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Which Doctrine has had the Bigger Impact on EU law, Direct Effect or Supremacy?

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Which doctrine has had the bigger impact on EU law, direct effect or supremacy?

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Situational Analysis and Introductory Remarks

The doctrines of the supremacy of the European Union (EU) and of the direct effect of EU law are both based on the competence of the EU . The EU can act only within the limits of its competence, and has them only as much as entrusted its Member States. Before this state of affairs, the competences of the EU were regulated by Articles 5 and 7 of the Treaty Establishing the European Community (Consolidated Version, 2002)¹:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein[...]The tasks entrusted to the Community shall be carried out by the following institutions:[...] Each institution shall act within the limits of the powers conferred upon it by this Treaty.

The current treaties are linked to the above rules. For example, Article 4 in paragraph 1 of the Consolidated Version of the Treaty on EU states that: “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States”².

The main purpose of this essay is to analyse which doctrine has had the bigger impact on EU law: direct effect or supremacy. The essay consists of an introductory section which sets the context, three chapters and a list of sources.

The first chapter analyses and interprets the doctrine of the supremacy of EU law. It provides a clear definition of the doctrine of supremacy, supported by relevant case law. In addition, it presents a historic account of the determination of the supremacy doctrine.

Determinants of the doctrine of the direct effect of EU law is the topic of the second chapter. In this section, the author explains the mechanism of the doctrine of the direct effect and outlines the conditions for direct effect. Finally, it provides information regarding the monist and dualist systems of law ,and the difference between the vertical and horizontal effects.

¹ *Treaty establishing the European Community (Consolidated version 2002)*, Official Journal C 325, 24/12/2002 P. 0033 – 0184.

² *Consolidated version of the Treaty on European Union*, Official Journal C 326 , 26/10/2012 P. 0001 – 0390.

The third chapter interprets the results and attempts to answer to the question: “Which doctrine has had the bigger impact on EU law, direct effect or supremacy?” This question is answered by using the integral methodology of research, recognised within the social sciences and law. In this instance, the comparative method was relevant to presenting the bilateral relations between both doctrines and their impacts.

1. Determinants of the Doctrine of the Supremacy of the European Union Law

The doctrine of the supremacy of EU law is the principle that protects the competences of the EU. In the case of conflict between domestic (national) law and EU law, the second prevails. Therefore, if the European law fully adjusts the particular area, the national legislation is unacceptable. The above statement is regulated by the Article 2.2 of the Treaty on the EU and the Treaty on the Functioning of the EU³:

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

This rule should be treated as the doctrine of pre-emption, which is characteristic of American law and is adopted by the EU legislation⁴.

One of the most important cases, which determines the doctrine of the supremacy and its relationship with the doctrine of pre-emption, is the *Commission of the European Communities v Ireland*⁵. In this case, the Commission complained that Ireland had infringed the exclusive competence of the Court of Justice of the European Union

³ *Consolidated versions of the Treaty on the Functioning of the European Union*, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

⁴ *A doctrine based on the Supremacy Clause of the U.S. Constitution that holds that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.*,The Legal Dictionary, [online:] [<http://legal-dictionary.thefreedictionary.com/preemption>], acc. 20.03.2016.

⁵ *Case 459/03 Commission of the European Communities v Ireland* [2006] ECR 04635.

(previously ECJ and now CJEU) to settlement on any disputes concerning the interpretation and application of European law. This particular case concerned the dispute which Ireland brought against the United Kingdom (UK), to the International Court of Arbitration (the Court), acting on the basis of the United Nations Convention on the Law of the Sea 1982⁶. The CJEU held that the “Protection and preservation of the marine environment” is a shared competence of the EU in external affairs. Moreover, the CJEU stated that there are EU Directives related to the dispute, and that the Union is also a party to the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)⁷. Based on that, the CJEU is the only proper court to settle this matter. Article 292 of the Treaty Establishing the European Community was violated by Ireland⁸. This kind of violation leads to the breach some of the responsibilities by EU member states, which is defined in the Treaties. This may interfere with the autonomy of the EU legal order. The *Commission of the European Communities v Ireland* case was an important affair, which drafted the foundation for the supremacy doctrine⁹.

The proper and most common definition of the doctrine of the supremacy of EU law can be found in the significant Italian case, *Costa v Enel*¹⁰. This case presented a specific clash between European law and domestic regulations. The CJEU stressed that in the case of conflict between the national law and the European the latter was supreme. This is because nothing should jeopardise the community nature of the European law or undermine the legal foundation of the EU¹¹:

[...]the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in article 5 (2) and giving rise to the discrimination prohibited by article 7[...]By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a

⁶ *United Nations Convention on the Law of the Sea 1982*, [online:] [http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf], acc. 25.2.2016.

⁷ *Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention)*, [online:] [<http://www.ospar.org/convention/text>], acc. 28.2.2016.

⁸ *Treaty establishing the European Community*, op cit.

⁹ *Commission of*, op cit.

¹⁰ *Case 6/64 Flaminio Costa v E.N.E.L.* [1964] ECR 585.

¹¹ *Ibidem*.

limitation of sovereignty or a transfer of powers from the States of the Community [i.e. Union], the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

A similar judgment can be observed in the German case: *International Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*¹². Here, the CJEU stated that secondary EU law, such as regulation, is more significant than the Constitution of the Federal Republic of Germany.

Both cases outlined above show that EU law shall prevail over the domestic regulation of individual Member States. Therefore, EU members may not apply the national provision which is incompatible with European law. In other words, supremacy of EU law over national law is absolute. Accordingly, it applies to both primary and secondary legislation.

Concluding these considerations of the supremacy doctrine, it is worth noting another Italian case: *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1976)¹³. This is a good example of the “milestone” for EU law, in which the CJEU declared:

in accordance with the principle of the precedence of community law , the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of , and take precedence in , the legal order applicable in the territory of each of the member states - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions[...]A national court which is called upon , within the limits of its jurisdiction , to apply provisions of community law 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 , even if adopted subsequently , and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.

Based on the above judgment, the consequence of precedence of community law is not contrary to the invalidity of the national law, but an obligation to not apply a legal norm.

¹² *Case 11/70 International Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹³ *Case 106/77 - Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 00629.

Therefore, precedence of community law is no precedence of validity, but the application of European Union law.

2. Determinants of the Doctrine of the Direct Effect of the European Union Law

The doctrine of the direct effect should be interpreted as the principle which allows individuals to instantly conjure EU law before domestic and European courts. It is important to note that the doctrine of the direct effect applies only to certain legal acts, and reliance on it is possible only under certain conditions.

The definition of the doctrine of the direct effect should be seen in the Dutch case: *Van Gend en Loos* (1963)¹⁴. In this case, The Netherlands changed the classification of goods for customs purposes. Following the change, the goods were subject to various duties, depending on the purpose for which they were bought. The Dutch importers questioned the amount of duties imposed on goods imported from Germany (formaldehyde), relying on Article 12 of the Treaty Establishing the European Community (currently Article 30). The CJEU decided that it is part of EU law¹⁵:

[...]the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals . Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage . 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 way upon individuals as well as upon the member states and upon the institutions of the community[...]

¹⁴ *Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR.

¹⁵ *Ibidem*.

Based on this, the Van Gend en Loos case provided an opportunity for those who were affected by the EU law start legal action. In order to apply the direct effect, the following three conditions needs to be met¹⁶:

- “[to] be clear and precise;
- [to] be unconditional/without exceptions;
- [to] not require any implementation by the Member States.”

The above conditions constitute a significant test that the CJUE must apply in every dispute which may arise.

The CJUE`s judgment regarding the conditions for direct effect can be found in the Belgian case: Defremne v Sabena (1976¹⁷). In this case, the CJUE stated that Article 119 of the Treaty Establishing the European Community has a direct effect¹⁸. In addition, the case Reyners v Belgian State includes a similar statement¹⁹. In both cases, the CJUE accelerated the process of European integration (the CJUE`s judgment replaced the adoption of directives). Based on this, the direct effect is used for the establishment of standards by individuals.

During the analysis of the doctrine of the direct effect, it is important to refer to the monist and dualist systems of law, and the difference between vertical and horizontal effects. In the first situation, it is crucial to understand that EU law is part of domestic law and is applied directly to it. In brief, in the monist approach, both domestic and international law are part of one legal system. On the other hand, the dualist approach determines domestic and international law as two separate legal systems. In order to implement new international acts or regulations, the special enforcement procedure needs do take place. A good example of the monist system is Ireland, which has the confirmation in the Crotty v An Taoiseach case²⁰. In addition, the UK uses the dualist

¹⁶ M. Cuthbert, *European Union Law*, London 2012, p. 40.

¹⁷ *Case 43-75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 00455.

¹⁸ *Treaty establishing the European Community*, op cit.

¹⁹ *Case 2-74 Jean Reyners v Belgian State* [1974] ECR 00631.

²⁰ *Crotty v An Taoiseach* [1987] IR 713.

approach which can be found on the Attorney-General (ex rel McWhirter) v Independent Broadcasting Authority case (1970)²¹.

To conclude the analysis regarding the doctrine of the direct effect, the vertical and horizontal effects should be mentioned. When individuals can rely on European standard in relation to their state, this is the vertical effect. The horizontal effect applies once an individual can invoke European law in relation to another individual. Accordingly, the legal norm has a direct effect if it confers individual rights that can be enforced before a national court in vertical (individual – the state) or horizontal (individual - individual) effect. This can be observed in the Spanish case: Walrave and Koch v Association Union Cycliste Internationale (1974)²².

3. Bilateral Relations and Impacts between the Two Doctrines – Interpretation of Results

Based on the analyses made in the previous two chapters, it is difficult to find a straight answer to the main essay question. Both doctrines are fundamental foundations of Community law.

In order to answer the question, “Which doctrine has had the bigger impact on EU law, direct effect or supremacy?”, it should be stressed that in any EU Treaties there is no any reference to the supremacy of European law²³. This aspect can be found only in the European case law created by the CJEU.

The doctrine of supremacy of EU law was the first legally binding interpretation. In the *Costa v Enel* case, the CJEU’s judgments were based on the monist construction of the

²¹ *McWhirter v Attorney-General* [1972] C.M.L.R. 882.

²² *Case 36-74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo* [1974] ECR 01405.

²³ E. Kirk, *EU Law*, London 2015, p. 33.

EU law system²⁴. The Court stated that EU law is part of the national law, and has a direct effect²⁵:

[...]The integration into the laws of each member state of provisions which derive from the community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system[...]It follows from all these observations 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 community law and without the legal basis of the community itself being called into question.

Based on the above judgments, it could be tempting to say that the doctrine of the supremacy of the EU has the bigger impact. Therefore, the doctrine of the direct effect cannot exist without the supremacy of EU law. In the Van Gand case, the CJUE – ECJ mentioned²⁶: “the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights”. As a result, the Member States of the EU have restricted powers to create domestic laws, which is against EU legislation. This example can be also found in the British case: *Macarthy Ltd v Smith* (1980)²⁷.

The CJEU (as the supreme legal EU body) created conditions which have to be met in order to apply the direct effect. This means that certain provisions of Community law have effect in the area of internal law of the Member States. However, this principle does not provide an answer to how the national courts needs to proceed in the event of a conflict between EU and domestic law.

The supremacy of the EU law is autonomy and absolute – *expressis verbis* – without any conditions. This principle states that no national law cannot prevail over the law derived from the Treaty, which is an independent source of law. Therefore, it has the bigger impact and meaning.

²⁴ *Case 459/03*, *op. cit.*

²⁵ *Ibidem.*

²⁶ *Case 26-62*, *op. cit.*

²⁷ *Macarthy v Smith* [1979] 3 All ER 325.

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