



#IEE60

## CARTE BLANCHE

Réflexion collective '60 ans en 6000 signes' dans le cadre du soixantième anniversaire de l'IEE-ULB

En 2024, l'Institut d'études européennes de l'ULB (IEE-ULB) a soixante ans ! Pour scander cette année anniversaire et très « européenne », il convie ses membres à réfléchir à des questions fondatrices de l'intégration européenne en 1964 et toujours d'actualité en 2024. Dans une forme courte et accessible, nos chercheurs proposent un portrait en mosaïque de l'Europe, entre continuités et mutations. Les auteurs sont libres de leurs propos qui ne représentent pas une position officielle de l'IEE-ULB.

### 60 Years of Costa v. ENEL: The Long March to Primacy

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*As the IEE celebrates its 60th year of existence, the 60th anniversary of the Costa v. ENEL judgement is fast approaching. 60 years is, no doubt, a long time. And yet, the primacy of EU law, as first recognized in that judgement all those years ago, remains today as controversial as ever.*

*Alors que l'IEE célèbre 60 ans d'existence, le 60e anniversaire de l'arrêt Costa contre ENEL approche à grands pas. 60 ans, c'est une longue période. Pourtant, la primauté du droit européen, telle qu'elle a été reconnue pour la première fois dans cet arrêt il y a tant d'années, reste controversée.*

2024 marks the 60th year commemoration of the creation of the Institut d'études européennes (IEE). As one of the first dedicated centres for research into European affairs, the 60th year anniversary of the IEE is an important milestone for the field of European Union studies as a whole. To say that much has happened since then would, no doubt, be a startling understatement. For one thing, the European Economic Community of the 1960s, both the immediate background and the focus of a nascent IEE, is today a true European Union (EU): a genuine polity that no longer keeps to the economic sphere, but spans almost the entire spectrum of social and political issues of the day. For another thing, the European club has grown massively in membership, the number of Member States having climbed gradually from 6 to 27 in the years that followed the founding of the IEE. Just as the scope and scale of the European venture has far exceeded anything that could have been imagined in 1964, so too has the IEE stepped up its ambitions by opening up to new areas of academic interest and bringing in an ever-widening array of multidisciplinary researchers from all over Europe and beyond. The European project has grown over time, and the IEE has moved with it.

1964 is not only the birth year of the IEE. It is also, by some quirk of coincidence, the year in which the European Court of Justice (ECJ) issued its decision in the Costa v. ENEL case, a ground-breaking judgement that has proven both constitutive of the EU legal and political identity and divisive in the EU-Member State relationship. For those who are not familiar with EU law, the name of this case may very well not ring a bell; and for those who are not familiar with the law tout court, the very suggestion that a Court judgement could be described as 'ground-breaking' may seem a bit of an exaggeration. Nevertheless, the very understanding of the EU as a supranational entity, as something new and greater than the sum of its constituent parts, owes much to this judgement and the judicial doctrine that was thus established.



In a nutshell, the ruling of the ECJ in the *Costa v. ENEL* case summons the principle of primacy into existence. This is a principle of EU law that has come to embody a seemingly straightforward, albeit incredibly controversial, axiom of European legal integration: in the event of a conflict, any and all operative provisions of EU law must override any and all operative provisions of national law. The significance of such a statement comes into full view only when one considers two additional specifications, as provided by the ECJ in later judgements: (a) wherever the principle of primacy applies, it applies absolutely and regardless of the rank or date of adoption of the national norm in question; (b) the principle of primacy translates into a judicial duty to prioritize the enforcement of EU law, so that the national judge is bound to disregard the rules of its own national legal system in cases where such rules cannot be made to fit in nicely with the tenor of the relevant rules of the EU legal system.

Let me spell out the implication of the primacy principle very clearly: The lowest of the low among EU law provisions must be applied in preference to the highest of the high among national law provisions, including constitutional law provisions. That this is so, that the effects of EU law are so zealously guarded as to require the disapplication of rival norms of national law is, in the eyes of many scholars of EU law, one of the major driving forces in a process of impressive legal and political transformation: from a mass of legal materials, EU law has risen to form a systemic order that is not only on par with the legal systems of the Member States but conceives of itself as the overarching or ‘common’ legal order. Equally, from an institutional framework for Member State coordination, the EU has developed into an autonomous political unit that, far from staying subservient to entrenched domestic interests, shows itself to be a locus of power in its own right.

The indispensability of the primacy principle can perhaps be best appreciated in the context of the recent resurgence of inter-jurisdictional conflict within the EU. Not for nothing is the principle of primacy at the heart of current tensions between the ECJ and the Polish and Hungarian constitutional courts – and, one might add, not only them. Be that as it may, unease about the principle of primacy is definitely above and beyond the present news cycle. Indeed, the principle of primacy has long been subject to judicial contestation. To anyone who knows or cares for the history of the EU, this assertion will hardly sound outlandish or shocking. But, if we take some distance and look back at the path to European integration, it is surprising to find that a foundational element of the EU legal order has been questioned, curtailed, and even opposed by a national constitutional court since the early 1970s. And it is even more surprising to note that this movement of resistance has not abated with time and, instead, has gathered steam. In what might seem like a trivial choice of comparison, let me make this conundrum plain: over the course of the past 60 years, the IEE has consolidated its position as one of the most important research centres on all things EU-related, and, yet, no analogy can be drawn on this point with the principle of primacy, which, though enjoying the same longevity as the IEE, remains a source of lively debate. This begs the question: Why has time not played in favour, but rather to the detriment, of the acceptance of the primacy of EU law?

In attempting to provide a satisfactory answer to the foregoing question, two main arguments have been put forward. The first is to say that the supreme authority of EU law and the EU, more broadly speaking, has come to be perceived as problematic as it has become more effective and, therefore, more limiting on Member State policy-making. The second is to portray struggles over primacy as naked struggles for power, that is as part of a protracted fight between different ‘oracles of the law’ over who should have the ultimate say. Whatever the merits or shortcomings of each of these arguments, what is clear is that the principle of primacy infringes on traditional ideas of the legal system and the sovereign state. In this light, 60 years might very well be too short a period to reach firm conclusions. Whether the principle of primacy is a hiccup in time or an eternal tomorrow is, accordingly, still to be seen.

