

# CONSTITUTIONAL SUPREMACY IN THE CONTEXT OF THE PRINCIPLE OF PRIMACY OF EUROPEAN UNION LAW

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## Abstract

*The relation between constitutional rules and European Union Law is construed differently, as there are several doctrinaire concepts and different case-law solutions. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of national law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules of national law, including over constitutional rules.*

*There are European constitutional jurisdictions to have set out they have the legal power to conduct the review of constitutionality of European Union law, incorporated into national legal order, by virtue of the principle of the Basic Law's supremacy.*

*This study addresses the interferences between the principle of primacy of European Union law and the principle of Constitution's supremacy with regard to doctrine and case-law pertinent to the matter.*

Key Words: *Principle of primacy of European Union law/ principle of Constitution's supremacy/ binding nature of European Union's legal standards/review of constitutionality of European Union's legal acts incorporated into domestic law/ Conformity of domestic law with European Union law.*

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## **1. Relationship between national law and European Union law**

One of European Union's major hallmarks is the existence of a system of its own made up of principles, written rules and standards established by the case-law. Therefore, clarification of relations between European Union law and national law is important. This issue may be resolved by resorting to a set of rules that are not laid down explicitly by the Constitutional Treaties, but they have been developed by the Court of Justice via several decisions, some of which are controversial. The constitutions of the European Union Member States comprise

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principle-value rules as regards the relation between European Union law and national law.

In practical terms, the interference between European Union law and national law occurs especially when there are contradictions between legal standards belonging to systems of law. Surely, the issue of relation between the two categories of legal standards is of interest not only in such a case, but also in cases where a court of law may enforce a standard of European Union's law. One of the most important aspects of this issue is the relation between Constitution's supremacy and, on the other hand, the principle of primacy of European Union law, as well as constitutional jurisdiction's competences with regard to enforcement and interpretation of the rules comprised by the European Union's legal acts.

We believe this issue may be analysed on two directions: 1/ relation between the domestic law (other than the constitutional one) and European Union law; 2/ relation between constitutional rules of Member States and, on the other hand, European Union law.

One of the most interesting discussions, from a case-law and doctrinal sense, involving European Union Member States' constitutional courts refers to the cooperation mechanisms to the Court of Justice of the European Union, Court of Justice of the European Union's case-law, doctrine but also national legislation deals with the principle of primacy or supremacy, precedence, pre-eminence of the European Union law over national systems of law.

The relation between constitutional rules and European Union law is construed differently, as there are several doctrinaire concepts. There is a school of thought claiming the Constitution's supremacy, including over European Union law, albeit it accepts the latter's enforcement priority in its compulsory rules over all the other rules of domestic law, and another one claiming the unconditional enforceability priority of all provisions in European Union law over all rules in the domestic law, including over constitutional rules. Some old-established European constitutional jurisdictions have reached, in certain historic moments and contexts, to the conclusion that it falls within their competence to review the constitutionality of European Union law, incorporated into domestic legal order, by virtue of the principle of the Basic Law's supremacy (for instance the Constitutional Court of Germany).

The Court of Justice has come to develop the principle of primacy of European Union law having regard to the rule of international public law, according to which "A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty". Another source was represented by the provisions of Art. 10 of the Treaty Establishing the European Community, as amended by the Treaty of Lisbon. The rule included in the provisions of Art. 10 is still unchanged to this date and it lays down the Member States' obligation to take any and all steps necessary in order to make sure the obligations arisen from the Community's treaties and acts are complied with. The same provisions impose the negative obligation of Member States to refrain from taking any measures which would jeopardize the attainment of the Treaty's objectives. These are not the only

regulations from the European Union Treaties which underlie the principle of primacy of European Union law over national law: the provisions of Art. 3 a) of the Treaty on European Union.

The principle of primacy and binding nature of the European Union Law was mainly constructed by case-law basis. The historical case-law of the Court of Justice of the European Union is pertinent to the matter, marking a step towards asserting this principle in relation to national law.

A significant moment is represented by the case of *Costa v. Enel*<sup>11</sup>. The Italian court submitted two applications for interpretation: one to the Italian Constitutional Court and another to the Court of Justice of the European Union. The Constitutional Court held that T.C.E. may not have normative value, except in so far as it is incorporated into national law by way of a law. At the same time, it was acknowledged that a national law may derogate from the Treaty's provisions.

The Court of Justice had a different opinion, expressed in its ruling: "These considerations show that the legal system arisen from the Treaty, independent source of law, may not be due to its special and original nature, overtaken by the domestic legal standards irrespective of their legal force, without lacking its community law characteristic and without the Community's legal foundation itself be called in question".

Another moment of the Court of Justice case-law's progress in this matter is represented by the cases "Internationale H<sup>2</sup>"; „Simmenthal I<sup>3</sup> and Simmenthal II<sup>4</sup>". The following considerations in the decision ruled to the case Simmenthal II are pertinent to our research theme: "as such it is incompatible with the requirements inherent to the community law's nature, any provision of national legal order or any practice – legislative, administrative or judicial, which would result in diminishing the community law's effectiveness in that denying the competent judge from enforcing it, the competency to do, at the precise moment of such enforcement, all that is necessary to remove the national legal provisions which, eventually would represent an obstacle to community rules' full effectiveness. Consequently, the answer to the first question is that the national judge in charge of, as per his/her competence, enforcing the provisions of community law, is obliged to ensure full effectiveness of such rules, declining to apply, ex officio if needed, any provision to the contrary of the national legislation, even subsequent, without seeking to or expecting its previous removal by law or by any other constitutional procedure" (considerations 22 and 24 of the decision).

Moreover, the Court found that national courts have the power to compel and even punish the legislative and executive power for the purposes of guaranteeing full effectiveness of the principle of primacy of European Union law over national law. (Ștefan, Andreșan-Grigoriu, 2008: 196-202)

<sup>1</sup> 6/64 *Costa v. Enel* (1964) ECR 585.

<sup>2</sup> 11/70, *Internationale H.*, (1970) ECR 1125.

<sup>3</sup> 35/76, *Simmenthal SpA* (1976) ECR 1871.

<sup>4</sup> 106/77, *Simmenthal* (1978) ECR 629.

This principle should be understood in the light of the rule of Community acts binding nature as well. The *regulation* has general application and is compulsory in all its elements. Unlike it, a *directive* is addressed to all Member States and is compulsory with regard to the outcome to be reached leaving the national authorities competence with regard to form and means they resort to so as to achieve the objectives set out. *Decision* is compulsory in all its elements for addressees referred to.

Direct application rule characterizing some of the European Union's law legal acts concerns the manner of understanding and application of the principle of primacy of European Union law. Regulations are directly applied since they require no transposition into national law. As the Court held in its case-law, Member States must not adopt national legislation whereby to implement regulations. Their provisions may be invoked by natural persons or legal entities directly before national courts. Unlike it, directive has no direct enforceability. It must always be transposed into the system of law of every Member State it is addressed to. The domestic normative act for transposing the directive is that whereby directive's substance shall enter the national system of law.

The principle of primacy of European Union law over national law is to be understood by the criterion of the possibility to directly invoke community acts before national courts. The "direct effect" phrase designates the attribute of a community normative act of creating in natural persons and legal entities' patrimony rights they can invoke directly before national courts. Without entering into details, we highlight that regulations, directives and decisions may, under certain circumstances, have direct effect. (Ștefan, Andreșan-Grigoriu, 2008: 214-234)

## **2. National courts' obligation to construe domestic law in accordance with European Union law**

One of the consequences of the principle of primacy of European Union law is also national courts' obligation to construe domestic law in accordance with European Union law. In trying to ensure European Union law's effectiveness and uniformity, the Court of Justice of the European Union has laid down several means as an incentive for the states to implement directives correctly and in a timely manner and in order to ensure their enforcement. One of these means is creating the doctrine of directives' direct vertical outcome.

In so far as the provisions of a non-implemented or inadequately implemented directive may not lead to a vertical direct effect since they do not comply with the requirement to be clear enough, accurate and unconditional, in order to infer the law, the citizen seeking justice wishes to exploit before national courts, the Court has instituted the obligation, devolving upon the national judge, to construe national legislation in relation to directive's substance.

One of the first cases to have had this obligation expressly formulated was the case of Van Colson. The Court held, in considerations of the decision ruled, that national legislation limits the right to legal redress of persons to have been

discriminated against while exercising the right to work. Such an instance is not in line with the requirements of effective transposition of Directive 76/207. As a consequence, the court of Luxembourg ruled: “It follows that, in applying national law and especially provisions of a national law specifically adopted with a view to applying Directive 76/207, the national court called upon to interpret it is required to do so, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with paragraph 3) of Art. 189 of T.C.E. (*Treaty on the Establishment of European Community*). Consequently, the Court stated: “It is for the national court to pass laws adopted with a view to applying the directive, in so far as national law gives a margin of discretion, interpretation and application in agreement with the community law’s requirements”.

The judgment of the European Union’s Court of Justice, ruled in the case of *Seda Küçükdeveci v. Swedex GmbH & Co*<sup>5</sup> is also enlightening. The Court reiterates the existence of the principle of non-discrimination on grounds of age, as well as the role of the national court in applying it. The German legislation providing that the period of employment completed before the employee reaches the age of 25 is not taken into account for calculating the notice period is contrary to the principle of non-discrimination on grounds of age, as laid down by Directive 2000/78. In this situation, the national court should disapply, if necessary, any contrary internal regulation, even in the case of legal proceedings between private individuals.

The considerations of this judgment show that Directive 200/78 gives expression to the principle of equal treatment in the field of employment and occupation. The principle of non-discrimination on grounds of age is a general principle of Union’s law. It is therefore for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78 to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.

In accordance with these conclusions of the European Union’s Court of Justice, Romanian courts also, where there are to apply the provisions of a national law for implementing a directive, shall interpret it in accordance with the directive’s wording and purpose. The Court’s case-law in the matter shows that national court is obliged, where it has to apply a law for implementing a directive, to take account not only of such law, but of the totality of rules of national law and to interpret them in accordance with the respective directives’ requirements, in order to deliver a solution compliant to the purpose pursued by the community act.

Having regard to the fact that Romanian law consists of excessive procedural formalism and more particularly of significant inconsistencies and contradictions, national courts are going to have difficulties in fulfilling this obligation.

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<sup>5</sup> Judgment in the case C-555/07.

Furthermore, the European Union's Court of Justice considers, in its case-law, this obligation of national courts to be subject to limitations. The obligation to interpret the domestic law to take account of the directive's wording and purpose exists only in so far as national law gives the court a margin of discretion. Within this meaning, the Court held the following in the case of Papino: "The principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*"<sup>6</sup>.

We believe that every time national law confers "related jurisdiction" on the court, which excludes the existence of a margin of discretion, the national judge does not have the above-stated obligation. By way of example, this category may include some of the procedural nature normative provisions. Also, national courts may not, in criminal matters, aggravate liability in criminal law of persons committing an act falling within the provisions of a directive, if it has not been implemented in the domestic law.

### 3. Brief considerations on the principle of Constitution's supremacy

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (...) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All

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<sup>6</sup> Judgment C-105/03.

these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy*. However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy". (Deleanu, 2006: 221-222)

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a country". (Muraru, Tănăsescu, 2009:18) Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1 paragraph 5) of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n.) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State". (Ionescu, 2015: 48)

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law". (Ionescu, n.d.: 48)