CONSTITUTIONAL COURTS AND THE COURT OF JUSTICE, CONSTITUTIONAL LAW AND EU LAW – TWO ARRANGED MARRIAGES AND THE LEGAL PROBLEMS ARISING FROM THEM

David Sehnálek[1]

ABSTRACT

This article addresses the question of relationship of constitutional courts to the Court of Justice in national case law; the hierarchy of these national courts to the Court of Justice of the European Union (EU); the hierarchy of national law (constitution) and EU law and the constitutional identity as a limit of the principle of supremacy. The innovative contribution of the present article is that it distinguishes between the effects of the principle of supremacy of EU law on national courts and on national legislators. It thus provides clear and precise guidance to national judges on how to proceed in contentious cases of conflict between national and EU law. This question is not satisfactorily answered in the case law of the Court of Justice. It is also avoided in articles and most textbooks dealing with the supremacy principle. This article also addresses the possibility of a comprehensive solution to the conflict between EU and national law in extreme, but politically extremely important and sensitive, divergences between the decisions of national constitutional courts and the Court of Justice. Contrary to conventional notions, which cognise such a divergence as a serious problem and tend to deny constitutional courts the possibility of making their own independent conclusions, the author of the present article sees this as a natural consequence of the position that these courts occupy in the legal systems of the Member States. In the last part of the article, the author presents several options that constitutional courts have and can use to deal with decisions based on EU law, ranging from full acceptance of this law to its complete rejection on the grounds that EU law does not fall within the frame of reference protected by constitutional law.

1 | Vice-dean for bachelor's degree study and two-year follow-up master's degree programme and Associate Professor, Department of International and European Law, Faculty of Law, Masaryk University, the Czech Republic; david.sehnalek@law.muni.cz.

https://doi.org/10.55073/2024.1.203-228

KEYWORDS
the preemption doctrine
federal preemption
supremacy
primacy
Court of Justice and National Courts
Constitutional Courts and EU Law
national identity

1. Introduction

The primacy of European law is a principle that has been present thereof for 60 years. It has been formulated in the case law of the Court of Justice in a way that still raises questions today. In fact, the Court's decisions on the primacy of the European Union (EU) law always respond to a particular sub-issue. They therefore do not deal with all aspects of this principle of application in a comprehensive manner. They also often contain conclusions that the Court of Justice has not thought through and which it has modified or ignored in subsequent decisions. Meanwhile, these judgments do not deal with the national perspective and the position of the national constitutional courts. Nevertheless, inconsistent and fragmented case law is not the only issue. It is also a problem that this case law is generally treated academically in the literature, that is, without proposing specific solutions of application nor drawing implications for national authorities of various kinds.

We can use two different terms to describe the relationship between national and EU law—it is either the primacy or supremacy of EU law. Sometimes they are used interchangeably, while at other times, a distinction is made between them. In this view, primacy is a manifestation and consequence of the supremacy of EU law[2] and is understood purely as a procedural institute relating to the work of the courts. In this article, I will work with the broader concept of supremacy which refers to the structural relation between the EU's and its Member States' legal orders.[3]

This article aims to identify the implications of the supremacy principle for Member States. Not in a purely academic way, however; there have already been many such treatises. It will be important to elaborate on the implications for the legislature, authorities, and courts. The reason for this approach is that the competences of these authorities differ. However, the supremacy principle is usually described in a uniform and universal way, without the authors concerned distinguishing between the implications for national authorities.

The second aim of the article will be to answer the question of the impact of the principle of supremacy on national courts, especially constitutional courts. Can these courts rule differently from the Court of Justice and from EU law? The

2 | Avbelj, 2011, pp. 744–763.
3 | Tuominen, 2020, pp. 245–266.

starting premise is that these courts may have this possibility. I will try to prove or disprove this premise in this article.

The third objective of the present article will be to determine the hierarchy of courts in the EU vis-à-vis not only the interpretation of EU law but also the application of EU and national law. The result should be the establishment of clear procedures for resolving conflicts in the application of the law. Empirical data suggest that national (Czech) courts make mistakes in practice, as they often do not distinguish between the principle of supremacy and that of direct effect, especially in the case of directives. The result is a paradoxical situation whereby constitutional courts tend to restrict the principle of supremacy of EU law and thus apply it to a lesser extent than the case law of the Court of Justice would suggest, while the general courts, on the contrary, overuse this principle even where the case law of the Court of Justice does not require or presuppose it.

The fourth objective of this article is to propose possible systemic and legislative solutions to the problems associated with the principle of supremacy.

2. Reminder of the principle of supremacy in the case law of the Court of Justice of the EU

A member state of the EU is in a similar position in law as a sub-state of a federal state (federation). According to the Court of Justice of the EU, the law of the EU takes precedence over national law, a solution typical of federal states. A certain peculiarity of the EU is that this principle has been formulated only in the case law of the Court of Justice and therefore has no support in the 'constitution', that is, in the founding treaties of the EU. In federations, on the contrary, the constitutional enshrinement of the principle of the supremacy of federal law is customary.

The case law of the Court of Justice on the supremacy of EU law is well known and will therefore not be discussed in detail herein, but only as a starting point. I will therefore summarise the basic rules that emerge from this case law, as they are important for further analysis.

First, the principle of supremacy is enshrined directly (and tacitly) in EU law and autonomously on national law (Costa vs. E.N.E.L.).[4] Second, it is only about a priority of the application of EU law, that is, it does not imply a higher legal force of the EU over national law and is therefore not a ground for the annulment of national legislation by the national court which applies the EU regulation. Third, although it is only a priority of application, the respective state is not entitled to maintain legislation that is contrary to EU law in force, and the principle of supremacy results in absolute priority in the sense that EU law also prevails over national constitutions

4 | Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Case 6/64.

(Internationale Handelsgesselschaft)[5] and national standards of human rights protection, even if they grant a higher level of protection than EU law (Melloni).[6]

In traditional federations, the relationship between state and federal law is defined similarly to the case law of the Court of Justice for EU and national law. In the US, it is the federal constitution, which enshrines in the 'supremacy clause' a supremacy over the law of the sub-states, including their constitutions. Similarly, the German Constitution defines the relationship between federal law and the law of the land in Article 31 of the Grundgesetz. In the UK, the member nations such as Scotland are only granted the ability to regulate selected issues by their own legislation, but the UK Parliament retains the power to regulate anything, even a matter that was previously devolved.

Despite these similarities, the system created in the EU shows quite fundamental differences. First, the EU has no state power of its own, independent of its Member States. It only exercises certain powers: those conferred on it by the Member States. The extent of the conferral has been greatest in the area of the adoption of legislation. However, law enforcement and dispute resolution are mostly the task of national authorities and courts. Unlike the federations, these national courts in the EU do not face the risk of judicial review of their judgments, even when they apply EU law. Indeed, the judicial systems of the EU and its Member States are separate. Federal courts, however, typically have the power to review the judgments of state courts if such judgments have a federal dimension. This solution reinforces the power status of the federation and its supremacy. It also contributes to the internal coherence of the system and the uniform application of the law throughout the federation.

Another difference is that in the EU, Member States are the 'Masters of the Treaties'. The EU came into being by their will and by their will it endures. It was the Member States who defined the scope of the EU. In federations, these issues are dealt with in the federal constitution, whether it is written (US or Germany) or unwritten (UK). This difference is more significant than it may appear at first. Even in traditional federations, conflicts can arise, but these conflicts are essentially exclusively about the division of powers between the federation and the state. In other words, it is a matter of determining what is still in the common interest of the whole federation, and which issues already fall, in whole or in part, within the competence of a sub-state. The concept of the scope of federal and state competences can evolve in both directions over time, both in favour of the expansion of federal competence and in favour of the sub-states, as evidenced, for example, by the Roe v. Wade decision and the change of approach in the US decision regarding Dobbs v. Jackson Women's Health Organization. The question that does not arise, because it is clear, is whether federal law takes precedence over the law of the sub-states at all. Neither does the question arise as to the relationship between state and federal courts, with the latter being higher in the hierarchy.

5 | Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11–70.
6 | Judgment of the Court (Grand Chamber) of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C399/11, Paragraph 56.

I have stated that Member States are the 'Masters of the Treaties'. In this respect, they differ from traditional sub-states of federations in that they have more power to amend the 'common constitution', as it is the product of their common will. But that is where the difference ends. The interpretation of this 'common constitution' is in both cases delegated to the 'federal level'. In the EU, it is the Union itself, through the Court of Justice, which provides the binding interpretation. This is common with the federations. But the consequence is that the Member States are in the unenviable position of having to deal with the most sensitive area for them—the definition of the scope of the powers they have conferred on the EU. These powers are conferred by means of the founding treaties, which are either general or completely silent on some important issues. This gives the Court of Justice a lot of room to interpret these treaties in favour of the EU.[7] The Member States are thus in the position of a donor who has concluded a gift contract with the donee, which only defines in very general terms what is to be the subject of the gift. The specifics are then, according to that contract, not to be made by the donor, or at least by the donor together with the donee, as it is the donee himself who has the power to specify what the gift is. Accordingly, the EU does so through the Court of Justice, often to its own advantage.[8]

A brief survey of the case law of the Court of Justice shows that this court's approach to the principle of supremacy is straightforward, settled, and has been clearly established for many years. Nevertheless, it should be pointed out that this Court has in the past also given judgments which it has not followed, or which have subsequently proven to be legally unsustainable and untenable.

For example, in the Costa decision, the Court of Justice stated that 'Unlike ordinary international treaties, the European Economic Community (EEC) Treaty established its own legal order which became part of the legal systems of the Member States from the entry into force of the Treaty and which is binding on their courts'. It goes on to state, in the same vein, that

> The consequence of the incorporation into the law of each Member State of provisions derived from a Community source, and more generally of the incorporation of the text and spirit of the Treaty, is that the Member States cannot successfully invoke a later unilateral measure against a rule of law adopted by them on the basis of reciprocity, which cannot therefore be invoked against it.

However, that statement contradicts its own thesis on the autonomy of EU law expressed in the same decision. If EU law is to be genuinely autonomous, it cannot be part of the legal systems of the Member States; it is only applicable in the Member States.

7 | In the case law of the Court of Justice of the EU, this is manifested in the form of the argument 'ever closer union between the peoples of Europe', which can be seen either as an expression of the intention of the legislator, which could also be conceived more abstractly as one of the arguments within the framework of teleological interpretation (argumentum ad Unionis Europaeae). Sehnálek, 2019, p. 10.
8 | Sehnálek, 2020, pp. 125–153.

The judgment goes on to talk about the actual powers of the EEC, but the EEC, or the current EU, as an international organisation, does not have any powers on its own, but only exercises selected conferred powers (there is a difference), which belong to the Member States.

Finally, the judgment states that 'the transfer of rights and obligations corresponding to the provisions of the Treaty by the States from their national legal order to the Community legal order constitutes a definitive limitation of their sovereign rights'. In the light of Article 50 of TEU and Britain's withdrawal from the EU, we now know for certain that the limitation of Member States' rights is not definitive and final, but only voluntary and temporary.

Similarly, in another well-known decision, Simmenthal,[9] the Court of Justice states that

> Moreover, by virtue of the principle of the primacy of Community law, the provisions of the Treaty and directly applicable acts of the institutions have the effect, in their relations with the national law of the Member States, not only of rendering any provision of national law inapplicable by their mere entry into force, but, moreover, since those provisions and acts are an integral part, albeit with a higher legal force, of the legal order in force in the territory of each Member State, they prevent the valid creation of new national laws to the extent that they are incompatible with Community rules.

The Court thus contradicts the thesis of the autonomy of EU law as a system separate from national law. Notably, EU law does not have a higher legal force than national law, a matter distinct from federations, because it is not part of a single legal system within which legal force can be determined and measured against each other.

However, it is not the purpose of this article to analyse these relatively old decisions, even though they may still be considered 'law'. The purpose is to point out that, first, the concept of the principle of supremacy in case law has evolved over time. Second, this article aims to submit that it is impossible to dogmatically insist on every word or sentence that appears in the Court's judgments. Conversely, the text of those judgments must be taken with a grain of salt and with an open mind, as the result of a certain compromise reached in a private debate between the judges. The judgments are a partial and often imperfect representation of the state of play in one particular case, not a generally applicable general guide.

Finally, there is no point in criticising the Court of Justice for the way it has conceived the principle of supremacy. That principle is simply the product of recognised necessity. EU law, as supranational law, cannot function effectively without having unconditional supremacy over national law. However, there must be limits, both legal and political.

9 | Judgment of the Court of 9 March 1978. Amministrazione delle Finanze dello Stato v Simmenthal SpA. Case 106/77.

3. Consequences of the supremacy of EU law for national authorities—the EU law perspective

What does the principle of supremacy mean in particular? The answer is, at first glance, uncomplicated: national authorities may not apply national law that conflicts with EU law. However, the reality is more complex and requires more careful analysis. The positions of the national bodies that make the law (the standard-setting bodies) and the bodies that merely apply the law (the courts and authorities) differ. It is precisely in this difference that one can see some sense in the distinction between the meaning of primacy and supremacy.

As far as the legislative bodies are concerned, the principle of supremacy is reflected in the fact that[10]

(a) prevents them from adopting national legislation in areas that are fully and exclusively regulated by EU law. An example is the regulation of customs duties applicable to imports of goods into the EU from a third country. The regulation of this area is complete in EU law and is contained in directly applicable legislation. Member States therefore have no scope for self-regulation.

(b) while this does not prevent these authorities from adopting their own legislation in the area regulated by EU law, it must meet the minimum standards contained in EU law. Typically, this is the case when a certain issue is regulated by a directive which contains a minimum standard for regulating a certain issue. A state may adopt its own regulation or even its own derogating solution, but it must comply with the minimum standard.

(c) does not prevent these authorities from adopting their own legislation, as EU regulation of the issue in a positive sense (this is the difference with the previous situation) is completely absent. However, EU legislation represents a limit beyond which national legislation must not go. More specifically, the EU regulation does not set the standard for the operation of the regulation in question but determines what is functionally impermissible from the viewpoint of EU law. A typical example of this situation is national levies on goods. These charges are set by Member States in national law and are not regulated by EU law. However, under EU law (see Article 30 of TFEU), such charges must not constitute a levy applied solely in connection with the passage of goods across borders (Diamantarbeiders).[11]

This was the passive side of the effect of the principle of supremacy on national legislatures. From a different, active perspective, the principle of supremacy, according to the case law of the Court of Justice (Commission of the European

10 | This part was inspired by and is based on a typology by Schutze, who analyses the problem from the US perspective and distinguishes between field, obstacle, and rule pre-emption. See Schutze, 2015, pp. 134 et seq.

11 | Judgment of the Court of 13 December 1973. Sociaal Fonds voor de Diamantarbeiders v NV Indiamex and Feitelijke Vereniging De Belder. Joined cases 37 and 38–73.

Communities v French Republic)[12] is reflected in the obligation on the legislative authorities to remove incompatibilities between national legislation and EU law. It follows for those authorities that

(a) the legislature has a duty to repeal national legislation that conflicts with EU law. This obligation arises in the case of the situation described in point (a) of the overview above. This means that the national standard is repealed in its entirety.

(b) the legislative authority has a duty to repeal or bring into line national legislation that conflicts with EU law. This obligation arises in the case of the situation described in points (b) or (c) of the summary above. This means that a national standard is repealed only to the extent that it is incompatible with an EU standard.

(c) the legislative authority has a duty to amend the scope of national legislation to remove incompatibilities with EU law. Thus, the national standard is not abolished, it is preserved, but its substantive scope is limited, for example, exclusively to national matters without an EU element.

In all of the aforementioned cases, it is irrelevant whether the EU legislation meets the Court's requirements for direct effect. In other words, the mere existence of EU legislation is sufficient in itself to affect the content of national law and the action of the national legislature by means of the principle of supremacy.

The effects of the principle of the supremacy of EU law on the institutions that do not make law but solely apply it, that is, on courts and administrative authorities, may be as follows:

(a) National courts and administrative authorities are under an obligation not to apply national legislation that conflicts with EU law without any further examination of its conflict with EU law. This obligation arises in the situation described in paragraph I(a) of the summary above.

(b) National courts and administrative authorities are obliged not to apply national rules, but only to the extent that they conflict with EU law. The prerequisite is a comparison between the standard of EU law and the standard contained in national law. If a compatible (Euro-conforming) interpretation of this national regulation with EU law is possible, they are alternatively free to apply it if the interpretation removes the incompatibilities. This obligation arises in the situation described in paragraph I(b) of the summary above.

(c) National courts and administrative authorities have a duty to test in specific cases whether a national regulation conflicts with EU law. Here too, any finding of a conflict may lead to a solution in the form of non-application of the regulation or its consistent interpretation. This obligation arises in the situation described in paragraph I(c) of the overview above.

(d) Finally, there may also be situations where national regulation is completely absent. Thus, the conflict with EU law does not lie in the fact that national law regulates certain issues differently than EU law requires. The problem is that there is no national solution. The general rule in such a case will lead to the conclusion that the competent authority may be obliged to apply the solution contained in the EU

12 | Judgment of the Court of 4 April 1974. Commission of the European Communities v French Republic. Case 167–73.

regulation, subject to other conditions. This situation typically arises in the case of directives that have not been properly and timely transposed into national law. However, if the conditions are not met, the supremacy of EU law does not apply.

(e) A specific case is a situation where the national legislation is not contrary to EU law because the latter does not provide for the relevant standard but has been adopted in contravention of EU procedural rules. In such a case, the national legislation cannot be applied by the court or authority. This was the situation in the CIA Security[13] and Unilever[14] case.

At first glance, all the solutions described above look similar to those concerning the standard-setting bodies. Yet there are significant differences. Even in a situation where, in view of the principle of supremacy, the national legislative authority is obliged to amend, repeal, or adopt a new national rule, the national court or administrative authority may be obliged to apply that national rule without applying the EU rule.

This situation can be very well demonstrated by the famous Mangold[15] case. The German legislator was not entitled to adopt the relevant solution for the employment of persons of a certain age for a fixed period of time because of a conflict with EU law. Once that national legislation had been adopted, it was under an obligation to remedy that conflict as soon as possible. Nevertheless, the national courts and authorities would not have been entitled to rule in favour of the employee concerned on the basis of EU law. That was because the recognition of the supremacy of EU law by the non-application of the national legislation would ultimately have created a situation functionally corresponding to the direct effect of the directive. However, according to the case law of the Court of Justice, which is not permissible in horizontal legal relations. If it were not possible (somewhat controversially) to apply a general principle of law in the situation in question, the matter would have to be resolved on the basis of national law. The fact that that law was contrary to the standard contained in EU law would have no effect on the national court. However, the legislature would be obliged to implement the national law. It is therefore clear that the position of the courts (and similarly the authorities) is different from that of the legislature.

It follows from the aforementioned that the priority application of EU law may be conditional on its direct effect. This is an aspect which the authorities applying the law must address, whereas it is irrelevant for the legislative bodies. If EU law is incapable of having a direct effect, it shall not be applied instead of national law (substituting direct effect), nor can it lead to the exclusion of the application of national law without the simultaneous application of EU law (excluding direct effect). This situation typically arises in the case of directives. In general, however,

13 | Judgment of the Court of 30 April 1996. CIA Security International SA v Signalson SA and Securitel SPRL. Case C-194/94.

14 | Judgment of the Court of 26 September 2000. Unilever Italia SpA v Central Food SpA. Case C-443/98.

15 | Judgment of the Court (Grand Chamber) of 22 November 2005. Werner Mangold v Rüdiger Helm. Case C-144/04.

it can occur with any legal rule enshrined, for example, in a regulation or primary law, if it is not capable of having a direct effect, for example, because it is too general and not clear, unconditional, or qualified by any reservation.[16]

The recent case law of the Court of Justice in the Pfeiffer[17] and Popławski II[18] decisions concerning directives and, more recently, in the Lin[19] decision concerning any source of EU law in general, has also clearly favoured this functional approach.[20]

It would seem that this solution is not contradictory. Yet, Czech courts tend to err in it. The first consequence is intuitive and therefore clear. In the case of the second, the courts may decide incorrectly. They may be under the misleading impression that, when they do not apply EU law (i.e., do not give it effect), they merely exclude the application of national law, complying with the requirements arising from the case law of the Court of Justice. This is not the case, as is, moreover, illustrated by the very exceptional decisions in the CIA Security and Unilever cases, in which the Court of Justice accepted this solution. However, it did so only and only in view of the specific nature of the directive in question, which did not harmonise the law of the Member States but merely laid down procedural rules for the adoption of national standards.

The second case in which, in my view, the principle of the supremacy of EU law may not be applied by the courts is where that application would involve exceeding the powers conferred by national law on the competent national court. The problem will not arise in the case of the ordinary courts and authorities, which are bound in their activities by the law, and therefore by EU law (Simmenthal). However, the position of the constitutional courts will differ. If the constitutional court is limited in its activities to deciding only on matters relating to the constitution (in the Czech Republic, including the Charter of Fundamental Rights and Freedoms), it cannot be required to uphold 'simple law', which, from the perspective of domestic law, is generally EU law. This does not, of course, preclude this Court from itself interpreting national law to conclude that it is also bound by EU law in its entirety, or only in the part relating to the protection of human rights and freedoms. I will discuss this issue later in the article.

16 | See conditions for direct effect formulated for the first time in Van Gend en Loos judgment. Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Case 26–62.
17 | Judgment of the Court of 5 October, 2004, Pfeiffer and Others. Joined cases C-397/01 to C-03/01.
18 | Judgment of the Court of 24 June 2019, Popławski II. Case C- 573/17.
19 | Judgment of the Court of 24 July 2023, Lin, Case C-107/23 PPU.
20 | This decision is remarkable for several reasons. First, it clarifies the procedure of national ordinary courts and protects them when they comply with EU law at the cost of violating national law by not respecting the decision of the Constitutional Court. Second, because it breaks the principle of lex mitior in the criminal and constitutional law of a Member State if this should be an obstacle to the effective application of EU law. On this point, see Benke, 2023, pp. 37 et seq.

4. Response by national law and national courts

The absence of a provision governing the supremacy of EU law in primary law gives national law and national courts the possibility to determine their own approach and their own rules for the application of EU law within their jurisdiction. This is a consequence of the fact that, although EU law is supposed to function federally according to the Court of Justice, the judicial systems of the EU are not federal at all.[21]

The limits of the functioning of the EU in terms of national law ought to be set at the national constitutional level. An example of such a constitution which itself sets a limit to the principle of supremacy is the Slovak Constitution, which in Article 7(2) limits the supremacy of EU acts to Slovak statutes (zákony Slovenskej republiky) only.

However, I am not aware of any explicit provision in any of the Member States that introduces at the national constitutional level a mechanism for reviewing whether the EU is acting within its conferred powers. The question has therefore been left, as in the case of EU law, to the national courts.

The reserved or rather conditional attitude of the German,[22] Italian,[23] and other constitutional courts towards the principle of supremacy is well known.[24] It is therefore astonishing that the whole system, which was created solely thru the judgments of the Court of Justice, has lasted for almost 50 years without giving rise to an open judicial conflict. If these first 50 years can be described as a time of purely verbal conflict,[25] the situation has undergone a dramatic transformation in the last decade. Peaceful coexistence limited to mutual verbal demarcation has been replaced by a state of open and acknowledged judicial conflict. The first case in which the supremacy of EU law and the role of the Court of Justice in its interpretation was challenged was the Czech Constitutional Court's decision in Holubec (Czechoslovak pensions),[26] followed by the Danish Supreme Court's decision in Ajos,[27] the German Constitutional Court's decision in PSPP,[28] and the Polish Constitutional Court's decision in supremacy and the rule of law.[29]

21 | Some authors proposed a more federal-like solution with EU courts established in all Member States, but such a reform does not see very likely in a near future. See Zemánek, 2003, pp. 9 et seq.

22 | I am referring to the well known case of the German Constitutional Court *Solange I, Solange II, Maastricht-Urteil, Lissabon-Urteil and Honeywell*.

23 | See, for example, Bonelli, 2018, pp. 357–373.

24 | See, for example, Vikarská and Dřínovská, 2022, pp. 1176 et seq. For an analysis of lesser know Spanish judgments related to the supremacy see García, 2017, or Duchek, 2023, p. 199.

25 | The German Constitutional Court has long been described as 'the dog that barks but does not bite'.

26 | Judgment of the Czech Constitutional Court, of 31 January 2012. in Holubec (Slovak pensions) case. Pl. ÚS 5/12.

27 | Judgment of the Danish Supreme court of 6. 12. 2016 15/2014 6 Available at: http://www.supremecourt.dk (Accessed: 20 January 2024).

28 | Judgment of the German Federal Constitutional Court, of 5 May 2020. joined cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

29 | For other examples of revolts see Bobek, Bříza and Hubková, 2022, pp. 110–112, or Bončková and Týč, 2022, pp. 1219–1222.

The jurisprudence of national constitutional courts from the period of calm, when the conflict was only verbal, suggested that a real conflict would arise either in the event of a constitutionally impermissible interference with the protection of human rights and freedoms by EU law or in a situation where the EU institutions acted *ultra vires*.

The judgments of the constitutional courts from the decade of turmoil and open conflict have partly confirmed these assumptions. Surprisingly, however, the source of the problems was not the protection of human rights and freedoms, but the question of the scope of the powers conferred and the different view of the facts. In addition to that, constitutional identity also became a problem.

A specific situation arose in the case of the Czech and Polish decisions. Neither of them represents a typical *ultra vires* situation. Rather, they concern different legal qualifications of the same problem. In the Czech case, the situation was one which, according to the Court of Justice, was subject to coordination within the EU social security system, whereas, according to the Czech Constitutional Court, it was a purely domestic matter relating to the break-up of the formerly common state with Slovakia.[30] In the case of Poland, there is a fundamental difference in how that state perceives the organisation of justice, which is a purely national matter, and the definition of the rule of law, where the Court indeed has jurisdiction. Just as the awarding of pensions in the Czech case may be a matter of national law and the break-up of the federation,[31] as well as EU law and coordination therewith, the independence of the judiciary may be part of an autonomous national procedural sphere or an EU concept of the rule of law.

This distinguishes the two cases from the Danish and German decisions. Those cases did not involve a different qualification of the situation. In Ajos, it was not the application or even the existence of a general principle of law that was at issue. It was only the question whether it could have direct effect in a situation where Denmark's accession treaty made no provision to that effect. Similarly, the qualification in the German PSPP case was not in dispute; the question at issue was essentially one of the degree of justification required.

I, therefore, conclude that a conflict between national and EU law can arise for the following reasons:

I. Material

1. EU law will interfere with the standard of protection of human rights and freedoms to an extent that will appear unsustainable from the perspective of a national constitutional court.

2. The EU authorities will intervene in the sphere of important national values: an intervention in constitutional identity.

30 | For details see Hamuľák, 2014, p. 128, or Křepelka, 2012, pp. 278–294, Stehlík, Sehnálek and Hamuľák, 2020, pp. 151–168.

31 | There is a third explanation that has nothing to do with EU law. The reason why the Constitutional Court ruled as it did was not because of opposition to EU law and the Court of Justice, but because of a long-standing dispute with the Supreme Administrative Court. The Court of Justice happened to be on the wrong side, but the main opponent of the Czech Constitutional Court was the Supreme Administrative Court. This conclusion is supported also by the Czech scientific literature. See for example Kosař and Vyhnánek, 2018, p. 866.

II. Formal

1. EU bodies will act ultra vires, and this category includes interference with what the Czech Constitutional Court calls the material core of the Constitution

2. The same situation will be qualified (treated) differently by national and EU courts. Thus, the dispute will not be about the existence of EU jurisdiction, as in the previous case, but about the legal qualification of the facts of the case.

The difference lies in the fact that for the first group, we do not reject the application of EU law a priori, but only ex post for insufficiency and inconsistency of its standard with the national standard. In the second case, we refuse to apply EU law without further consideration because we consider the situation in question to be a matter governed exclusively by national law.

The question entails how to resolve potential conflicts. A rational place to start would be to define the relationship between EU and national law in legal philosophical terms. The problem is that this approach will not work. In fact, legal philosophy has so far failed to provide a systemic understanding of EU law. It is the starting point for a view of how the relationship between EU law and national law should work. Why does the legal philosophy approach fail? It is because there is no one central authority that can both ask and answer this question. Thus, we get a very different answer depending on whether the supranational Court of Justice (federalist approach) or the national constitutional courts (constitutionalist approach) deal with the relationship between EU law and national law.[32]

A clear answer could have been given by the Member States in primary law (they have the power, as they are 'Masters of the Treaties'). They tried to do so in the Constitution for Europe, but this attempt failed.

The current solution in the declaration concerning primacy[33] is legally non-binding and therefore insufficient. Moreover, it refers to the opinion of an internal body of the EU (the legal service of the Council of the EU) and is only a declaration of the conference, not of the Member States. A federalist solution to the problem of supremacy directly in the 'constitution' has therefore not been adopted.

32 | However, the question of the legal-philosophical approach to law is worthy of attention, so I refer to the literature dealing with this issue. The absence of a one-size-fits-all solution follows from this literature Scheu, 2002; Brown, 2014; Pavlík, 2004; Weiler and Haltern, 1996, pp. 411–448; Schilling, 1996, pp. 389–390; Moorhead, 2012, pp. 126–143.

33 | Declaration No 17 concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

5. Solutions from the perspective of national constitutional courts

So far, I have worked mainly with the Court of Justice's perspective. However, it is also possible to approach the problem from the other side, that is, from the perspective of national law as formulated by national constitutional courts.

They have gradually and very carefully formulated their own doctrinal approach to EU law and its relationship to national law. The 'solange' approach of the German Constitutional Court and the *'contro limiti'* doctrine of the Italian Constitutional Court are well known. As these are well described and researched issues in the literature, they will not be further discussed herein.[34]

Common to both approaches is the belief that in national law in general (constitutional law in particular) there is a set of certain rules and values that are inalienable. Accession to the EU could therefore only and exclusively take place within the limits of these values. Consequently, the supremacy of EU law and its autonomous character cannot lead to the elimination of those rules or values.

In this view, the EU was created derivatively, on the basis of national (constitutional) law and therefore within its limits. The law of the EU was thus able to emerge as an autonomous and independent law. But it did so within certain limits, in the spirit of the maxim '*Nemo plus iuris in alium transferre potest quam ipse habet*'. If certain values are inalienable, then logically there could be no transfer of the exercise of powers in these areas to the EU. National law simply cannot and does not allow this.

At this point, I would like to point out one thing that is often forgotten. When one examines the position of national constitutional courts on the supremacy of EU law, these courts are treated as one large group. However, this is not the correct approach. I believe that there is a subtle difference between the constitutional courts of the founding Member States, such as the German constitutional court or the Italian constitutional court. They were confronted with a fait accompli and could not influence the Court's decision or the conditions of membership of the EU. The situation of the new Member States and their constitutional courts is different. They were joining the European Union under conditions that had already been clarified and where the concept of the principle of supremacy was well known from the Court Justice's jurisprudence. This approach was therefore accepted by new Member States in its entirety on entry into the EU.[35]

34 | Specifically for Czech constitutional response to the supremacy principle, see, for example, Bobek, Bříza and Hubková, 2022, pp. 115–174; Malenovský, 2006, p. 774; Tichý and Dumbrovský, 2013, p. 191.

35 | Accession to the EU was by international treaty, so one could support the thesis here by estoppel, a principle of public international law.

6. Supremacy and national constitutional law: Two mutually incompatible concepts?

At first glance, it may seem that the two solutions are incompatible and therefore cannot exist side by side. Their very existence is seemingly legally wrong. Logically, therefore, one of these solutions must be rejected as incorrect. However, I do not share this distinct approach. Indeed, I believe both approaches are compatible.

First, the European Court of Justice draws on EU law in formulating and interpreting the principle of supremacy. It is therefore not concerned with national limits. It cannot even deal with them, as it is not competent to interpret and apply national law.

Second, national constitutional courts interpret their own constitutions. This is their main task, and it is up to the Member States themselves to ensure consistency within their own legal system and between the different branches of government. Indeed, the executive and legislature seem to have no problem with the supremacy of EU law within the limits formulated by the Court of Justice. If they did, this would probably be reflected in some form in the text of the founding treaties, or in the protocols or declarations annexed to them. This has not happened so far (with the exception of the somewhat problematic declaration mentioned above). Only the constitutional courts have therefore defined themselves in relation to supremacy.

From this perspective, the work of the constitutional courts must be viewed as follows: first, they do not review and reassess the case law of the Court in the area of the principle of supremacy, but second, they interpret their own constitution to ascertain the conditions and limits of a State's membership of an international organisation. This is what they can and should do under national constitutions.

One cannot argue that constitutional courts should submit to EU law and its principle of supremacy without a corresponding change in the national constitution. It would be a denial of their independent and impartial role in interpreting constitutional law. Nevertheless, they can come to that decision on their own as they have that power. Does this mean that these courts should unnecessarily emphasise differences and create unnecessary conflicts with EU law and the Court of Justice? Certainly not; they too are bound by the principle of loyalty.[36]

36 | In Czech jurisprudence such a cooperative approach can be demonstrate by a decision of the Constitutional Court in the case of the European Arrest Warrant. Despite the clear wording of the Charter of Fundamental rights and Freedoms this court came to a conclusion compatible with EU law. It did so through creative and extensive interpretation of national standard. See Judgment of the Constitutional Court of 3 May 2006 Evropský zatýkací rozkaz (eurozatykač) Pl.ÚS 66/04 and Sehnálek, 2021, p. 217.

7. How to address the supremacy of EU law from the perspective of national law and national courts

First, it is necessary to stress the difference between the ordinary and constitutional courts. According to the Simmenthal decision, the ordinary courts have the status of courts of the EU and are therefore obliged to apply EU law as their own law in preference to national law. I therefore consider that in their case, the supremacy of EU law will be fully apparent. Although these courts may also be called upon to protect rights and freedoms regulated by the Constitution (diffuse enforcement of the Constitution), in view of the supremacy of EU law, they must also give priority to EU law in these cases.

The situation is different in the case of the constitutional courts. These courts (at least the Czech Constitutional Court) do not enforce law in general, that is, simple law (and thus also the EU law). They have very narrowly defined tasks relating to constitutional justice and therefore stand outside the hierarchy of the general courts in a given country.

Their task derives from national law, and EU law interferes only to a limited extent with the procedural autonomy of Member States. From this perspective, it is therefore permissible under EU law for these courts to perform one specific function, that of exercising constitutional justice. From that viewpoint, they do not have to perform, and do not perform, the function of a general court enforcing EU law. That is the task of the ordinary courts. The consequences of the Simmenthal decision therefore concern them only to a limited extent.

This statement does not mean, of course, that the constitutional courts do not have to follow EU law at all. Such a conclusion would be incorrect. By their loyalty to the law of the EU, they are bound both by national law (respect for external obligations)[37] and EU law.[38] The analogy with public international law is obvious.

This specific position enables national constitutional courts to rule on national constitutions and national arrangements for fundamental human rights and freedoms in full compliance with EU law. The constitution is a source of national law, so it is natural that, in interpreting it, these courts may reach a solution that is contrary to what EU law envisages. If that happens, it is not a denial of the supremacy of EU law.

Moreover, rejecting the conclusions of the Court of Justice of the EU is not a denial of the supremacy of EU law, and such a conclusion would be a shortcut and an incorrect one at that. The constitutional court may fully respect the interpretation of EU law, but it may qualify the facts differently. The consequence of this

37 | It is enshrined in the Czech Constitution, for example, in Article 1(2) as follows: 'The Czech Republic respects its obligations under international law.' A certain shortcoming of the Czech Constitution is that, even after almost two decades of membership of the EU, it does not respond to membership of this organization. However, the obligation contained in the quoted provision is interpreted as encompassing not only international law but also EU law.

38 | Article 4(3) of the EU Treaty.

different legal qualification is that it subsequently applies national law. The general confusion that often arises here is, in my view, due to the Anglo-Saxon view of the matter, which identifies a judicial decision with the law, and in this view the Court's decision is intended to be a precedent—a source of law. That is not the case.[39] Although the constitutional court cannot interpret EU law differently from the Court of Justice in this way, nothing prevents it from classifying the facts as a problem of national constitutional law and then interpreting and applying it.[40]

The emergence of such situations is, of course, a complication. However, it can be solved in one of the following ways:

1. Legislatively so that: a) the respective state amends its constitution to comply with EU law; b) all Member States together amend primary law to reflect the limits of national law.

2. Judicially so that: a) the Court of Justice will change the interpretation of EU law to reflect the requirements of national law, particularly in situations affecting the national identity of a Member State; b) the constitutional court adapts the interpretation of constitutional law to the requirements of EU law.

3. Politically so that: a) the country leaves the EU.

4. Institutionally: a) setting up a new body to deal with conflict situations; b) by limiting the binding effect of decisions in preliminary rulings on matters relating to EU competence, national identity and the protection of human rights and freedoms, or of all decisions in these proceedings in general[41]; c) or by reallocating powers between EU institutions.

The overview above reveals that conflicts are natural and also solvable. They may even provide a useful impetus for the further development of either EU or national constitutional law. However, the difficulty of resolution varies considerably. A legislative solution under 1(a) may run up against the immutability of certain elements of the national constitution. The solution under point 1(b) presupposes a consensus of all Member States, which may be difficult to achieve.

A judicial solution is more feasible, where the institution of the preliminary question can help. Practical examples show that 'judicial dialogue' between the highest courts may (or not) work.[42]

39 | For explanation, see, for example, Sehnálek, 2020, pp. 125 et seq.

40 | See the Ajos case, in which the Danish Supreme Court concluded that Danish law did not allow the direct effect of the general principles on accession to the EU and therefore the principles could not have that effect in Denmark. Judgment of the Danish Supreme court of 6. 12. 2016 15/2014 6 Available at: http://www.supremecourt.dk (Accessed: 20 January 2024).

41 | It is noteworthy that the systematic placement of the power to rule on preliminary questions is at the very end of the list of its powers. This, according to Professor Malenovský, Judge Emeritus of the Court of Justice, may suggest that the original concept of the preliminary ruling procedure, and thus the role of the Court of Justice in interpreting EU law, appears to have been merely supplementary. As is evident and not only from this article, the preliminary ruling has on the contrary become a major instrument of integration, having led, among other things, to the formulation of the principle of supremacy. See Malenovský, 2007, p. 1068.

42 | An example of a functional dialogue is the 'Taricco saga', see Sehnálek, 2019, pp. 48 et seq.; Vikarská, 2017; Sehnálek and Stehlík, 2019, pp. 181–199.

The third solution is the ultimate one. However, if such an extreme situation arises, such as a conflict of EU law with the material core of the rule of law or with its national identity, and at the same time a change in the legal framework of the EU or national constitutional law is impossible, leaving the EU is the only possible solution to such a situation.

The fourth solution assumes that a new political (i.e., not judicial) body would be established. This body could operate with equal representation of the EU and Member States (presumably at the level of the constitutional courts), and would review contentious issues. I do not consider this solution appropriate, as it would create duplication with the Court of Justice and would not guarantee that it would fulfil its function. The functionality of such a body would depend heavily on the personalities nominated from the Member States to that body. The views of these individuals may differ from those of the top institutions, even if they are members. There is therefore no guarantee that this Court would not be a Court of Justice 2.0.[43]

Limiting the binding nature of the preliminary ruling is a functional solution, but it does not address the core of the problem. So who will decide if it is not the Court of Justice and how will the uniform application of EU law be ensured and not threatened? This solution does not answer that question.

A realignment of powers between authorities might make sense. It would mean strengthening the intergovernmental element in the institutional structure of the EU. I can imagine that key issues relating to powers and national identity would be decided definitively not by the Court of Justice but unanimously by the European Council. I can also imagine that this new EU setting will be followed by a national regulation, which, for example, will create a new procedural tool in the constitutional court, obliging the Prime Minister (or President) of a Member State to seek a binding opinion from the constitutional court on a given matter before deciding in the European Council. The downside of this solution would be a significant slowdown in the process of European integration. However, I believe that we are now at a stage where we can afford to slow down a bit.

The wrong, but often very effective, solution is to do nothing, literally. In the Czech Republic, an example of this solution is the application of the institute of state liability for damages caused by breach of EU law (Francovich liability). State liability for damages, which has been established by the case law of the Court of Justice, appears in the judgments as a sophisticated and functional institute and useful tool of the protection of one's rights. In practice, however, the applicability of this institute has long been problematic, if not outright impossible. Therefore, this institute is essentially meaningless in the Czech Republic. I consider this solution to be the worst possible, as it is not legal.

Paradoxically, this article may suggest a deficiency on the part of EU law because this law does not explicitly formulate the principle of supremacy in founding treaties. As I have noted herein in another context, several national constitutions also exhibit a similar serious deficiency. The Czech Constitution, for example, for almost two decades of EU membership, provides only for EU entry.

43 | Sehnálek, 2019, pp. 32 and 33.

It omits the conditions of not only membership but also withdrawal from the EU. However, these issues could/should be addressed at the national constitutional level (together with other issues related to EU membership, particularly in legal and institutional spheres).

I stated above that constitutional courts do not have to be bound by EU law. But the situation is more complicated. Indeed, national law (or the case law of the relevant constitutional court) may 'draw' EU law into the national legal framework. There are several ways in which this can happen. In the case of the Czech Constitutional Court, the following possibilities are offered:

1. EU law will take precedence over all national law, including the entire constitution, given the need to respect external obligations. By analogy, this solution would also have to apply to all international law. This is not how the Czech Constitution is interpreted.

2. EU law as a whole will become part of Czech constitutional law, but within the limits of the material core of the Czech Constitution. This solution was not chosen either. It would have meant that the Czech Constitutional Court became a general court within the reach of EU law.

3. Only EU standards for the protection of human rights and freedoms will become part of Czech constitutional law. This has already happened in the case of international human rights treaties.[44]

4. EU law as a whole (or in its human rights part) becomes part of the frame of reference against which the constitutional court judges cases, without being a systemic part of the Czech legal system (which is the case in the previous two options). The constitutional court has already ruled in this way, but there does not seem to be a consensus among the individual chambers that this is the correct solution.[45]

5. The constitutional court will not apply EU law at all, as it is outside the scope of its review.[46]

Of the above, I consider the last to be correct. All the other solutions are problematic because they lead to the direct subordination of the constitutional court to the Court of Justice in matters of interpretation of EU law or make the constitutional court a general court. [47] Compliance with EU law can be ensured at the level of the general courts, while the review of validity and interpretation is carried out by the EU courts. The inclusion of the constitutional court is redundant in this respect.

The argument against this approach, which I have already encountered informally on several occasions, is 'And who will help the specific parties, in a situation where they can no longer avail themselves of the ordinary remedies, if not the

44 | Judgment of the Constitutional Court of 25 June 2002 'Konkurzní nález' Pl.ÚS 36/01.
45 | This approach was applied for example in judgment of the Czech Constitutional Court of 5 November 2019 case No. II. US 2778/19.
46 | The question of the relation between the Czech Constitution and the Charter is extensively covered by Hamuľák in the Czech literature. See, for example, Hamuľák, 2011, pp. 288–308; Hamuľák, 2010. Hamuľák has addressed this issue also in Hungarian law context see Hamuľák, Sulyok and Kiss, 2019, pp. 130–150.
47 | Kühn, 2005, pp. 57–62.

constitutional court?' I do not consider this 'messianic argument' to be correct, for purely formal reasons. In such cases, the constitutional court conceives of its powers extensively or even directly exceeds them.[48]

Regardless of the solution chosen, there is no need for a constitutional court because the general courts should preferentially rule according to EU law. But this is a somewhat complicated conclusion in the Czech Republic. Indeed, in its *'konkurzní nález'* decision,[49] the Czech Constitutional Court limited the ability of general courts to rule in situations where they find a conflict with a human rights treaty. If EU law is to be treated in the same way as public international law (and the Czech Constitution does not distinguish between the two), this means that the general courts are obliged under Article 95(2) of the Constitution to refer to the constitutional court for a decision those cases where there is a conflict between EU human rights law and domestic law. However, this approach is inconsistent with EU law and is therefore inapplicable in the light of the Simmenthal decision in relation to EU law. The priority application can be decided by these general courts themselves, and they do not need the constitutional court to do so.[50]

8. Principle of supremacy and national identity

Up to now, we have worked with cases involving parallel and mutually independent work between the Court of Justice and national (constitutional) courts. Nevertheless, national courts and the Court of Justice, as well as European law and constitutional law, do meet in one case. It concerns the definition of the content of the concept of national (constitutional) identity.[51] It is national identity on the basis of which national specificities can be considered, and thus, the full supremacy of EU law cannot be asserted.

National identity is a term and institute of EU law. The content of this term and its meaning is determined both by EU law through the Court of Justice and

48 | The question of whether the constitutional court should be the one to review the general courts in cases where EU law should have been or has been applied is also raised by Vikarská and Dřínovská in their article, and they stated that the German court chose this option (the case concerned constitutional identity) and this court questioned the supremacy of EU secondary law, see Vikarská and Dřínovská, 2022, pp. 1176 et seq., the Czech Constitutional Court also (consumer protection). However, unlike the German one, it applied the EU directive through an essentially newly created general principle of consumer protection. For details see Sehnálek, 2021, p. 268.

49 | Judgment of the Constitutional Court of 25 June 2002 "konkurzní nález" Pl.ÚS 36/01.

50 | The change of approach was recently confirmed by the Constitutional Court in its decision Pl.ÚS 3/20 of 6 October 2021.

51 | This is not the only such legal term. Another where this situation arises is e.g. public order or public morality from Article 36 of TFEU.

by national law, particularly through the constitutional courts and the way they define the constitutional identity.[52]

The EU term 'national identity' is therefore not absolutely independent (autonomous) from national law as are other terms of EU law. The latter, by means of it, permeates EU law and directly influences its meaning. The material focus of national constitutions and respect for certain rights undoubtedly belong to the content of this term. How national law and national courts treat these institutions is therefore binding on the Court of Justice.

The problem is that while the specific content of the concept of national identity is derived from national law for each respective Member State, the limits of this concept are set by EU law through the Court of Justice,[53] and it has a monopoly on the correct interpretation of EU law within the reach of EU law. This is undoubtedly an interesting demonstration of the interdependence between the Court of Justice and national laws and courts.

Another problem is that constitutional identity is often a very general concept without a specific definition. Therefore, the Court of Justice is not significantly constrained by national law and can select only those aspects of such a broad concept that suit its purposes. This is the case, for example, in Czech law. The Czech Constitution does not define the concept of constitutional identity. Neither does the case law of the constitutional court provide a coherent answer. In addition to that, the Czech literature is rather limited to description of the case law of the Court of Justice on national identity. In fact, I have so far found only one Czech academic article that contains a relevant attempt to define the Czech concept of constitutional identity in a way that could provide a starting point for the definition of the relationship with EU law and the Court of Justice. In this article, Kosař and Vyhnánek[54] define three concepts of constitutional identity. They distinguish between, first, the narrow concept, which can be equated with the Czech eternity clause (*'Ewigkeitsklausel'*),[55] and, second, the broad concept, which is based on the material core of the constitution and therefore also contains an inherent value base. Finally, third, both authors distinguish the popular, that is, non-legal, conception of constitutional identity, which also includes the perception of the people and their elected representatives of what constitutes the core of the Czech constitutionalism. The third conception of constitutional identity also includes elements that are not traditional parts of constitutions, such as restitution or lustration laws, the so-called Beneš decrees,[56] the principle of the welfare state, and some social

52 | Terms 'national identity' and 'constitutional identity' are not identical. Whereas the first represents and institute of the EU law, the later is an institute of national law. They, therefore, may have a different meaning.

53 | These limits are mapped by Zbíral, 2014, pp. 112–133 and Bončková and Týč, 2022, pp. 1209–1215.

54 | Kosař and Vyhnánek, 2018, p. 855.

55 | According to the Article 9 Section 2 of the Czech Constitution 'Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible'.

56 | Post WW2 Czech legislation under which some German and Hungarian citizens were expelled from Czechoslovakia and their property confiscated.

problems associated with the division of the Czechoslovak federation.[57] In this situation, unfortunately, the Czech law and the Czech concept of constitutional identity have nothing significant to contribute to the debate on national identity and its content in the EU law.

The possible divergence between the Court of Justice and the national courts in terms of national identity does not constitute a specific problem requiring a particular approach. Everything we have said above in general terms applies to its solution. The way how the limits are set, however, has the consequence that national identity is only a conditional protection of vital Member States' interests. It is conditional because it is a matter of EU law, and therefore, the Court of Justice has the final say on the interpretation of this term.

9. Conclusion

The first objective of this article was to identify the implications of the primacy principle for Member States. The primacy principle affects different national authorities differently. There are differences between the authorities that apply the law (courts and authorities) and those that make the law. The former may be limited in their priority application of EU law by the direct effect principle. The latter are not subject to any such limitation.

The second aim of the article was to answer the question about whether national (constitutional) courts could rule differently from the Court of Justice and from EU law. The answer depends on whether these courts rule according to national or EU law. In interpreting national law, the courts are in principle limited only by the principle of loyalty (and indirect effect). Otherwise, they determine their own interpretation of it. They may therefore reach a different solution than the Court of Justice on the basis of their interpretation of national law. In the case of EU law, national courts are bound by the interpretation of EU law as formulated by the Court of Justice. However, this does not mean that they are subordinate to the Court of Justice. It is merely a limitation on the possibility of interpreting EU law in terms of methods of interpretation.

Although national courts are bound by the jurisprudence of the Court of Justice, it should not be taken literally and as a source of law. Decisions are delivered in a certain context, which is subject to change. The reasoning of judgments may contain abbreviations or errors. Finally, the jurisprudence of the Court of Justice is evolving and may change. When in doubt, rather than mechanically adopting the original decision, it is better to refer to the case for a preliminary ruling and ask again. Judicial dialogue can lead to a sensible new solution.

The third objective of the article was to determine the hierarchy of courts in the EU in the interpretation of EU law and the application of EU and national law. The crux of the problem is that there is no hierarchy between the national and the EU courts, except for the interpretation of EU law. The Court of Justice has no

57 | Ibid., p. 869.

power to interpret national law nor can it review its validity. This fact is particularly important from the perspective of the constitutional courts. The Court of Justice has no power to examine and determine the limits of membership of the EU under national constitutions. That is the exclusive competence of the national constitutional courts. From this perspective, we can view these courts as equals.

The fourth objective of this article is to propose possible systemic and legislative solutions to the problems associated with the principle supremacy. A logical solution would be to enshrine the supremacy principle in the text of the founding treaties, while simultaneously regulating the conditions of membership of the EU in national constitutions. A solution could also be to modify the powers of the various institutions of the EU, strengthening the powers of the European Council in matters of competence. In such a case, I would consider it sensible to supplement the national regulation with a new procedural institute that would have to be initiated on a compulsory basis before the European Council could take its own decisions. The deciding authority would be the national constitutional court.

Finally, I feel it necessary to stress that the current strange silence of EU and national law on the principle of supremacy was the only possible way to ensure the existence of a supranational form of integration. Indeed, as enshrining supremacy in writing in the founding treaties would be politically unacceptable at the time of the European Community's creation, it was therefore pragmatic to remain silent on supremacy to create the conditions for the principle to be formulated through the courts. However, it is now time to move on from this approach and to legislate explicitly on the issue of the relationship between EU and national law, one way or the other.

Bibliography

Avbelj, M. (2011) 'Supremacy or Primacy of EU Law-(Why) Does it Matter?', *European Law Journal*, 17(6), pp. 744–763; https://doi.org/10.1111/j.1468-0386.2011.00560.x.

Amalfitano, C., Pollicino, O. (2018) 'Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note', *Verfassungsblog*, 5 June [Online]. Available at: https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/ (Accessed: 22 June 2023).

Benke, K. (2023) 'The Saga May Continue: On the Intricate Dialogue Between the Constitutional Court of Romania and the Court of Justice of the European Union', *Central European Journal of Comparative Law*, 4(2), pp. 9–40; https://doi.org/10.47078/2023.2.9-40.

Bobek, M., Bříza, P., Hubková, P. (2022) *Vnitrostátní aplikace práva Evropské unie*. 2nd edn. Praha: C.H. Beck.

Bončková, H.K., Týč, V. (2022) 'Článek 4 Smlouva o EU' in Tomášek, M., Šmejkal, V. (eds.) *Smlouva o fungování EU. Smlouva o EU. Listina základních práv EU. Komentář*. Praha: Wolters Kluwer.

Bonelli, M. (2018) 'The Taricco saga and the consolidation of judicial dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017', *Maastricht Journal of European and Comparative Law,* 25(3), pp. 357–373; https://doi.org/10.1177/1023263X18773046.

Brown, G.W. (2014) 'The European Union and Kant's idea of cosmopolitan right: Why the EU is not cosmopolitan', *European Journal of International Relations*, 20(3), pp. 671–693; https://doi.org/10.1177/1354066113482991.

Duchek, O. (2023) 'Princip aplikační přednosti v judikatuře Ústavního soudu Španělského království', *Právní rozhledy,* 31(6), pp. 199–207.

García, M. (2017) 'Cautious Openness: the Spanish Constitutional Court's approach to EU law in recent national case law', *European Law Blog*, 7 June [Online]. Available at: https://doi.org/10.21428/9885764c.cfec6f75 (Accessed: 15 September 2024).

Hamuľák, O. (2011) 'Flexibilita ústavního pořádku, právo Evropské unie a marginalia k Listině základních práv Evropské unie' in Mlsna, P. (ed.) *Ústava ČR – vznik, vývoj a perspektivy*. Praha: Leges, pp. 288–308.

Hamuľák, O. (2014) 'The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of Czech Constitutional Court Vis- à-Vis EU and Supranational Legal Order)', *European studies – The Review of European Law, Economics and Politics*, 1(1), pp. 119–129.

Hamuľák, O., Sulyok, M., Kiss, L. N. (2019) 'Measuring the 'EU'clidean Distance between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the EU Charter of Fundamental Rights', *Czech Yearbook of Public and Private International Law*, 10(1), pp. 130–150.

Hamuľák, O. (2010) *Právo Evropské unie v judikatuře Ústavního soudu České republiky: reflexe členství a otázek evropského práva v ústavní judikatuře*. Prague: Leges.

Kosař, D., Vyhnánek, L. (2018) 'Ústavní identita České republiky', *Právník*, 157(10), pp. 854–872 [Online]. Available at: https://www.ilaw.cas.cz/upload/web/files/pravnik/issues/2018/10/6.Kosa%C5%99-Vyhn%C3%A1nek_854-872_10_2018.pdf (15 September 2024).

Křepelka, F. (2012) 'The imperfect dismantlement of the Czechoslovak pension system as an impulse for rebellion against European Union law', *European Journal of Social Law*, 2012/4, pp. 278–294.

Kühn, Z. (2005) 'K přezkumu ústavnosti českých aktů implementujících evropské právo nejen ve vztahu k tzv. eurozatykači', *Trestněprávní revue,* 4(3), pp. 57–62.

Malenovský, J. (2006) 'K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva', *Právní rozhledy,* 2006/21, pp. 774–783.

Malenovský, J. (2007) 'Triptych zobrazování Soudního dvora ES: arbitr, „motor integrace" nebo „velký manipulátor"?', *Právník*, 2007/10, pp. 1065–1083.

Moorhead, T. (2012) 'European Union Law as International Law', *European Journal of Legal Studies,* 5(1), pp. 126–143.

Pavlík, J. (2004) 'Kant's idea of eternal peace and the European Union', *Acta Oeconomica Pragensia*, 12(2), pp. 11–39; https://doi.org/10.18267/j.aop.254.

Sehnálek, D. (2019) *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. Praha: C.H. Beck.

Sehnálek, D. (2020) 'The European Perspective on the Notion of Precedent – are EU and Czech Court Decisions Source of Law?', *European Studies: The Review of European Law, Economics and Politics*, 7(1), pp. 125–153; https://doi.org/10.2478/eustu-2022-0050.

Sehnálek, D. (2021) 'Interpretation of Fundamental Rights in the Czech Republic' in Tóth, Z. J. (ed.) *Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries*. Miskolc-Budapest: Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing, pp. 245–300; https://doi.org/10.54237/profnet.2021.zjtcrci_4.

Sehnálek, D., Stehlík, V. (2019) 'European "Judicial Monologue" of the Czech Constitutional Court – a Critical Review of its approach to the Preliminary Ruling Procedure', *International and Comparative Law Review,* 19(2), pp. 181–199; https://doi.org/10.2478/iclr-2019-0020.

Scheu, H.C. (2002) 'Koncepce komunitárního práva v praxi Evropského soudního dvora a v právní teorii', *Mezinárodní vztahy*, 37(1), pp. 5–19.

Schilling, T. (1996) 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', *Harvard International Law Journal*, 1996/37, pp. 389–410.

Schütze, R. (2015) *European Union Law*. Cambridge: Cambridge University Press.

Stehlík, V., Sehnálek, D., Hamuľák, D. (2020) 'National Report' in Botman, M., Langer, J. (eds.) *National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order*. Den Haag: Eleven International Publishing, pp. 151–168.

Tichý, L., Dumbrovský, T. (2013) 'Ústavní soud ČR mezi dvěma právními řády: od interpozice k nové evropské doktríně', *Právní rozhledy*, 21(6), pp. 191–198.

Tuominen, T. (2020) 'Reconceptualizing the Primacy–Supremacy Debate in EU Law', *Legal Issues of Economic Integration*, 47(3), pp. 245–266; https://doi.org/10.54648/leie2020015.

Vikarská, Z. (2017) 'O daňových podvodníkoch a ústavnej identite (Taricco II)', *Jiné Právo*, 7 December [Online]. Available at: https://jinepravo.blogspot.com/2017/12/taricco-II.html (Accessed: 22 June 2023).

Vikarská, Z., Dřínovská, N. (2022) 'Evropský zatýkací rozkaz ve stínu krize právního státu: dům postavený na písku', *Právník*, 2022/12, pp. 1176–1195.

Weiler, J. H. H., Haltern, U. R. (1996) 'The Autonomy of the Community Legal Order – Through the Looking Glass', *Harvard International Law Journal*, 37(2), pp. 411–448.

Zbíral, R. (2014) 'Koncept národní identity jako nový prvek ve vztahu vnitrostátního a unijního práva: poznatky z teorie a praxe', *Právník*. 2014/2, pp. 112–133.

Zemánek, J. (2003) 'Reforma soudnictví v Evropské unii', *Právní rozhledy*, 7(9), pp. 99–117.