THE PRINCIPLE OF DIRECT APPLICATION AND PRIORITY OF EUROPEAN LAW

MARIN Ştefan – Claudiu(*)

ABSTRACT
ONE OF THE MOST IMPORTANT ASPECTS OF COMMUNITY LAW IS THE IMPACT ON THE LEGAL SYSTEM OF THE MEMBER STATES, THE EUROPEAN COMMUNITIES DEVELOPING OVER TIME IN AN ORGANIZATION OF STATES WITH A RELATIVELY INDEPENDENT JUDICIARY SYSTEM. PRIORITY REPRESENTS AN ESSENTIAL REQUIREMENT OF COMMUNITY LAW; COMMUNITIES PURSUING AND ACHIEVING OBJECTIVES OF A COMMON MARKET REQUIRES UNIFORM APPLICATION OF COMMUNITY LAW.
I THINK THAT ONE OF THE FOUNDATIONS OF THE EUROPEAN UNION IS REPRESENTED BY A NEW LEGAL ORDER IMPOSED IN RELATION TO NATIONAL LEGAL SYSTEMS. WHAT IS INTERESTING TO RESEARCH IS THE WAY THIS IMPOSITION IS GOING TO HAPPEN. REGARDING TO THE NATIONAL AND INTERNATIONAL LAW THERE ARE TWO CONCEPTS ON THE RELATIONS BETWEEN THEM: DUALISTIC OR MONISTIC.

KEYWORDS: EU LAW; DIRECT APPLICATIONAND PRIORITY; DUALISM; MONISM; COURT OF JUSTICE

1. Is the Community law a new legal order?

By establishing the European Communities (and later the European Union), Member States agreed to give up some sovereignty attributes which characterize them in favor of a supranational entity; this way, they give up willingly (by transferring) a set of national attributes, their recovery being possible only in exceptional circumstances, like when a Member State is firmly decided to terminate its membership and leaves the Union. Thus, it is understood that the above attributes cannot be restored to the authorities of the Member States; therefore, the transfer of power to EU institutions is considered to be

irreversible.[1] The integral cession is granted because is not allowed any sort of discrimination between states, in this regard, one or more Member States may not waive a lesser extent of those attributes at the expense of others who might be forced to abandon major powers, this way giving rise to inequality. Consequently, it must be strictly observed until the last detail the principle of equal treatment, and by this I mean that no Member State is entitled to benefits other than those that can be easily obtained from a fair distribution of rights and duties and the correct application of Community law. I think that the principle of solidarity should be considered to ensure a better balance between Member States.

By creating a Community of unlimited duration (unspecified), having its own institutions, legal personality, capable of representing internationally and especially with real competences born from limiting (or transfer) of powers from the Member States to the Community, Member States have limited their sovereign rights, albeit within limited fields, creating a set of legal rules applicable to both citizens and Member States. Integrating the provisions of European Communities to each Member State and, in general, the terms and spirit of the Treaty make it impossible for states to prioritize a unilateral measure subsequent to a legal system accepted by them based on reciprocity.[2]

Giving up of certain attributes of sovereignty is highlighted *expressis verbis* in some of the Member States fundamental laws, such as France, Germany (article 23 of the Basic Law - Grundgesetz) or Greece. Thus, in France Constitution[3], in article 88, paragraph (1) it is written: "*The Republic shall participate in the European Communities and the European Union, consisting of states that have chosen freely, under treaties that have established joint exercise some of their powers*." Article 88, paragraph (2) states that "*Subject to reciprocity and in accordance with procedures laid down by the Treaty on European Union, signed on 7 February 1992, France agrees to transfer the competences necessary for the establishment of economic and monetary union*". Greek State emphasizes in its own fundamental law[4] at article 28, paragraph (3) that "*Greece may freely do under a*

---

* *Masterand în cadrul Universităţii "Constantin Brâncuşi" din Târgu-Jiu, la Facultatea de Relaţii Internaţionale, Drept şi Ştiinţe Administrative, specializarea Administraţie Publică Europeană*

[1] Manolache, Octavian; *Tratat de drept comunitar, Ediţia a V-a*, Bucureşti, C.H. Beck, 2006, p. 65 *apud* Gyula, Fábián; *Primordialitatea dreptului Uniunii Europene faţă de dreptul naţional al statelor membre care vor să adere la această Uniune*, în *Dreptul*, nr. 3 - 1996, p. 8

[2] Ştefan, Tudorel şi Andreşan – Grigoriu, Beatrice; *Drept comunitar*, (Bucureşti: C.H. Beck, 2007), 190

[3] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/constitution/constitution_roumain.pdf, accessed at September 7, 2012

[4] http://www.servat.unibe.ch/icl/gr00000_.html - accessed at september 7, 2012

law passed by an absolute majority vote of all members of Parliament to limitations on the exercise of national sovereignty, provided that this is dictated by a major national interest, do not affect human rights and fundamentals democratic system and be carried out in accordance with the principles of equality ".

Regarding to Community law we can distinguish two[5] characteristics. Firstly that Community law order is autonomous, by this understanding both the autonomy of sources and concepts of Community law, regulation judicial disputes (involving community jurisdictional authorities) and EU rules which cannot be made ineffective by national legal provisions. Second, Community legal order is a legal order built into the legal system of the Member States (and here we mean both the subjects of Community law - which are not only Member States but also people, individuals - and national authorities which applies Community law rules); it is important that the appliance must be identical in space and time.

I think that one of the foundations of the European Union is represented by this new legal order imposed in relation to national legal systems. What is interesting to research is the way this imposition is going to happen, or whether Community law will have a life of its own, independent of national legal systems and it will be integrated in some way be national systems, whether in a hierarchical system.

2. The relation between legal systems in terms of monism and dualism

Regarding to the national and international law there are three concepts (or theories)[6] on the relations between them, dualistic or monistic. In the dualistic sense, international law and national law are separate legal system, equal and independent, so that international law rules have no value regarding to national law and *vice versa*, so they must be transformed into internal law rules (which are the only that organs and state courts may apply), but this would cause the possibility of amending or even repeal them by a subsequent law. However, in practice is not common that the transformation to be made by reproducing it.

EU Member States are not characterized by a completely dual system, but in all of them international customary law is part of domestic law. However, the international

[5] Manolache, Octavian; op. cit., 65
[6] Manolache, Octavian; op. cit., 67

treaties in countries like Britain, Denmark and Ireland are not directly and immediately applicable in the national law, requiring transformation of the rules resulting from them in national legal rules. In my opinion this system has a number of disadvantages: first, the transformation process can be lengthy, while the amendments, the text can be changed, losing its original meaning. Also, in this way any future national law can prevail over the law incorporating international rules (but this system is not applicable for transformation of decisions issued by international organizations, such acts maintaining their purpose). Regarding the second version of dualism, or mitigated dualism, met in Germany and Italy, prior to government accession to international treaties is necessary to obtain parliamentary approval; in this case the general rules of international law are binding and have priority over domestic legislation. Mitigated dualism name comes from the fact that the law approving the treaty also incorporates, any modifications not being possible.

According to the monist theory, there is only one legal system, which encompasses both international and internal law in a unitary system of rules placed in a hierarchy. Monism has two variants, the primacy of internal law and the primacy of national law but in both variants international law, in internal application, do not qualify as domestic law; also, it is not necessary a process of transformation by any national legislative measures. Basically, monism has a more logical structure: if the international law is more recent than the internal law that are in disagreement, it will take priority; but, if the rule of international law is followed by a national law, the latter should be fully consistent with international law and thus would provide an easy and effective way standard rule of international law stems from its nature. The advantages of the monistic theory compared with the dualistic one is its higher logical level, considering normal that the rules of a larger community to prevail against those of its component parts; I think that it is also important to note the fact that the application of international law will be made within national legal systems so designed to implement them will be, however, states as separate entities.

Regarding the Community law it is easily noticeable the absence of any express provisions in both the Constitutive Treaties of the Communities and in the following ones, designed to regulate its incorporation into national law of the Member States. In this case, article 288 of the Treaty on European Union (ex. article 249 TEC)[7] provides regarding the

[7] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:RO:PDF, accessed on September 9, 2012

regulations adopted by the Community bodies, that they have general application, are binding in their entirety and directly applicable to Member States. By this provision we mean that the regulations should apply by national institutions directly, without the need for other measures prior to the transformation of EU law into national law.

Regarding the Court of Justice, its position towards this issue is clear, an example is *Case 28/67 Molkerei-Zentrale Westfalen / Lippe GmbH v Hauptzollamt Paderborn*[8] where said institution noted the objective of the EC Treaty which is to establish a common market whose operation is a direct concern to Member States so that this Treaty is more than an agreement which creates simply mutual obligations between the contracting parts; also, the Community has been established represents a new legal order for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and between subjects that are included not only Member States but also their nationals. Thus, the Court finds that independently of the laws of Member States, Community law does not, therefore, impose only obligations on individuals but is also intended to confer them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also under obligations which the Treaty imposes in a clearly defined way to persons, Member States and Community institutions.

In a similar context, adopting the monistic theory, the Court of Justice also pronounced on the admissibility and compliance with the TCE of a nationalization law later in *Case 6/64 Flaminio Costa v. ENEL*[9]; in this case, the Italian Government argued that a request for a preliminary ruling made by a judge is absolutely inadmissible because the Italian court cannot rely on such proceedings for order to resolve the dispute; it should apply only a national law that is more recent, and not a Treaty provision. Thus, it was argued that the Italian court had no choice; under Italian law he had to enforce the law more recent, given that, in this way, the Italian Constitutional Court also pronounced in a similar case between same parties. The solution given by the Court of Justice was that the transfer from the Member States of the national system of rights and obligations to the Community makes a permanent limitation of their sovereign rights, being impossible for a subsequent act, unilaterally issued by the Member State and incompatible with Community law to prevail against a Community act.

[8] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEX numdoc&numdoc = 61967J0028 & lg = en accessed September 9, 2012

[9] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc = 61964J0006 & lg = en, accessed on September 10, 2012

With reference to these two decisions, the Court held that, unlike ordinary international treaties, the TCE created its own legal system, becoming an integral part of the legal systems of the Member States after the entry into force of the TCE, concluding that their courts should apply it.

In practice, enlightening is the *Case 118/00 G Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*[10]; in this case has held that any provision of the national legal system and any legislative practice, administrative or judicial may affect the effectiveness of Community law (prohibiting national courts, which have jurisdiction to enforce this law, can undertake everything necessary at the time of his application to do aside national legislative provision that would prevent even temporarily, Community rules full authority and effect) are incompatible with the requirements that are the very essence of Community law. This principle of precedence of Community law means that not only lower courts, but all the courts of the Member State have absolute obligation to give effect to Community law.

3. Relevant principles to the application of Community law: immediate application, direct application, application with priority

3.1. Principle of immediate application

Member States obligation to fulfill in good faith their obligations from treaties which they have concluded, as a consequence of the principle of *pacta sunt servanda* established by the Vienna Convention was circumscribed by public international law, to the solutions offered in the debate dualism / monism previously analyzed throughout this essay. Consequently, Community law is characterized by an immediate application in the legal order of the Member States. In this *Case 6/64 Flaminio Costa v. ENEL*[11], the dictum of the Court of Justice, according to which the EEC regulations are not subject to national measures of reproductive or executive, which may modify or in any way condition their

[10] http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d51687f08072d34a28a4ade2a2461c95e2.e34Kaxi Lc3eQc40LaxqMb N4Oa3aQe0?text=&docid=85969&pageIndex=0&doclang=EN&mode accessed at September 11, 2012

[11] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdocDoc & num = 61964J0006 & lg = en accessed on September 10, 2012

entry into force and, especially, national measures of this type cannot be substituted to Community rules, to avoid the them to implement or repeal them, even partially.

The immediate effect was recognized judicially by the Court of Justice, to the whole set of EU rules: primary law, secondary law (including decisions, directives on which was set simple powers of execution by the Member States and not admission to internal order) resulting from external agreements of the Communities.

The immediate effect is stated first in the founding treaties, whatever the initial conditions under which Member States have ratified, namely the new candidates joined them; Court of Justice has held that the treaties in question have to be applied in as Community law, prohibiting such conversion or their reception into national law. Also provided solutions for founding treaties are valid in the case of regulations, whose insertion into ordinary law was clearly established, excluding any other reception. Regarding directives, in this case were expressly distinguished from transposition measures and reception, showing in this manner that it is impossible to deduce the necessity of reception because the effectiveness of the directive is subject to enforcement of the act of secondary law in question by State State. Similarly, it was shown that decisions taken by Community institutions enjoy immediate effect whether addressed to the Member States or individuals; the effect in question is associated with the content of the document and not any national measure which involves implementing it. Also, the Court of Justice has held that international agreements concluded by the Communities links Member States without legal effect thereof may be subject to some form of national intervention.[12]

3.2. The principle of direct application

This principle was established by the Court of Justice in *Case 26/62 Van Gend & Loos v Nederlandse Administration der Belastingen*[13] when the Community jurisdiction, contrary to previously opinions expressed by their own general attorneys, established the Community law ability to directly create rights and obligations for individuals. In this case was cited article 12 of the Treaty establishing the European Economic Community; the article stipulates that member states shall refrain from introducing between themselves any

[12] Bercea, Raluca; *Drept comunitar. Principii*, (C.H. Beck, București, 2007), 210

[13] http://www.cvce.eu/obj/judgment_of_the_court_van_gend_loos_case_26_62_5_february_1963-en-4b81dcab-c67e-44fa-b0c9-18c48848faf3.html accessed September 11, 2012

new customs duties. When interpreting this article, the Court concluded that the treaty which enshrines it is more than an agreement which creates mutual obligations between the parts. This fact is sufficient for the Community jurisdiction to say that the overall effect of Community law is to create rights and obligations for individuals and their compliance can be imposed both to the state and to other individuals; the condition is that the comunitar law has to be sufficiently clear, precise and unconditional, so that its application would impose additional measures (because in relation to these, authorities may have different appreciations).

Court decision in this case and also in *Case 6/64 Flaminio Costa v. ENEL* is considered very important as expressly designate one of the most important consequences of the direct effect, the law which is recognized the effect is justice before national courts. In this sense, individuals may invoke rights under Community law rules have stipulated in their favor in front of the judges of the Member State, who are perfectly competent to judge.[14]

Direct applicability of Community law means that its rules must be fully and uniformly applied in all Member States from the date of the entry into force and while still in force. Directly applicable provisions is a source of rights and obligations for all those affected by them, whether states or individuals who are parties to the legal relationship as Community members. This consequence regards any national court, whose target is to protect the rights offered to people by the Community law, if we talk about a question of competence.

3.3. Principle of priority application

In the founding treaties is impossible to find any reference to the possible primacy of Community law over national law of the Member States. However, it considers in the doctrine that this provision is likely default, as this is a prerequisite for recognition effectiveness of several provisions of treaties, for example art. 10, art. 234 and art. 249 of the Treaty establishing the European Community. In any of the above items is not explicitly recognized this principle. However, the Court has substituted this shortcoming by dictum sites that he stated the need to give a solution in case of conflict between a treaty

[14] Manolache, Octavian - op. cit., 75

and an Italian law instituted later (*Case 6/64 Flaminio Costa v. ENEL*). However the Court of Justice also states that the law stemming from the Treaty (derived from an independent source and given its special and original nature), cannot be legally oppose to the internal text of any kind may be, without the its Community nature to lose.

Analyzing in a general manner, the Court establishes primacy of Community law over national law as a ontological condition, whose priority does not come from any hierarchy established between the two legal systems, but the very logic of union project. On the other hand it shows that the superiority of Community law derives from its own nature and not from any concession made by Member States. However, the whole block will have legal effect prevalence of all internal rules, regardless of their position in the hierarchy of national legislation. Finally, the primacy of Community law occurs only within the European legal order strictly speaking, but has specific effects in the internal order of the Member States, the national court being required to impose a penalty, as appropriate. Court does not mention, however, how the judge will do so.

It is important to note about the extent of primacy of Community law that it was described as an absolute principle, unconditionally; the doctrine is making, however, a difference between the unlimited application of the principle and its intensity which is not stable. On the rules and regulations affected beneficiary is easy to note that enjoy this effect any Community rule and is affected by any internal rule.

4. Conclusions

Priority represents an essential requirement of Community law; Communities pursuing and achieving objectives of a common market requires uniform application of Community law. So, the priority of Community law resulting from a hierarchy between national and EU (contrary to the European construction bases) but is based on the fact that the legislation must prevail, otherwise ceases to be common there. Community law asserts its superiority by virtue of their very nature, superiority does not result from a concession from the constitutional law of the Member States. Community law brings priority in its entirety in national law, this means that the priority is for the benefit of all Community rules primary or derived, directly applicable or not. Also priority is exercised against all national standards, administrative, legislative and even at a constitutional level.

Priority of Community law not only works in the Community legal order, i.e. relations between states and institutions and especially in front of the Court of Justice, but also in national legal systems where imposes to them.

BIBLIOGRAPHY

Books:

1. **Bercea, Radu**; *Drept comunitar. Principii*, Bucureşti: C.H. Beck, 2007
2. **Manolache, Octavian;** Tratat *de drept comunitar, Ediţia a V-a*, Bucureşti: C.H. Beck, 2006
3. **Ştefan, Tudorel şi Andreşan – Grigoriu, Beatrice**; *Drept comunitar*, Bucureşti: C.H. Beck, 2007

Websites:

1. *http://curia.europa.eu*
2. *http://eurlex.europa.eu*
3. *http://www.conseil-constitutionnel.fr*
4. *http://www.cvce.eu*
5. *http://www.servat.unibe.ch*

In preparing this study, I also consulted the following works:

1. **Aurescu, Bogdan**; *Sistemul jurisdicţiilor internaţionale*, Bucureşti: All Beck, 2005
2. **Năstase, Adrian; Aurescu, Bogdan şi Jur, Constantin**; *Drept internaţional public*, Bucureşti: C.H. Beck, 2009