

CLIENT ALERT

THE COURT OF JUSTICE OF THE EUROPEAN UNION CLARIFIES THE INTERPLAY BETWEEN THE FUNDAMENTAL PRINCIPLES OF PRIMACY OF EU LAW AND DIRECT EFFECT IN CASE ‘POPLAWSKI II’

I. On 25 June 2018, the Grand Chamber of the Court of Justice of the EU (CJ) rendered an important judgment in the case ‘**Poplawski II**’¹ on the relationship between EU and national law. In this judgment, which can be considered to hold a constitutional nature, the Court essentially dealt with the not yet entirely clear² relationship between the principles of primacy of EU law and direct effect.³

In particular, the CJ was asked to ascertain whether the obligation imposed on national authorities to disapply national laws which are contrary to EU law provisions is conditional upon the direct effect of these latter. The circumstance that the judgment was rendered by the Grand Chamber demonstrates the importance and novelty of this specific issue.

II. It is worth noting that the principle of primacy implies that, where a conflict between EU and national law arises, the former shall prevail over the latter, including

¹ Judgment of 25 June 2019, C-573/17, *Poplawski*, ECLI:EU:C:2019:530, available in <http://curia.europa.eu/juris/document/document.jsf?jsessionid=1900A900E96B4498EB19683C6F168713?text=&docid=215342&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=607138>.

² See, to this effect, Carla Farinhas, *O princípio do primado do direito da União sobre o direito nacional e as suas implicações para os órgãos jurisdicionais nacionais*, in *Julgar* no. 35, May-August 2018.

³ See, to this effect, José Luís da Cruz Vilaça, *Le principe de l’effet utile du droit de l’Union dans la jurisprudence de la Cour*, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law*, Asser Press, 2013, page 285, conceiving the primacy principle as ‘...a broader notion [vis-a-vis the principle of direct effect], as even EU rules that do not have direct effect shall be respected and their useful effect preserved by the judicial orders of the Member States’.

over constitutional law.⁴ In turn, the principle of direct effect enables individuals to directly invoke EU law before a national authority or court, provided that certain conditions related to the level of clarity, precision and unconditional character of the EU law provisions at stake are fulfilled.⁵

The uncertainty regarding the appropriate interaction between these two fundamental principles of EU law had been growing among the legal community following several judgements of the CJ rendered, in particular, in the context of preliminary ruling proceedings concerning the direct effect of rules included in EU directives.⁶ The need for clarification was all the more acute after the opinion delivered by Advocate General Y. Bot in the case ‘**Poplawski I**’, where he advocated the autonomy of the principle of primacy vis-a-vis the principle of direct effect. He therefore claimed that, based on the principle of primacy itself, national judges were always obliged to set aside the application of national rules incompatible with EU law provisions even if the latter did not meet the conditions to have direct effect.

Notwithstanding, in ‘**Poplawski I**’,⁷ rendered on 29 June 2017 by the Fifth Chamber (presided by Judge José Luís da Cruz Vilaça), the CJ was solely asked to examine whether the rules of a framework decision had direct effect and whether the national provisions at stake could be interpreted in conformity with EU law. The CJ concluded that, although the rules of the framework decision did not have direct effect, it was possible to interpret national law in conformity with those EU rules. In other words, the

⁴ See, e.g., cases of 15 July 1964, 6/64, *Costa / Enel*, ECLI:EU:C:1964:66; of 17 December 1970, 11/70, *Internationale Handelsgesellschaft mbH/Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; 9 March 1978, 106/77, *Amministrazione delle finanze dello Stato/Simmenthal*, ECLI:EU:C:1978:49.

⁵ See, e.g., judgments of 5 February 1963, 26-62, *van Gend & Loos*, ECLI:EU:C:1963:1; and of 30 January 2018, C-360/15 – X, ECLI:EU:C:2018:44.

⁶ See, e.g., judgments of 1 February 1977, *Verbond van Nederlandse Ondernemingen*, 51/76, EU:C:1977:12; of 28 March 1996, *Ruiz Bernáldez*, C-129/94, EU:C:1996:143 ; of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628; of 30 April 1996, C-194/94, *CIA Security International*, ECLI:EU:C:1996:172; of 26 September 2000, C-443/98, *Unilever Italia*, ECLI:EU:C:2000:496.

⁷ Judgment of 29 June 2017, C-579/15, *Poplawski*, ECLI:EU:C:2017:503 available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=192248&pageIndex=0&doclang=PT&mode=lst&dir=&occ=first&part=1&cid=1485372>.

question referred by the national court to the CJ for a preliminary ruling did not concern the consequences of a potential scenario in which it would be impossible to read national law in a manner compatible with EU rules lacking direct effect. Accordingly, the CJ did not rule on this issue.

III. By contrast, in ‘**Poplawski II**’, the CJ started by underlying that the principle of primacy requires all Member State bodies to give full effect to the various EU provisions (§§53-54).

In this regard, the CJ pointed out that the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and to afford individuals the possibility of obtaining redress where their rights have been impaired by a breach of EU law attributable to a Member State (§57).

Moreover, the primacy principle entails that, where it is unable to interpret national law in conformity with the requirements of EU law, the national court is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (§58).

That said, the Court underscored that account should also be taken of the other essential characteristics of EU law and, more particularly, the fact **that only some of the provisions of EU law have direct effect**. Therefore, the principle of the primacy of EU law could not create a single set of rules for the application of all of the provisions of EU law by the national courts (§§59-60).

Against this background, the CJ declared that **‘a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it’** (§ 62) and noted that **‘a national court’s obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national**

law which is contrary to a provision of EU law if the latter provision does not have direct effect’ (§ 68).

In the case at hand, the CJ hence concluded that, since framework decisions did not have direct effect under the EU Treaty itself, national courts were not required, solely on the basis of the primacy afforded to EU law, to disapply a provision of its national law which was contrary to those framework decisions. Nonetheless, it recalled that the binding character of such decisions places on national authorities an obligation to interpret their national law in conformity with those decisions as from the date of expiry of the period for their transposition (§§ 71-72).

IV. Similarly to the landmark cases *Van Gend & Loos* and *Costa/Enel*, which have long been described as driving forces of European integration, the judgment in **‘Poplawski II’** bears a great importance. More than half a century after first referring to the principles of direct effect and primacy, the Court ultimately clarified that, **in the absence of direct effect of the EU rules, the primacy principle does not require national authorities and courts to disapply national provisions contrary to EU law.** Nonetheless, those authorities and courts still remain bound by the principle of consistent interpretation, which is especially relevant where EU rules do not have direct effect.⁸ If it is not possible to interpret national law in conformity with EU law, individuals shall still be able to obtain redress where their rights have been impaired by a breach of EU law attributable to a Member State.⁹

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⁸ See, e.g., judgment of 14 July 1994, C-91/92, *Faccinni Dori*, ECLI:EU:C:1994:292.

⁹ In the same vein, see José Luís da Cruz Vilaça, *supra cit.* footnote no. 3, p. 290.