The relationship between EU law and the national legal orders

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Relationship EU – national law

- Principle of primacy
- Direct effect
- Conform interpretation
- Liability of MS
I. Principle of primacy
Principle of primacy: ECJ

6/64, Costa/ENEL (1964) – arguments:

- Treaty created own legal system – integral part of MS legal systems
- by creating the Community \( \rightarrow \) MS created body of law – binding for nationals & MS
- terms & spirit of the Treaty make it impossible that national measure would have precedence
- such precedence of national law would take away from the Treaty its character of Community law

\( \rightarrow \) Community law has primacy over national law
Primacy: precisions

Primacy over which provisions?
- all national provisions, “however framed” (Costa)
- including “principles of a national constitutional structure” (11/70, Internat. Handelsgesellschaft)

Consequences?
- ECJ: difference NCC: no competence to set aside conflicting national rules (interpretation “precludes”)
- national authorities:
  (1) inapplicability of conflicting national rules
  (2) duty to change & avoid adopting conflicting national legislation (106/77 Simmenthal II)

Primacy or supremacy?
17. Declaration concerning primacy

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

Opinion of the Council Legal Service

of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.
Primacy: absolute?

Limitations by national constitutional courts: ultra vires control of EU acts and ECJ judgments

- BVerfG: Honeywell (6.7.2010, 2 BvR 2661/06)
- Czech Constitutional court (14.2.2012): reaction to ECJ judgment C-399/09, Landtová: no cross-border element

→ CZ CC: “constitutional courts maintain their role of supreme guardians of constitutionality even in the realms of the EU”
Critique of CZ CC Landtová decision

Playing With Matches: The Czech Constitutional Court’s Ultra Vires Revolution

By JAN KOMAREK

When the Czech Constitutional Court (CCC) declared the CJEU’s judgment in C-399/09 Landtová “ultra vires”, one of my colleagues commented: “giving Solange into their hands was like to let children play with matches”. I am afraid it is the adequate description of the decision, which is difficult to explain in legal terms and which in my view has much more to do with the psychology of the Court and its individual judges, although other domestic actors, the Supreme Administrative Court and the Government, also played an important role.

I suspect many readers of this blog will have to check the CJEU’s website in order to know what Landtová case was about. From the point of view of EU law it was an ordinary case, decided by the Fourth Chamber, concerning the interpretation of Regulation No 1408/71 on the application
II. Direct effect
Direct effect: ECJ

26/62, Van Gend en Loos (1963)

– Art. 12 EEC Treaty – MS should refrain from introducing new customs duties (~ Art. 30 TFEU)

– Art. 12 EEC Treaty – direct effect – arguments:

  - Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights
  
  - Community law not only imposes obligations on individuals but is also intended to confer upon them rights
  
  - The wording of Art. 12 contains a clear and unconditional prohibition which does not make its implementation conditional upon a legislative measure enacted under national law
Direct effect: conditions & importance

Provision has direct effect if “self-executing”:

- **Clear** (necessity of preliminary ruling irrelevant)
- **Unconditional**
- **No national implementing measure needed**

Consequences:

→ individuals may derive rights directly from EU law
→ immediate enforceability by individuals of EU provisions in national courts
Direct effect: precisions

Direct effect vs. direct applicability

**vertical direct effect**
- primary law
- secondary law (regulations, directives)

**horizontal direct effect**
- exception: directives

[Diagram showing the relationship between direct effect and direct applicability]

[Image: en.wikipedia.org/wiki/File:Double-arrow.svg]
Direct effect of directives

Direct effect possible, 2 limitations:

1. Deadline for transposition expired (directive unimplemented or incorrectly implemented)
2. Claim against MS (152/84, Marshall I: directive may not impose obligations on / be relied upon against an individual) → pb.: individ. rights & unequal application

Remedying lack of horizontal direct effect

- Broad interpretation of notion “Member State” (152/84, Marshall I: bodies subject to control of the State → tax, local authorities, public employers)
- Interpretation in conformity with the directive
- State liability for damages
Horizontal direct effect of directives through the back door?

**e.g. C-555/07, Küküçdeveci**

- horizontal situation: employer & employee
- DE legislation: discrimination on grounds of age
- Directive 2000/78/EC: framework for equal treatment in employment \(\rightarrow\) “principle of equal treatment” = no direct or indirect discrimination
- EU law, more particularly the **principle of non-discrimination on grounds of age as given expression by the Directive 2000/78** precludes national legislation, such as that at issue in the main proceedings
III. Interpretation in conformity with EU law
Principle of conform interpretation

14/83, Von Colson and Kamann:
“…national courts are required to interpret their national law in the light of the wording and the purpose of the directive…to achieve the result [envisaged by the directive]”

C-106/98, Marleasing – which provisions?
– provisions for implementation of the directive
– all other provisions adopted before/after directive
Conform interpretation – when?

before the deadline for transposition: obligation to refrain from interpreting national law in a way that would seriously compromise the attainment of the objective of directive (C-129/96, Inter-Environnement Wallonie)

after the deadline for transposition: general obligation of conform interpretation
Limits of conform interpretation

How far? “as far as possible” (Marleasing)

Two limitations

– General principles of EU law: legal certainty & non-retroactivity (80/86, Kolpinghuis Nijmegen)
– No interpretation contra legem (C-212/04, Adeneler)
Importance of conform interpretation

- Importance for horizontal relations (btw. individuals) – no direct effect of directives
- Non-implemented / wrongly implemented directive → effect vis-à-vis individuals
- Examples?
Quelle case
Example of conform interpretation

C-404/06, Quelle (preliminary question BGH)
- German civil code: where goods not in conformity are replaced → right of the seller to require the consumer to pay compensation for the use of those goods
- Directive 1999/44/EC – sale of consumer goods: where goods not in conformity are replaced → free of charge
- ECJ: German law not in conformity with directive
- BGH: conform interpretation not possible?
BGH: Quelle

- BGH: conform interpretation: the provision is to be interpreted restrictively → in case of sale of consumer goods, no compensation for use
- From BGH judgment (November 2008):

Eine richtlinienkonforme Rechtsfortbildung im Wege der teleologischen Reduktion setzt eine verdeckte Regelungslücke im Sinne einer planwidrigen Unvollständigkeit des Gesetzes voraus; eine solche planwidrige Unvollständigkeit kann sich daraus ergeben, dass der Gesetzgeber in der Gesetzesbegründung ausdrücklich seine Absicht bekundet hat, eine richtlinienkonforme Regelung zu schaffen, die Annahme des Gesetzgebers, die Regelung sei richtlinienkonform, aber fehlerhaft ist.

- Change of German civil code (December 2008)
IV. Liability of Member State for breach of EU law
Liability of Member State for breach of EU law

C-6/90 and C-9/90, Francovich

→ MS has to pay damage caused to individual by breach of Community law – arguments:
  – national courts must ensure that the Community law has full effect
  – full effectiveness would be impaired if individuals were unable to obtain redress when their rights are infringed
  – the principle of Member State liability is inherent in the system of the Treaty
Liability: precisions

**Conditions for liability:**
- Rule of law infringed confers rights to individuals
- Sufficiently serious breach
- Direct causal link between breach of obligation and damage

**National substantive & procedural conditions:**
- Not less favourable than those for domestic claims (principle of equivalence)
- Should not make redress impossible or excessively difficult (principle of effectiveness)

**Also national judicial bodies** (C-224/01, Köbler)
V. Practical questions

1) Conflict between national law and EU law?

2) If yes: direct effect possible?
   a) Conditions fulfilled?
   b) Vertical or horizontal relationship?
   c) Which legal act (diff. regulation - directive)?

3) If not: conform interpretation possible?

4) For parties: can I sue the MS for damages?
»Les Traités ne prevoient aucun mécanisme d'aller et retour...On a parfois parlé d’Europe à deux vitesses, mais jamais d'un droit Communautaire à marche arrière.«

Robert Lecourt

Ancien président de la CJCE

(L’Europe des Juges, 1976, p. 303-304)
Thank you for your attention!

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