



*Robert Schuman*

*The Relationship Between  
Community Law and National Law*

- Martin Stiernstrom



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*The Relationship Between  
Community Law and National Law*

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# *The Relationship Between Community Law and National Law*

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*The French Government /.../ proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.*

(The Schuman Declaration, May 9, 1950)

## **1. The Evolution of the Doctrine of Supremacy as established by the European Court of Justice (ECJ)**

### **1.1 Introduction**

This paper is concerned with the relationship between Community law and national law. The most important features of this relationship are the supremacy of Community law over national law, the direct effectiveness of Community law in the national courts and the procedures by which Community law can be enforced in the Member States. Focus will mainly be on the first of these features. The Treaties establishing the European Communities (ECSC, EURATOM and EEC)<sup>1</sup> are more than classical international agreements creating mutual obligations between the contracting parties. By ratifying those Treaties the Member States intended to do more than that, although they most probably did not foresee all the conclusions which the European Court of Justice (ECJ) has drawn from the specific nature of those Treaties over the years.<sup>2</sup> A good question is: what is it that distinguishes them from other international agreements?

First, they have created quasi-governmental bodies (the institutions) independent from the national public authorities and endowed with legislative, administrative and judicial sovereign rights, which were transferred to them by the Member States. Second, the Treaties lay down basic principles, which are either worked out in the Treaties themselves or implemented by acts of the institutions. Treaties and rules constitute a set of rules which directly, without interference or intervention, impose obligations upon and create rights for the Member States or natural or legal persons within the Community. The Treaties therefore present many analogies with national constitutions.

As was shown, the rules embodied in the Treaties (referred to as primary Community law) are constantly being expanded and implemented by new Treaties, made more specific, implemented, interpreted and applied by the various acts and measures of the institutions (known

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<sup>1</sup> European Coal and Steel Community, European Atomic Energy Community and European Economic Community

<sup>2</sup> See speech by Joschka Fischer at Humboldt University in Berlin, May 12, 2000. Reprinted in Nelsen, p. 70–75.

as secondary Community law). The Treaties have therefore, as was ascertained by the ECJ, established a specific legal order. Indeed,

*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 limitation of sovereignty or transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves.*<sup>3</sup>

The principle of supremacy of Community law over national law in the Member States has never been enshrined in the Treaties. None of the Treaties explicitly expressed that Community law should take precedence over national law nor was the principle endorsed by subsequent Treaty revisions. The Treaties are therefore said to be silent on the issue of the relationship between conflicting national law and Community law. Nonetheless, it is an essential part of the legal order of the EC.<sup>4</sup> The principle of supremacy is an unwritten rule of Community law and does not apply to the second and third pillars of the EU.<sup>5</sup> The doctrine has evolved only through the jurisprudence of the ECJ. This has, on the whole, been an evolutionary rather than revolutionary process. It is evident that there will be clashes between Community law and national law. In the event of conflict there must be a set of rules that indicate what legal norm shall prevail over the other. The ECJ has created a system whereby the laws of the Community take precedence over conflicting laws in the Member States. Consequently, the national courts are obliged to ensure the practical effectiveness of supremacy by upholding Community law. Naturally, the reception of the doctrine of supremacy in the Member States has been varied.<sup>6</sup>

The European Union is founded on the competences that have been attributed by the Member States through the Treaties. Community law cannot take precedence over national law in a field where the Community lacks competence. The doctrine of supremacy in European Community law has evolved through the jurisprudence of the ECJ in a vast number of cases. This paper aims to examine the evolution of the doctrine of supremacy by scrutinizing the most important cases. In addition, it will examine how the EU Constitution addresses the question of supremacy of Community law.

## **1.2 Van Gend en Loos: The Doctrine of Direct Effect**

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<sup>3</sup> Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

<sup>4</sup> See [http://europa.eu.int/eur-lex/en/about/abc/abc\\_13.html](http://europa.eu.int/eur-lex/en/about/abc/abc_13.html).

<sup>5</sup> Borchardt, p. 24.

<sup>6</sup> Bomberg, p. 62

The case of *Van Gend en Loos* from 1963 is seen as a great milestone in European law.<sup>7</sup> It concerned the Dutch company Van Gend en Loos that imported a chemical product from Germany into the Netherlands. The company claimed that the Dutch Customs and Excise had charged it with too high customs duties and that, since Article 25 of the EC Treaty bans the introduction of new custom duties and the increase of existing duties on the market, this was contrary to Community law. Van Gend en Loos therefore brought an action against the Dutch customs authorities before the *Tarief commissie* in Amsterdam, which is the highest court with regards to taxes in the Netherlands. The Dutch Court referred the matter to the ECJ for a preliminary ruling,<sup>8</sup> since it was not certain if Article 25 of the EC Treaty had direct application within the territory of a Member State. Could citizens in a Member State lay claim to individual rights by invoking Community law before national courts?

Reading the ECJ's decision gives one a good insight of the nature of the transfer of sovereignty from the Member States to the Community and the consequences of the pooling of sovereignty, that is, the common exercise of power on the Community level. The following passage is worth being quoted in whole:

*The objective of the EEC Treaty, which establishes a Common Market, the functioning of which is of direct common concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It also confirms more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to co-operate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.*

*In addition, the assigned to the Court of Justice under Article 177<sup>9</sup>, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that the Community has an authority which can be invoked by their nationals before those courts and tribunals.*

*The conclusion to be drawn from this is that 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 center upon them rights which come part of their national heritage. Those 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.*

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<sup>7</sup> Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>8</sup> What regards preliminary ruling, see article 234 of the EC Treaty and Hartley p. 258–293.

<sup>9</sup> Nowadays Article 234 (my remark)

The Court stated that the Treaty not only imposes obligations on the individuals of the Member States but also confer upon them rights, which is up to the national courts to protect. Article 25 was said to produce direct effects. This meant that Community law could, under certain conditions, create rights for individuals of the Member States that were to be protected by national courts. If individuals would be deprived of the right to invoke Community law before these courts and authorities then they would no be able to invoke their individual rights. The justifications for attributing direct effect to articles in the Treaty were the necessity to ensure the effectiveness and uniform application of Community law in the Member States and legal integration in the Community.<sup>10</sup>

Not all Community law and Treaty articles can produce direct effect. The ECJ has since then in other cases specified a set of rules when Treaty articles and directives can produce direct effect. If a provision is to have direct effect it must fulfill a number of criteria such as being “clear, unambiguous, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure.”<sup>11</sup> The doctrine of direct effect was a product of the ECJ and is nowhere to be found in the Treaty.

### **1.3 Costa-Enel: The Doctrine of Supremacy**

The case of *Van Gend en Loos* affirmed that Community law is a separate legal system, distinct from, though closely linked to, both international law and the legal system of the Member States. Just a year later, another case gave the ECJ an opportunity to set out its position in more detail. The case of *Costa-ENEL* created the supremacy doctrine of European law.<sup>12</sup> We will observe that the ECJ ruled that Community law is hierarchically supreme to the law of the Member States. In case of a conflict between national law and EC law, the latter will prevail and have supremacy over national law of the Member States. The supremacy issue was not affirmed in the *Van Gend en Loos* case since the referring Dutch Court had not posed the question to the ECJ for its preliminary ruling.

The facts of the case were as follows. Costa was an Italian lawyer who refused to pay an electricity bill issued by the Italian electricity company ENEL.<sup>13</sup> Costa had shares in the ENEL electricity company. Costa claimed that he did not have to pay the electricity bill because the Italian nationalization law of the electricity industry was contrary to Community provisions. The Italian nationalization law had been passed after the Italian ratification of the EC Treaty. Italian constitutional law applied the rule of *lex posterior derogat priori*, i.e. the last passed law was to take precedence over an earlier passed law. The Italian court referred the matter to the ECJ for a preliminary ruling.

It is worthwhile to give a full citation of the Court’s remarks on the nature of the European Community and the creation of the doctrine of supremacy:

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<sup>10</sup> Even other types of Community legislation, such as directives, can have direct effect. See Hartley, p. 187–232.

<sup>11</sup> See Hartley, p. 191 and Melin p. 41.

<sup>12</sup> Case 6/64, Flaminio Costa v ENEL [1964] ECR 585.

<sup>13</sup> Interestingly the bill was only on ITL 1,926.

*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 limitation of sovereignty or a transfer of powers from the States to the Community, 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.*

*The integration into the laws of the each Member State provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, makes 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.*

On the basis of its detailed observations, the ECJ reached the following conclusion:

*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. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.*

The Court reiterated the position made in *Van Gend en Loos* that the EC Treaty has created its own legal system, a unique Community that goes further than any other international agreement. This new legal system is an integrated part of the legal systems in the Member States and the national courts are obliged to uphold and apply Community law. Furthermore, the Court reiterated the standpoint made in *Van Gend en Loos* that the Member States have limited their sovereign rights, albeit in limited fields and created a legal order that binds both individuals and the Member States themselves.

The Court goes on to affirm that it would be impossible to grant primacy to a national rule that has been passed later than the Community measure. The Member States have accepted the Community legal system and must thereby abide by its rules. The Court goes on to state that the execution of Community law cannot vary from one Member State to another since it would impair the effectiveness of Community law and be contrary to a coherent legal system. That would jeopardize the achievement of the objectives of Article 10 of the EC Treaty that states that the Member States must ensure fulfillment of their Treaty obligations. Furthermore it would lead to discrimination on the basis of nationality.

Furthermore, the ECJ argues that without supremacy Treaty obligations would not become “unconditional” but rather “merely contingent” if the Member States could set aside Community law by adopting subsequent national legislation. The Court also declared that the precedence of Community law was declared in Article 249 of the EC Treaty. The Article confirms that a regulation shall be binding and directly applicable in the Member States. The Court



considered that such a provision would be meaningless if a Member State could choose not to follow it on the ground of national law. The *Costa* ruling therefore was an audacious step by stating that the Member States have limited their sovereign rights to the Community and transferred power to its institutions.

The ECJ has been consistent and upheld its view from the *Van Gend en Loos* and *Costa* cases. The Court stated in December 1991 in its opinion on the draft of the Agreement for establishing the EEA<sup>14</sup> that:

*As the Court of Justice has consistently held, the Community Treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subject of which comprise not only Member States but also their nationals ... The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.*<sup>15</sup>

Neither the doctrine of direct effect nor the doctrine of supremacy in European law was enshrined in the EC Treaty. As a result of this, the ECJ has been criticized for its ruling by going farther than mere interpretation of the Treaty and going into a sphere of policy-making.<sup>16</sup>

#### **1.4 Internationale Handelsgesellschaft : Full Supremacy of EC law**

A constitution is the set of rules that govern political bodies. These rules are often protected by special courts and cannot be changed as easily as ordinary law. In *Costa* the matter at hand regarded a clash between a provision of ordinary national law and a provision in the Treaty. An interesting question is: what happens if that national provision is a constitutional provision?

The case of *Internationale Handelsgesellschaft* concerned the question of whether EC law should have supremacy over the Constitutions of the Member States and especially if Community law takes primacy over the fundamental rights provisions in national Constitutions.<sup>17</sup> The case is said to mark the classic claim of full supremacy of Community law. The Court held that Community law should take precedence over all provisions in national law whatever its legal status even the Member States' Constitutions.

In order to control the market in certain agricultural products, a system had been introduced by the Community, under which exports were permitted only if the exporter first obtained an export license and gave an economic deposit. However, if the firm failed to import the goods then the firm would lose its deposit. The matter at hand regarded a firm that had lost its

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<sup>14</sup> The Agreement for establishing the European Economic Area was signed between the seven European Free Trade Area (EFTA) countries and the Member States of the European Community on May 2, 1992.

<sup>15</sup> Opinion 1/91, [1991] ECR I-6079.

<sup>16</sup> Boomerberg, p. 62

<sup>17</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

deposit. The applicants claimed that the whole system was invalid as it was contrary to fundamental human rights. According to German constitutional law public authorities may impose on the citizen only those obligations which are necessary for attaining the public objective in question. In the German administrative court it was argued that the Community measure was invalid for it violated the German Constitution and the question of its validity was referred to the ECJ for preliminary ruling. The question concerned whether the ECJ considered the European regulation to be in violation of fundamental rights of individuals.

The ECJ held that the law stemming from the Treaties is an independent source of law and that it cannot be overridden by rules of national law “*however framed*”. Otherwise, it would be deprived of its character of Community law which would lead to the Community itself be called into question. Consequently, the “*validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure*”.

This means that no matter what the nature and status of the legal provision of the Member State, the directly applicable Community provision shall take precedence. Therefore, fundamental rights that are part of a Constitution or the constitutional structure of a Member State cannot affect the validity of Community law. Furthermore, the ruling made it clear that Community law has precedence even over national legislation that was adopted after the relevant Community provision.

The Court justified its ruling by referring to the fact that the unity and efficacy of EC legislation would be seriously harmed if a national court would be permitted to review its validity on the basis of specific provisions in the Member States’ legal system.

## **1.5 Simmenthal II: The duty of national courts**

The cases of *Costa* and *Internationale Handelsgesellschaft* both clarified many questions relating to the relationship between national law of the Member States and Community law. *Costa* laid the foundations of the supremacy doctrine by stating that Community law shall take precedence over national law. In *Internationale Handelsgesellschaft* the Court stated that Community law has primacy over all national law whatever the legal status of the national law. Thus, fundamental constitutional provisions in a national constitution cannot override EC law. The national court of the Member States must therefore enforce Community law even if there is a clash with their own national provisions. The *Simmenthal II* ruling laid clear the practical implications of the supremacy doctrine.<sup>18</sup>

The facts were simple. Simmenthal imported beef from France to Italy and was made to pay a fee for public health inspection when the meat crossed the frontier. An Italian law passed in 1970 laid this down. It was however contrary to the EC Treaty and two Community legislations passed in 1964 and 1968 respectively. The case began in an Italian court where two points were raised by the Italian authorities. First, that the Italian law must prevail because it was passed *after* the two Community legislations, and secondly, even if the Italian law conflicted with Italy’s

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<sup>18</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629.

Treaty obligations, it had to be applied by the Italian courts until such time as it had been declared unconstitutional by the Italian Constitutional Court. This latter contention was based on a principle of Italian constitutional law according to which questions concerning the constitutionality of Italian laws had to be determined by the Constitutional Court. A reference was made to the European Court to obtain a ruling on these issues.

The ECJ held that it was the duty of a national court to give full effect to the Community provisions and not to apply any conflicting provisions of national legislation, even if it had been adopted subsequently. It also held that it should not wait for the national law to be set aside either by a constitutional court or by the legislature. The key passage in the judgment deserves to be quoted in full:

*Furthermore, 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 State 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.*

*Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.*

Three things should be noted about this. First, the ECJ's statement is limited to Treaty provisions and "directly applicable measures of the institutions". Secondly, it does not state that conflicting national provisions are void, but merely that they are "inapplicable". Thirdly, the second paragraph is concerned not only with national legislation which conflicts directly with a Community provision, but also with national laws, which "encroach upon the field within which the Community exercises its legislative power". The powers of Member States can be limited even where the conflict is only indirect or potential. For example the Member States have lost their power to enter into agreements with third countries. This loss of jurisdiction applies even where there is no direct conflict with Community measures.

## **1.6 Factortame: ECJ creates remedy to disapply national legislation**

The *Factortame* judgment is seen as the most far-reaching case made by the ECJ, with regards to the relationship between Community law and the law in the Member States.<sup>19</sup> The origin of the case was a decision by the Community to adopt fish conservation measures. To achieve this

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<sup>19</sup> Case C-213/89, *R.v. Secretary of State for Transport, ex parte Factortame Ltd. And Others* [1990] ECR I-2433.

objective, limits were laid down on the total number of fish of various species that could be caught in a given period. Quotas were allotted to each Member State. Certain Spanish fishermen, however, thought that they could obtain a share of the British quota by the expedient of registering companies in the United Kingdom and transferring the ownership of their boats to those companies. They claimed that, since their boats were owned by British companies, they were entitled to sail the British flag and therefore take fish from the British quota, rather than the Spanish quota. British fishermen objected to this “quota hopping”, and the British Government passed legislation to prevent it.<sup>20</sup> The Spaniards immediately challenged the legislation in the British courts, claiming that the registration procedure in the UK was discriminatory, and a reference was made to the ECJ to determine whether it was contrary to Community law.

Since the ECJ normally takes about one to two years to decide such cases, this would have meant that the fishing boats in question would have been idle for some time suffering irreparable damage. The Spaniards therefore applied for an interim injunction to preclude the Government from enforcing the British statute until the ECJ had given its ruling. The House of Lords ruled that, under United Kingdom law, there was no power to grant an injunction against the Crown to suspend the application of an Act of Parliament. The House of Lords then made a reference to the ECJ asking a question of remedies: did Community law require that interim injunctions against the Crown should be available to litigants claiming rights under Community law? In other words, could a national court suspend application of a national rule that prohibits the national court from granting interim relief.

The ECJ found in favor of the Spanish fishermen. It ruled that the effectiveness of EC law would be impaired if a rule of national law could hinder a national court from granting interim relief in a matter regarding Community law. The Court stated that national courts must set aside its national law if it has a case before it concerning Community law and the only reason for not granting interim relief is a rule of national law. The ECJ stated that where, in a case involving Community law, a national court considers that the sole obstacle to the granting of an interim relief is a rule of national law, Community law requires to set aside that rule. The ECJ reaffirmed its position in *Simmenthal II* and stated that directly applicable provisions of Community law make any conflicting provision of national law inapplicable. The British court must disapply the Act of Parliament since it was inconsistent with the EC Treaty. *Factortame* had a considerable impact in the United Kingdom where parliamentary sovereignty is a fundamental constitutional principle.<sup>21</sup>

## **2. Primacy of Community Law According to the EU Constitution**

The Treaties have so far been silent on supremacy and it is the ECJ that has gradually established the doctrine of supremacy in Community law since the early days of the *Costa* case. Adopting a Constitution for the European Union means rewriting the Treaties. The Convention on the Future of Europe agreed to include the primacy of Union law in the Draft Constitution. The final text of “The Treaty Establishing a Constitution for Europe” was approved by the Heads of State and Government on June 18, then tidied up, and formally signed by them on the Capitol Hill in Rome

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<sup>20</sup> The Merchant Shipping Act 1988: For flying the British flag the boats had to be owned by a company of which 75% of its shares were held by British citizens domiciled in the UK.

<sup>21</sup> Hartley, p. 225

on October 29, 2004. Before entering into force the Constitution still has to be ratified by the national parliaments and referendums have to be held in the Member States if the national constitutions so require. Article I-6 of the Constitution states:

*Union law*

*The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.*

It seems evident that the Convention delicately preferred the weaker word “primacy” to the stronger “supremacy”. However, the implications of the article would probably not change if the Convention had used “supremacy”. What is more important is that the wording of the article is ambiguous and can lead to different interpretations. For instance, should one consider that all EU law is supreme to all national law, including national constitutions? The wording does not give a precise answer. Paradoxically, the article can also be interpreted as not granting supremacy over national constitutional provisions but mere basic national law.

It is clear that Article I-6 is an attempt to codify the jurisprudence of the ECJ on supremacy. One think tank concludes, “*the article on the primacy of EU law changes nothing substantive. European law has had primacy since an ECJ ruling of 1964 /.../. The clause is necessary to ensure that national legislation conforms with commonly agreed EU rules. The single market could not function without EU law prevailing over national laws that contradict it.*”<sup>22</sup> However, one may question whether the article is a *de facto* enlargement of the supremacy doctrine or merely a codification? The Member States will most likely regard the primacy of EU law to exist as a result of their ratification of the Constitution. But the standpoint of the Court may well differ. If the article stands, ambiguity still exists. Furthermore, one could also argue whether the article in fact is counterproductive since it does not unveil the many questions concerning the relationship between EU law and the law in the Member States. One must bear in mind that the doctrine of supremacy is a well-established principle of Community law.

In the early years of its existence, the ECJ did not have much work to do.<sup>23</sup> More recently the caseload has increased and a Court of First Instance has been created. Perhaps the most serious complaints about the ECJ is the excessive length of time it takes for cases to be brought before the Court and for decisions to be taken. Some may say that the attempt to codify the doctrine of supremacy will bring up an unnecessary discussion and cases on a principle that is deeply rooted in the Community.<sup>24</sup> But on the other hand, it would be absurd not to mention the primacy of EU law in the Constitution.

### **3. Conclusion**

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<sup>22</sup> See “The CER guide to the EU’s constitutional treaty” at <http://www.cer.org.uk/eu/index.html>

<sup>23</sup> See Coffey, p. 63

<sup>24</sup> One judge at the ECJ (anonymous) has expressed the belief that his already growing workload, would increase further due to the Constitution. See <http://news.bbc.co.uk/1/hi/world/europe/3720429.stm>.

The EU is based on a pact between sovereign nations that have resolved to share a common destiny and to transfer an increasing share of their sovereignty to the Community.<sup>25</sup> In contrast to past attempts, by Napoleon and Hitler for example, to unite Europe by force, the European Community is based on the consent of the Member States.<sup>26</sup> Underlying this consent is the tacit assumption that all the Member States will play the game according to the same rules. National Governments are prepared to accept Community law, which are against their interest, but benefit others, if other Member States are prepared to do the same when the balance of advantage is reversed. It follows from this that the Community law must have the same meaning and effect in all Member States. This in turn requires that ultimate authority to decide these questions should reside in a single court whose jurisdiction extends over the whole Community. The only such court in existence is the ECJ.

It also follows from these premises that Community law must override national law in the event of a conflict. If this were not so, Member States could avoid the application of Community rules disadvantageous to their interests by the simple expedient of passing conflicting legislation. Moreover, if Community law is to be directly effective, an essential characteristic of a supranational system, the ECJ must have the final say with regard to its validity and interpretation.

Community law would be useless if it could not be effectively enforced. This is mainly done in two ways; by private individuals in the national courts and by the Community (the Commission) in the ECJ. Once it is accepted that Community law is directly effective and prevails over national law the way is open for an individual with a right under Community law to bring proceedings in the national courts and thus make use of national legal remedies to enforce it. Alternatively, proceedings can be brought by the Commission (or another Member State) in the ECJ against a Member State which fails to abide by Community law.

This paper has dealt with the basic rule of Community law that a directly effective provision of Community law always prevails over a provision of national law. This rule, which is not found in any of the Treaties but has been proclaimed with great emphasis by the ECJ, applies irrespective of the nature of the Community provision (constitutive Treaty, Community act, or agreement with a non-member state) or that of the national provision (constitution, statute, or subordinate legislation). It also prevails whether the Community legislation came before or after the national provision. In all cases the national provision must give way to Community law. As shown in the previous sections, the Community legal order grew and developed mainly at the hands of the Community judges. Over the years the ECJ has played an essential role consolidating its autonomy in relation to municipal and international law, by emphasizing its originality and by imposing its precedence. Perhaps the Court has been the most driving force of all the Community institutions when it comes to European legal integration. In the light of these judgments, one should recall the case where it established the supremacy of Community law for the first time, namely the *Costa* case. The ECJ stated that:

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<sup>25</sup> Fontaine, p. 55.

<sup>26</sup> Shown by the quote from the Schuman Declaration at the beginning of this paper. Among the leading advocates of European integration Schuman, Spaak, Spinelli, and Monnet, it was Monnet who was the main driving force. From Monnet's memoirs one can read that his ultimate aim was a united Europe. See McKay, p. 47. As we have seen these fellows have been skillfully helped by the ECJ through the years.

*[t]he 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.<sup>27</sup>*

As we have seen this also applies with regard to national constitutional provisions. To put the ECJ's view simply: either Community law stands by itself, is uniformly applied and has precedence over national legislation, or it does not exist at all. It is a kind of belief of all or nothing.

The general principle of Community law's precedence over national law has more concrete consequences. Community rules that have direct effect are a direct source of rights and duties for all those affected thereby. The national courts must, as an organ of a Member State, protect the rights conferred upon individuals by Community law. In accordance with the principle of precedence, Community measures, by their coming into force, automatically render any conflicting provisions of current national law inapplicable.

It follows that every national court, in cases within its jurisdiction, must apply Community law in its entirety and protect the rights, which the latter confers upon natural or legal persons. In other words, it must set aside any conflicting provision of national law, whether prior or subsequent to the Community provision. It is not necessary for the national court to request or await the prior setting aside of such national provisions by legislative or other means.

The EU Constitution states explicitly for the first time in a Treaty that EU law takes precedence over national law. Defenders of the Constitution say this is just an explicit statement of what is already the practice, with the ECJ already ruling that EU law is supreme over national laws. However, opponents insist that it would make it impossible for the Member States to challenge the supremacy of the EU in future, should it wish to, and that the current Parliament cannot bind the sovereignty of future parliaments.<sup>28</sup> Nonetheless, it remains to be seen whether the Member States will endorse the wording or the very existence of such an article. My guess is that once the smoke settles after discussions on more contentious issues such as the Common Foreign Security Policy (CFSP) and Qualified Majority Voting (QMV), the primacy of EU law will be enshrined in the Constitution without much controversy.

Seen in this light, the EU appear, beyond all limitations, ambiguities, hesitations and conflicts, as a legal, political, social and economic system, which thanks to its balanced institutional structure and inherent potential, constitutes the best possible solution for Europe's problems and the hope for its development.

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<sup>27</sup> Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

<sup>28</sup> See "EU Constitution: the battlegrounds" by Anthony Browne at <http://www.timesonline.co.uk/article/0,,13509-1080883,00.html>

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