[39]It should be noted that twelve years[40]of constant and intensive jurisprudence of the ECJ were sufficient to the Court to go from the consecration of the principle of primacy to the claim that it has become "inherent to the Community legal system". To bridge the initial gap of EC's legal structure (the absence of conventional legal norms), the Court was obliged to significantly deepen the principle of primacy, one of the cornerstones of European integration. However, its implementation can still vary considerably from one Member State to another, following their legal, judicial and academic traditions, as well as the requirements imposed by their own constitutional developments.

2. The principle of direct effect

The *sui generis* character of the European Community was already noticeable after the announcement of its main objective: "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities [...] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and

[37]"That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals", ECJ judgment *Gerhard Köbler v. Republik Österreich*, p. 32.
[38]*Ibid*, p. 39.
[39]*Ibid*.
[40]The time that has elapsed between judgements *Francovich* (November 19, 1991) and *Köbler* (September 30, 2003).

non-inflationary growth [...] raising of the standard of living and quality of life, economic and social cohesion and solidarity among Member States".[41]The very formulation of this Article shows that the founding treaty is much more than an agreement whose only mission is to create mutual obligations between States and, therefore, the Community legal order already had a vocation to reach directly the national of a Member State. This vocation, known in doctrine of EU law as "direct effect", represents another important specificity of EU law in relation to the classical international law. As it was the case with regard to the principle of primacy, the Court has gradually established and defined the content of the principle of direct effect. In addition, the application and scope of this principle depends on the type of European legal act and, in some cases, on compliance with certain conditions. Finally, the recent jurisprudence of the ECJ, providing a new interpretation of the effects of the primacy of EU law, also suggests the possibility to go further in understanding of the principle of direct effect. Therefore, the question of direct effect of EU legal norms leads us to consider the affirmation and the content of the principle (2.1.), before examining its application criteria and further development (2.2.).

2.1. The affirmation and the content of the principle

The ability of a legal norm belonging to the classical international law to be applied in the internal legal order without any mediation of national law is an exception: for it to become self-executing,certain conditions must be met. In other words, when interpreting an international treaty, the decisive criterion to determine whether a provision is self-executing is the intention of the parties. In addition, the parties' intention is never presumed, it must be marked either by an express stipulation stating that a treaty provision can directly be the source of law in sovereign states, or by indirect stipulation stating that individuals are the addressees of this concrete provision. It follows from the foregoing that the norm of international law reaches the individual (without the mediation of national law) rarely and under specific conditions. On the other hand, the entirety of rules of the EU law have an intrinsic possibility to produce rights and obligations for individuals.[42] This "direct influence to the legal status of

[41]Article 2 of the EC Treaty. This provision corresponds to that of the current Article 3 of the TEU.

[42]"The Community constitutes a new legal order [...]the subjects of which comprise not only Member States but also their nationals", ECJ judgment *Van Gend & Loos* of February 5, 1963 (case 26-62), p. 23.

individuals"[43] also means that this represents the creation[44]of a direct relation betweenresidents of the Community/Union and its law. As it was the case of the principle of primacy, the concept of direct effect of Community law is judge-made; it has been established in February 1963, by the judgment of the ECJ known as *Van Gend & Loos*whose wordingis quite revolutionary: "independently of the legislation of Member States, Community law not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage".[45] To specify their extent, the ECJ added that "these rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined wayupon individuals as well as upon the Member States and upon the institutions of the Community".[46] Nevertheless, development and enhancement of the principle of direct effect becomes much more apparent after an analysis of the subject matter of the judgment *Van Gend & Loos.*The object of the preliminary ruling was to determine whether the Article 12 of the TEEC has an internal effect, so that the nationals of Member States may assert (based solely on this Article) individual rights which national courts must safeguard. The question was particularly interesting, since the Article 12 of the TEEC was aimed (by introducing the prohibition of customs duties or charges having equivalent effect on imports and exports between Member States) to establish a common market, designated as a main tool for the realisation of the mission of Community announced by Article 2 of the Treaty. According to the observations of some Member States, the conclusion that Article 12 can produce a direct effect could not be sustained, because, by the provision in question, the Community law is addressed to Member States; moreover, the Advocate General adopted a favourable view on these observations. However, evoking the spirit, the text and the scheme of the Treaties, the ECJ has significantly moved away from a purely textual and subjective reading, in order to embrace the teleological

[43]Simon 1998: 134.

[44]The scope of the principle of direct effect is different for different sources of Community law. In addition, one should take into consideration the case-law of the ECJ regarding the conditions for the direct applicability and the fact that "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 and to the diligence of the Commission and of the Member States", ECJ judgment *Van Gend & Loos*, p. 25.

[45]Summary of the judgment *Van Gend & Loos*, p. 3.

[46]*Ibid.*

and systematic interpretation, allowing to assert that "the fact that under this Article (12) it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation".[47]In addition, the existence of the infringement proceedings against a Member State for non-compliance with its obligations under the Treaty is not sufficient to negate the direct effect of its provisions, since "the fact that these Articles of the Treatyenable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations, does not mean that individuals cannot pleadthese obligations, should the occasion arise, before a national court, any more than the fact the Treaty places at the disposal of the Commission ways of ensuringthat obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national courts, of pleading infringements of these obligations".[48] Moreover, beyond the establishment of a common market and notwithstanding the existence of infringement proceedings, the institutional structure of the EU itself clearly indicates that the individual is the subject of EU law: the European Parliament is elected by direct universal suffrage, while the Economic and Social Committee ensures the quality of life, social protection and employment of EU citizens.

Given the fact that "the States have acknowledged that Community law has an authority which can be invoked by their nationals before (their) courts and tribunals,"[49] every EU citizen has the right to demand from the national court the application of legal norms having direct effect against national authorities[50] (vertical direct effect) or against other individuals

[47]ECJ judgment *Van Gend & Loos*, p. 24.
[48]*Ibid.*
[49] Ibid.
[50]The term "national authorities" should be understood as widely as possible. For a list of these authorities, one can only be inspired by the case-law of the ECJ concerning the obligation of the various bodies and/or institutions of the Member States to repair the damage suffered by the individual for non-compliance with Community law. The obligation to repair exists even if the damage is attributable to the national legislature (the judgment *Brasserie du Pêcheur-Factortame*), the local community (judgment *Konle*), the public body independent of the state (the judgment *Haim*) or the national supreme court (judgment *Köbler*). The most interesting here is the fact that the content of one principle of Community law (direct effect) can be specified on the basis of the case-law concerning another (primacy).

(horizontal direct effect). In principle, this invocation of Community law before the national court is not contrary to the principle of national procedural autonomy: "it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions Community law".[51] However, a rigid implementation of the principle of national procedural and institutional autonomy can cause considerable variations from one Member State to another with regard to the implementation and scope of the provisions of Community law. Therefore, it may cause some differences in treatment or, *ultima ratio*, the legal position of EU nationals can be vastly different in case of the same EU provision, situation which can cause unacceptable inequalities in "area of freedom, security and justice".[52] It is clear that, in the present state of its development, the effectiveness of the EU law depends very much on its application by the national courts; for that reason, the ECJ has worked on the framing of national procedural autonomy, to ensure proper application of the EU provisions having direct effect. Generally,[53] the procedural autonomy is tempered by the principles of equivalence (action based on Community law must be governed by the same rules as those governing purely internal situation) and effectiveness (the appeal provided by national law cannot make it "virtually impossible or excessively difficult"[54] the protection of rights based on EU provisions having direct effect).

In any respect, the positive consequences of the principle of direct effect outweigh the benefits it brings to individuals (although this is its most important result). Often coming in support of the mechanism of infringement and reinforced by a proper application of the principle of primacy, the direct effect confirms Union's *sui generis* character and ensures direct relationship between EU nationals and its legal system.

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[51]ECJ, judgment *ZentralfinanzeG and ReweRewe-Zentral AG v. Landwirtschaftskammerfür das Saarland* of December 16, 1976 (case 33/76), p. 5, Col. p. 1989.

[52]Article 3-2 of the Treaty on European Union (former Article 2 TEU).

[53] Here we will not consider the consequences of the principle of subsidiarity on the national procedural autonomy regarding the implementation of the EU provisions having direct effect, since the question of the procedural autonomy of the Member State arises only in the absence of the EU legislation on the matter.

[54]This formula is regularly repeated in ECJ judgments (eg. Judgment *Bianco and Girard* of February 25, 1988 (cases 331-376 and 378/85), Col. p. 1099.

2.2. The application criteria and further deepening of the principle

Any EU legal act has a potential aptitude to produce a direct effect; however, certain conditions must be met so that this aptitude becomes a reality. The application criteria of the principle of direct effect are different for various sources of EU law and, moreover, they vary according to the intrinsic characteristics of the legal act in question. In other words, knowing the exact hierarchical position of a provision in the EU legal system is a necessary, but not always sufficient step to determine whether it can produce a direct effect. The systematization of material characteristics of a provision confirming its ability to produce such an effect is elaborated by the jurisprudence of the ECJ.[55] Through the mechanism of questions referred to the ECJ for a preliminary ruling (under Article 267 of the TFEU), this Court has developed a coherent system of rules for determining whether an EU legal norm is "intended to confer upon them rights which become part of (the) legal heritage (of individuals)".[56]

Regarding the founding treaties, certain provisions have a full direct effect, since they produce cumulatively avertical direct effect (the effect that may be invoked against national authorities and EU institutions) and a horizontal direct effect (ability to confer rights and obligations upon individuals in their inter-personal relationships). In the first place, it is the case when the provisions of the Treaty explicitly confer obligations to the Member States and certain categories of individuals (usually legal persons), including an implicit allocation of rights to other categories of individuals (generally physical persons). For example, "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited,"[57] while the"restrictions on the freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member other than that of the person for whom the services are intended"[58]or "freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment,

[55]The important phenomenon of the case-law of the ECJ as a law-making activity largely exceeds the needs of our research in this paper. However, we shall only note that in EU legal theory it is necessary to rule out a rigorous and classical understanding of the theory of separation of powers.
[56]Summary of the judgment *Van Gend & Loos*, p. 3.
[57]Article 43 of the TEC, now Article 49-1 of the TFEU.
[58]Article 49 of the TEC, now Article 56-1 of the TFEU.

remuneration and other conditions of work and employment".[59] Secondly, it is the case when the provisions of the Treaty explicitly confer obligations to the Member States[60] and/or certain categories of individuals (companies), including *ipso facto* the possibility for these provisions to produce direct effect in inter-individual legal relations: "shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".[61]

A second group of sources of primary EU law consists of provisions having a partial direct effect, since they produce only the horizontal direct effect. Logically, these provisions can only be invoked against national authorities, because they include obligations or prohibitions intended for Member States, as, for example, the provisionsolemnly declaring that "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".[62]Since the number of those provisionsexceeds the number of provisions having a full direct effect and bearing in mind that the direct effect has a high importance for EU law, it can be concluded that the horizontal direct effect is a classic effect, at least regarding the founding treaties.

Finally, there has to be mentioned that a number of provisions of primary EU law has no direct effect, simply because a) their function is to

[59]Article 39-2 of the TEC, now Article 45-2 of the TFEU.

[60]At first glance, Section 1 – "The rules applying to undertakings" of the first chapter, title VI of the TEC was not addressed to the Member States and specifically targeted companies. However, the system of Community. competition rules importantly includes Member States, often with certain explicit obligations already contained in the founding treaties, as it is the case of Article 86: "In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89". This reference to all provisions of Chapter 1 clearly shows to what extent the system of Community competition rules requires the participation of the Member States.

[61]Article 81-1 of the TEC, now Article 101-1 of the TFEU.

[62]Article 12-1 of the TEC, now Article 18-1 of the TFEU.

address some procedural issues[63]; b) they relate to aspects of the establishment of the common market which may not have direct consequences for individuals[64] or c) for other reasons specified in the extensive case-law of the ECJ.[65]

The Community legal actthat generates the least uncertainty about its ability to producea direct effect is the Regulation; the reason is simple: Article 249 of the TEC (now Article 288 of the TFEU) states that it has "general application" and "shall be binding in its entirety and directly applicable in all Member States".[66] In any event, it is a full direct effect (it can be invoked against Member State and EU authorities, as well as in interpersonal relationships), since this effect is required by its character and function in the EU legal system. Nevertheless, despite its full and immediate applicability,[67] regulations oftenrequire (in some situations) a national measure (legislative or, more frequently, administrative) of application. As "automatic" and limited it may be, this national measure may deprive of any direct effect certain provisions of a Regulation: "although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those

[63]This is the case of the provision of Article 97 of the TEC (ex-Article 102 of the TEEC): "Where there is reason to fear that a provision laid down by law may cause distortion within, the Member State desiring to proceed therewith shall consult the Commission; the Commission has power to recommend to the Member States the adoption of suitable measures to avoid the distortion feared", ECJ judgment *Costa v. ENEL* supra, Col. p. 1159.

[64]The provisions of the TEC were prohibiting any aid granted by Member States, ECJ judgment *Iannelli&VolpiSpA v. Ditta Paolo Meroni* of March 22, 1977 (case 74/76) Col. p. 557.

[65] For example, ECJ judgments *GimenezZaera* of September 29, 1987 (case 126/86) concerning Articles 136 and 137 of the TEC (social policy) and *Schlüter* of October 24, 1973 (case 9/73) on Article 10 of the TEC (principle of collaboration and Community loyalty).

[66]Article 249-2 of the TEC (now Article 288-2 of the TFEU).

[67]The ECJ stated that the direct applicability of regulations not only causes the futility of any national measure of transposition, but also includes the prohibition of such an internal act: "all methods of implementation are contrary to the Treaty, which would have the result of creating an obstacle to the direct effect of Community regulations and jeopardizing their simultaneous and uniform application in the whole of the Community" - ECJ judgment *Commission v. Italy* of February 7, 1973 (case 39/72), p. 17.

regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none theless necessitate for their implementation, the adoption of measures of application by the Member States".[68]It follows from such a decision of the Court that the regulations, while keeping their numerous specificities compared to the directives, sometimes share with them the complexity regarding their direct effect.

Directive as source of EU law, in principle, does not have a direct effect, since it presupposes the existence of national measures (most often legislative) of transposition into national legal system: "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".[69] Despite this, as in many other cases, the case-law of the ECJ has led to the reasoning that brings a lot of nuances (in this case, very complex) to the original rule and, under certain conditions, allows the direct effect of Directives. Anyway, if the provisions of a Directive have been properly transposed (in the material sense and in a timely manner), individuals are attained only through the national transposition measures, and, consequently, there is no direct effect of a Directive. However, the possibility of direct effect appears only in a particular situation, when two sets of conditions are simultaneously met: a) after the expiration of the deadline for its transposition into national legal system, the Directive in question remained non-transposed or has been transposed in a defective manner and b) the provisions of the directive are sufficiently clear, precise and unconditional.

As to the first condition, it is theoretically an adaptation (indirect but certainly adequate) of the old rule of Roman law *nemo auditurpropriamturpitudinemallegans*[70]: "a Member State which has not adoptedthe implementing measures required by the Directive within the prescribed period may not plead, as against individuals, its own failure to

[68]ECJ, judgment *Monte ArcosuSrl* of January 11, 2001 (case C-403/98), p. 26.

[69]Article 249-3 of the TEC (now Article 288-3 of the TFEU).

[70]The meaning of this maxim of Roman contractual law of contracts is literally: no one is entitled to rely on its own wrongdoing. More specifically, party which, in a contractual relationship, caused the nullity of the contract, cannot invoke this nullity to exempt itself from an obligation under the contract.

perform the obligations which the Directive entails".[71] However, the second set of conditions raises more doubts. Uncertainties related to the clarity of a provision can always be dispelled by judicial interpretation; however, the accuracy of the provisions should be such that each choice of national authorities on modalities or content of the implementation must be very limited or non-existent.[72] Finally, the unconditional character of a Directive, as one of the most discussed questions both in theory and in jurisprudence, can be summed up in the principle that, generally, the national implementing measure must be predetermined in the text of Directive in such a way that this predetermination severely limits the discretion of the national authority.[73]

Notwithstanding the fact that the principles of primacyand direct effect are distinct, well establishedrules of EU law, they are related to the extent that their overlapping begins to overcome the stage of mutual

[71]ECJ, judgment *Ursula Becker* of January 19, 1982 (case 8/81), Col. p. 224.

[72] Good example of the limited legislative discretion of the Member State is the EU's legislation on consumer protection: „Those provisions are sufficiently precise to enable the national court to determine upon whom, and for whose benefit, the obligations are imposed. No specific implementing measure is needed in that regard. The national court may confine itself to verifying whether the contract was concluded in the circumstances described by the Directive and whether it was concluded between a trader and a consumer as defined by the Directive", ECJ, judgment *Paola Faccini Dori* of July 14, 1994 (case C-91/92), p. 14.

[73]Concerning the unconditional character of a Directive, the latitude of Member States' legislative action exists, but it is always possible to determine some fundamental rights of individuals: „Articles 4 and 5 allow the Member States some latitude regarding consumer protection when information is not provided by the trader and in determining the time-limit and conditions for cancellation. That does not, however, affect the precise and unconditional nature of the provisions of the Directive at issue in this case. The latitude allowed does not make it impossible to determine minimum rights. Article 5 provides that the cancellation must be notified within a period of not less than seven days after the time at which the consumer received the prescribed information from the trader. It is therefore possible to determine the minimum protection which must on any view be provided", ECJ, judgment *Paola Faccini Dori* supra, p. 17.

reinforcement.[74] Starting from the mid-eighties,in the jurisprudence of the ECJ was established a division between direct effect and possibility to invoke an EU legal norm, in the sense that a provision apparently devoid of direct effect may be invoked before the courts because of its primacy. In other words, an individual may derive certain benefits directly from a provision of EU law, even if this provision does not meet all the requirements necessary for "classic" direct effect; the consequence is that the primacy virtually encroaches on the domain of the other fundamental principle of EU law affecting the legal status of individuals without conferring "uponthem rights which become part of their legal heritage"[75] in the narrow sense of the term. Accordingly, a provision of EU law not having a direct effect may be invoked before the national court because of its primacy. On the basis of more than forty years of ECJ's jurisprudence, it is quite complex to determine when this "invokability" can actually take place. However, the teleological and comparative analysis shows that the case-law of EU's highest court was quite unambiguous on the following three situations:

a) a provision of EU law can be invoked before a national court in order to achieve the inapplicability (but not always annulment)[76] of the conflicting national provision; this only results in non-application of the national provision, while immediate implementation of an EU legal norm requires the direct effect;

[74]Without any doubt, even before the process we called "further deepening of the principle of direct effect" has begun, it was always the principle of primacy that, if properly applied by the competent national authorities, was in a position to support the principle of direct effect.

[75]Summary of the judgment *Van Gend & Loos*, p. 3.

[76]In any event, a formal annulment is always a better solution, favourable for legal certainty within the EU. Concerning a provision of the EU law having a direct effect, the ECJ found that "although the objective legal position is clear, namely, that Article 48 and Regulation 1612/68 are directly applicable in the territory of the French Republic, nevertheless the maintenance in these circumstances of the wording of the *Code du travail maritime* gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on to Community law", ECJ, judgment *Commission v. French Republic* of April 4, 1974 (case 167/73), p. 41, Col. p. 628.

b) a provision of EU law can be invoked in order to get the compensation for damage caused by non-implementation or incomplete implementation of a provision of EU law[77] or, at least,
c) an EU legal norm can be invoked in order to obtain the interpretation of a national provision in the light of the EU law,[78] with a view to ensure its efficiency in the national legal system.

Conclusion

It is clear that the EU law is in a constant process of mutation and development; the main principles, analysed in this paper, that define the character of this new legal system are known for a long time, but "as a new form of international organization, the Community requires the application of the principles of international law and the theory of international organizations, on the basisof which is materialized the maturation of the legal system of the Community, by a progressive incorporation of mechanisms from the general theory of the state in internal laws".[79] On the other hand, the establishment of a common market, task whose implementation also depends on a highly coordinated national legal systems, requires the introduction of the concept of global EU's interest, which "has the merit of insisting on the fact that it is in the interest of the legal system wanted collectively by the Member States and not by the sum or average of individual interests".[80] Overits numerousand profound changes during more than half a century elapsed between the adoption of the Treaty of Rome and the entry into force of the Lisbon Treaty, the

[77]It was found in the sub-section 1.2. of this paper that the Member State is obliged to repair the damage caused to the individual for failure to comply with EU law, even if that loss is attributable to the national legislature, the local authority, the public body independent of the state or the national supreme court, see footnotes 34-37.
[78] As the ECJ underlined in one of its judgments: "in applying the national law […], national courts are required to interpret their national law in the light of the wording and the purpose of the Directive", ECJ, judgment *Sabine von Colson and Elisabeth Kamann* of April 10, 1984 (case 14/83), p. 26, Col. p. 347.
[79] Michel, 2003, p. 29.
[80]Eckert, Kovar and Ritleng (eds.), 2007, p. 30.

European Union has becomea political entity *suigeneris*, half way between an international organization and a para-federal structure of shared sovereignty. Consequently, it is reasonable to predict that the specificity of EU's normative structure shall continue to depend on its complex relations with national legal systems.

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SPECIFIČNOST PRAVNOG PORETKA EVROPSKE UNIJE – ASPEKTI VEZANI ZA PRINCIPE PRVENSTVA I DIREKTNE PRIMENLJIVOSTI

Apstrakt

Osnovni mehanizam za stvaranje normi međunarodnog prava je zaključivanje multilateralnih međunarodnih ugovora, uz poštovanje fundamentalnog principa“pactasuntservanda”. Nema sumnje da pravo Evropske unije (EU) ima svoje poreklo u međunarodnom javnom pravu. Međutim, iako akti i institucije EU sistemski proklamuju da imaju za cilj uspostavljanje unutrašnjeg tržišta – zone u kojoj je zagarantovano slobodno kretanje ljudi, dobara, usluga i kapitala – i pored toga što je uočljivo postepeno jačanje elemenata koji ukazuju na političku, a ne samo ekonomsku integraciju država članica, EU se i dalje može okarakterisati kao sui generis međunarodna organizacija. Iz rečenog proizlazi da EU kao organizacija i njen pravni sistem imaju brojne značajne specifičnosti. Cilj ovog članka je da analizira dve od navedenih specifičnosti koje se mogu smatrati posebno značajnim: sposobnost normi pravnog poretka EU da uživaju prvenstvo u odnosu na norme unutrašnjih pravnih poredaka država članica (Poglavlje 1 – princip prvenstva) i činjenicu da mogu proizvoditi direktno dejstvo za fizička i pravna lica u unutrašnjim pravnim sistemima (Poglavlje dva – princip direktne primenjivosti).

Ključne reči: pravo Evropske unije, princip prvenstva, princip direktne primenljivosti, direktiva, Sud pravde Evropske unije (Evropski sud pravde).