

5. Primacy of European Union Law — from Theory to Practice

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Abstract: *The primacy of European Union law is one of the fundamental principles of European Union law. As a conflict of law rule established by the European Court of Justice, it functions as a tool to ensure uniform application of European Union law within the Member States. However, this tool faces numerous obstacles when applied in practice. The aim of this essay is to demonstrate these problems. Therefore, the essay starts with a brief explanation of the theoretical aspects of the primacy of European Union law. Thereafter, the author discusses the problems the application of this principle has to cope with in practice and tries to make some recommendations as to how these problems could be solved. The essay ends with a summary.*

I. Introduction

Once upon a time, a wicked little Court, “tucked away in the fairyland Duchy of Luxembourg”¹⁾, cast its magic spells, known as Van Gend & Loos, Costa/E.N.E.L. and Simmenthal, on national courts all over Europe and by this means turned them into community courts, who liked their new clothes and so they all lived happily ever after.

If European Integration was a fairy tale, it could go something like this. But it is not, and reality is far more complex. The fundamental principles of European Union law were established by the European Court of Justice (ECJ) long ago, and a lot has already been said and written about them.²⁾ Moreover, these principles are well known, at least in theory, to those national authorities who ought to apply them. As *John Temple Lang* already stated in 1997, today there can be no doubt that

“every national court in the European Community is now a Community law Court. (...) In fact national courts probably apply Community law more often than the two Community courts do. (...) [E]very national court, whatever its powers, is a Community

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1) *Stein*, Lawyers, Judges, and the Making of a Transnational Constitution, [1981] 75 AJIL 1, p. 1.

2) For a comprehensive overview, see *De Witte*, in: Craig/De Burca (eds.), *The Evolution of EU Law*, OUP 1999, p. 177 et seq.

court of general jurisdiction, with power to apply all rules of Community law.”³⁾

National courts have formally accepted their duty under Article 4 paragraph 3 Treaty on European Union (TEU) to apply European Union law in its entirety. However, the application of European Union law by national courts and administrative bodies still faces several obstacles. This applies also for the general principles of European Union law, which were mainly established by the European Court of Justice through its case law. This essay may focus on one of the fundamental principles of European Union law and its application by national courts and administrative bodies: the principle of primacy of European Union law.

Therefore, I will at first examine the theoretical aspects of the primacy of European Union law (II). I will briefly explain the definition (II.1.), the prerequisites (II.2.) as well as the consequences (II.3.) and the acceptance (II.4.) of this principle. I will then turn to the practical aspects of the principle of primacy (III.). After giving a short example of how the principle of primacy may function in “the ideal case” (III.1.), I will turn to the problems the application of this principle has to cope with in practice (III.2.) and make some recommendations as to how these problems could be solved (III.3.). The essay will then finish with a brief summary (IV.).

II. Theoretical part

1. Definition

For the purpose of this essay, primacy of European Union law is understood as a conflict of law rule.⁴⁾ Thus, primacy of European Union law means in the context of this essay that in the case of a conflict of any national legislative act with any European legislative act the latter precedes whereas the former must be disappplied.

Primacy must not be mistaken for supremacy.⁵⁾ Unlike primacy, supremacy is inevitably linked with hierarchy.⁶⁾ Thus, the concept of supremacy only applies in a single, hierarchically structured legal order, in which norms are ranked from top to bottom.⁷⁾ As regards the European Union, European Union law and the laws of the Member States belong

3) *Temple Lang*, *The Duties of National Courts under Community Constitutional Law*, [1997] 22 E.L.Rev. 3, p. 3.

4) The term primacy may also be used with a wider meaning, comprising not only the duty to disapply national law in the case of a conflict, but also the duty to construe national law in conformity with European Union law.

5) For use of the term “supremacy” in the context of determining the relationship between European Union law and national law see *Craig/De Burca*, *EU Law*, 4th ed., OUP 2008, p. 344 et seq.

6) It should be mentioned, that in its case law, the European Court of Justice never referred to the term “supremacy” with regard to the relationship between European Union law and national law. Instead, it only uses the term “primacy”.

7) For such a concept, see *Kelsen*, *Reine Rechtslehre*, Deuticke 1934, p. 74 et seq.; *Merkl*, *Prolegomena einer Theorie des Rechts*, in: *Verdross* (ed.), *Gesellschaft, Staat, Recht*, Springer 1931, p. 252 et seq.

to different legal orders based on different ultimate rules.⁸⁾

Thus, in such a system which is often called constitutional pluralism,⁹⁾ the concept of primacy of European Union law may only function as a conflict of law rule.

2. Prerequisites

As already mentioned, primacy presupposes a conflict of rules. That is, two equally valid legal norms must be applicable to the same case at hand. Moreover, application of both norms must be impossible due to their incompatible legal consequences.¹⁰⁾

By creating the European Union, the Member States have transferred certain competences to the former. Thus, the European Union may validly enact law that is directly applicable within the Member States. This law comprises regulations, directly applicable directives and decisions as well as directly applicable provisions of the two Treaties the European Union consists of, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Unlike Federal States, the European Union lacks a comprehensive delimitation of competences between the Union and the Member States. Moreover, most competences are target-oriented.¹¹⁾ Hence, validly enacted legal acts of the Union may be applicable in policy areas that are still occupied by validly enacted legal acts of the Member States.

If the respective legal acts are incompatible due to their legal consequences is a question of interpretation. Thus, determining a conflict presupposes interpretation.

According to this broad definition of conflict,¹²⁾ different forms of conflict may occur. For example, a legal act belonging to European Union law may set out an obligation that contradicts an obligation set out in national law. Even more important in practice is a type of conflict in which a prohibition set out in national law is incompatible with a permission granted under European Union law. With regard to the latter, the fundamental freedoms set out in the TFEU grant specific freedoms to citizens of the European Union and therefore

8) See *Grussmann*, Grundnorm und Supranationalität, Rechtsstrukturelle Sichtweisen der europäischen Integration, in: von Danwitz et al. (eds.), *Auf dem Wege zu einer Europäischen Staatlichkeit*, Boorberg 1993, p. 47, (58 et seq.); *Wahl*, Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten, [2009] 48 *Der Staat* 586, p. 601 et seq.

9) See, for example, *MacCormick*, The Masstricht-Urteil: Sovereignty Now, [1995] 1 *E.L.J.* 259, p. 264 et seq.; *Kumm*, Who is the final arbiter of constitutionality in Europe?: Three concepts of the relationship between the German Federal Constitutional Court and the European Court of Justice, [1996] 36 *E.C.M.L.Rev.* 351, p. 375 et seq.; *Maduro*, Contrapunctual Law: Europe's Constitutional Pluralism in Action, in: Walker (ed.), *Sovereignty in transition*, Hart 2006, p. 501 et seq.; *Walker*, The Idea of Constitutional Pluralism, [2002] 65 *M.L.R.* 317 et seq.; *Eleftheriadis*, Aspects of European Constitutionalism, [1996] 21 *E.L.R.* 32 et seq.

10) See *Niedobitek*, Kollisionen zwischen EG-Recht und nationalem Recht, [2001] 92 *Verwaltungsarchiv* 58, p. 73 et seq.

11) See Article 114 TFEU.

12) For a definition of conflict in international law see *Vranes*, The Definition of 'Norm Conflict' in International Law and Legal Theory, [2006] 17 *EJIL* 395 et seq.

constantly give rise to conflicts between national law and European Union law.

3. Legal consequences

I will now turn to the consequences of such a conflict. It is well established case law of the ECJ that conflicting national legislative acts are only rendered inapplicable.¹³⁾ That is, they must not be applied.

Moreover, the ECJ has also made it crystal clear that all national institutions are under a legal duty to enforce the primacy clause and disapply any conflicting provision of national law on their own motion without having to ask any other institution – either on national or European level – in advance.¹⁴⁾ The term national institution used in this context comprises all national courts and administrative authorities. Furthermore, the national legislator is under a duty to revise the national legal order and amend the conflicting national norm so that it complies with European law.¹⁵⁾

4. Significance

The concept of primacy which I just explained cannot be found in the Treaties. However, the ECJ established it in the case *Costa v. E.N.E.L.*¹⁶⁾ In this judgment the Court held that European law precedes national law when a conflict of norms occurs. The convincing argument was already submitted by the German scholar *Hans Peter Ipsen*.¹⁷⁾ As he puts it, the concept of primacy serves as a safeguard for the functioning of the Union. To explain this in own words, that means the following: The aim of the European Union is European integration. This aim is mainly driven by law enacted by the European Union. The European Union does not enforce its law on its own but relies on the administrative bodies of the Member States. This bears the danger that the application of European law may diverge between the Member States. Diverging application between now 27 member States would in turn endanger the aim of European integration. Hence, the concept of primacy of European Union law aims at guaranteeing the uniform application of European Union law within the Member States.

13) ECJ, case C-10/97, *IN.CO.GE'90*, [1998] ECR I-6307.

14) See for national courts ECJ, case 106/77, *Simmenthal II*, [1978] ECR 629; for administrative authorities ECJ, case C-118/00, *Larsy*, [2001] ECR I-5063.

15) See ECJ case 167/73, *Commission/France*, [1974] ECR 359, at para. 41/42; case 159/78, *Commission/Italy*, [1979] 3247, at para. 22; case 168/85, *Commission/Italy*, [1986] ECR 2945, at para. 13; case 104/86, *Commission/Italy*, [1988] ECR 1799, at para. 12; case C-197/96, *Commission/France*, [1997] ECR I-1799, at para. 14; case C-145/99, *Commission/Italy* [2002] ECR I-2235, at para 30.

16) ECJ, case 6/64, *Costa/E.N.E.L.*, [1964] ECR 614.

17) *H. P. Ipsen*, Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht, in: *Europarechtliches Kolloquium in Bensheim 1964: Aktuelle Fragen des Europäischen Gemeinschaftsrechts*, Enke 1965, p. 1 (20 et seq.); *idem*, *Europäisches Gemeinschaftsrecht*, J. C. B. Mohr 1972, p. 280 ff.

5. Acceptance

Taking this into account, the Federal Constitutional Court readily accepted the concept of primacy.¹⁸⁾ This acceptance was recently reaffirmed in the judgment on the Treaty of Lisbon.¹⁹⁾ However, since this acceptance is based on the national constitution,²⁰⁾ it is also limited by the latter. Thus, the Federal Constitutional Court held that in the case that a Union norm infringes the inalienable core of the national constitution, the concept of primacy will not apply. A look across the borders reveals that most of the highest courts of other Member States accept the concept of primacy under similar restrictions.²¹⁾

III. Practical Part

1. Ideal case

Within the limits of these restrictions, the primacy of European Union law is supposed to instantly guarantee the uniform application of European Union law. However, primacy faces several obstacles when applied in practice.

2. Problems

a) Divergence of Interpretation and Application

The first problem stems from the divergence of application and interpretation. As already mentioned, a conflict of law rule only applies when interpretation of both norms unfolds a conflict. Thus, such a rule can only be applied after the interpretation of the potentially conflicting norms.

In Germany, in a situation of “constitutional conflict”, interpretation and application are both concentrated at the Federal Constitutional Court. If a national court doubts the constitutionality of a national norm, it is obliged to stay proceedings and refer the case to the

18) See Federal Constitutional Court, decision of 9 June 1971, *Lütticke*, [1972] 31 BVerfGE 145.

19) Federal Constitutional Court, decision of 30 June 2009, *Lisbon*, [2010] 123 BVerfGE 267, p. 396 et seq. English translation available via http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

20) See, for instance Federal Constitutional Court, decision of 6 July 2010 in case 2 BvR 2661/06, at para. 53, English translation available via http://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html.

21) See, for example, UK: House of Lords, *R v Secretary of State for Transport ex parte Factortame* [1990] 3 C.M.L.R. 375, para 4; Italy: Corte Costituzionale, decision of 8 June 1984, *Spa Granital v. Amministrazione delle Finanze dello Stato*; France: Conseil d'Etat, decision of 20 October 1989, *Nicolo and another*, English translations available in: Oppenheimer (ed.), *The Relationship between European Community law and national law*, Grotius 1994; Poland: Constitutional Tribunal, decision of 11 May 2005, K14/08; Czech Republic: Constitutional Court, decision of 8 March 2006, PL ÚS 50/04, *Sugar Quotes*, English translation available via <http://www.concourt.cz/view/pl-50-04>; affirmed in decision of 28 November 2008, PL ÚS 19/08, *Lisbon I*, English translation available via <http://www.concourt.cz/view/pl-19-08>.

Federal Constitutional Court.²²⁾ The latter will then determine whether there is a conflict; it will also draw the consequences. Thus, binding interpretation and application coincide.

The situation is quite different in the situation of a “European conflict”. Here, all national administrative authorities as well as all national courts are obliged to set aside conflicting law autonomously.

Firstly, national administrative authorities do not even have the right to refer a question to the European Court of Justice. *Secondly*, ordinary national courts are not obliged to ask the European Court of Justice if they want to disapply a provision of national law which they deem to be contrary to European law.²³⁾ Only courts of last instance are under Article 267 paragraph 3 TFEU obliged to refer a question of interpretation of European law to the European Court of Justice. However, some cases may never come as high. The most important incentive is probably that a reference may – in the eyes of the national court – unduly delay the process.²⁴⁾ Another one can be that the losing party may not want to risk a precedent. And even if a case comes before the court of last instance the latter may still refrain from making a reference to the European Court of Justice, thereby either making use of the *acte claire* doctrine²⁵⁾ or stating that the case does not raise a decisive question of European Union law.²⁶⁾

As a result, the application of European Union law – or in this case the disapplication of national law – precedes the final and uniform determination by the European Court of Justice whether a conflict between a provision of national law and a provision of European Union law exists. In other words, binding interpretation and application diverge.

b) Alternative interpretation

Taking this into account it is not surprising that the enforcement of the primacy clause may vary from administrative authority to administrative authority and from court to court to the detriment of legal certainty. We have seen the latter with respect to Germany in the area of Gambling law. Here, administrative as well as criminal courts gave different answers on the compatibility of the German state monopoly on games of chance with the freedom to provide services under European law. The question was first raised in 1991 and reached

22) See Article 100 paragraph 1 of the German Basic Law: “Where a court considers a law unconstitutional, the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land court competent for constitutional disputes if the matter concerns the violation of the constitution of a Land, or from the Federal Constitutional Court if the matter concerns the violation of the Basic Law.”

23) See ECJ, decision of 20 January 2010 in case C-555/07, *Kücükdeveci*, not yet reported.

24) According to the Annual Report of the ECJ 2009, preliminary reference procedures normally last 17 months. The Annual Report is available via http://curia.europa.eu/jcms/jcms/Jo2_7000/.

25) See ECJ, case 283/81, *CILFIT*, [1982] ECR 3415, at para. 21.

26) See, for instance, Federal Tax Court, decision of 11 June 1997 in case X R 74/95, 183 BFHE 436; decision of 14 December 2004 in case XI R 1/04, 209 BFHE 48; Federal Administrative Court, decision of 23 August 1994 in case I C 18/91, 96 BVerwGE 293.

its peak after a judgment of the Federal Constitutional Court of 28 March 2006. In this judgment, the Federal Constitutional Court declared the Treaty of the Länder (i.e. the German Federal States) on Lottery of 2004, which established the said state monopoly on lottery and sports betting, to be incompatible with the constitution. However, the Federal Constitutional Court held that it was at the choice of the Länder either to maintain a state monopoly or to open the market for private operators and that the void legal regime could nonetheless be applied until the enactment of new laws in compliance with the constitutional requirements. Subsequently, the German Länder agreed on a new Treaty on games of chance, which came into force on 1 January 2008 and which maintained the state monopoly. As already mentioned above, the Federal Constitutional Court is not competent to decide on a conflict of national law with European Union law. Thus, during the transition period and after the coming into force of the new legal regime, private brokers and operators of games of chance focused on challenging the compatibility of the national laws in this sector by invoking European Union law. This led to innumerable diverging judgements and decisions of German courts²⁷⁾ and caused a divergent application of German law to the detriment of legal certainty for a period of approximately four and a half years. The final say of the European Court of Justice was handed down in three decisions of 8 September 2010 and affirmed the previously alleged infringement of European Union law.²⁸⁾

On the other hand, this may even lead to the situation that a provision of national law that clearly infringes a provision of European law may still be applied over years. For this, German tax law provides an example. Until recently, paragraph 10 section 1 number 9 of the German Act on Income Tax stated that parents could deduct tuition fees which they paid for their children from their earnings. However, this provision only applied when tuition fees were paid to German private schools. Deduction was not possible if parents sent their children to private schools in other member States of the European Union. With a view

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- 27) In favor of compatibility, for instance: Higher Administrative Court of Baden-Württemberg, decision of 10 December 2009 in case 6 S 1110/07, [2010] 5 ZfWG 24 et seq.; Higher Administrative Court of Saxony-Anhalt, decision of 17 February 2010 in case 3 L 6/08, [2010] 5 ZfWG 277 et seq.; Lower Administrative Court Augsburg, decision of 8 September 2008 in case Au 5 K 06.1246, not reported; Lower Administrative Court Karlsruhe, decision of 15 September 2008 in case 2 K 1637/08, [2008] 3 ZfWG 395; Higher Administrative Court of Bavaria, decision of 10 July 2006 in case 22 BV 05.457, not reported; Higher Administrative Court of Berlin-Brandenburg, decision of 8 May 2009 in case OVG 1 S 70.08, [2009] 4 ZfWG 194 et seq.; Lower Administrative Court Saarlouis, decision of 18 December 2008 in case 6 K 37/06, [2009] 4 ZfWG 75 et seq. In favour of incompatibility, for instance: Lower Administrative Court Berlin, decision of 22 July 2010 in case 35 A 353/07, [2010] 5 ZfWG 380; Lower Administrative Court Freiburg, decision of 16 April 2008 in case 1 K 2052/06, [2008] 3 ZfWG 227; Lower Administrative Court Arnsberg, decision of 5 March 2008 in case 1 L 12/08, [2008] 3 ZfWG 149.
- 28) ECJ, decision of 8 September 2010 in case C-46/08, *Carmen Media*, not yet reported; decision of 8 September 2010 in case C-406/06, *Winner Wetten*, not yet reported; decision of 8 September 2010 in joint cases C-316/07, C-35807 – C-360/07, C-409/07 and C-410/07, *Stoß et al.*, not yet reported. See *Streinz/Kruis*, Unionsrechtliche Vorgaben und mitgliedstaatliche Gestaltungsspielräume im Bereich des Glücksspielrechts, [2010] 63 NJW 3745.

to the case law of the European Court of Justice, it was doubtful whether this provision complied with the fundamental freedoms of the European Union. Hence, the compatibility with European Union law was challenged before national tax courts between 1995 and 2005 16 times. Out of these 16 times, the Federal Tax Court was involved five times.²⁹⁾ However, the European Union law arguments were rejected in all cases. Even more, none of these courts found it necessary to make a preliminary reference to the European Court of Justice, notwithstanding the fact that the European Commission had already invoked an infringement procedure in 2002. It took until 2005 that the lower administrative court of Cologne was the first to refer the case to the European Court of Justice.³⁰⁾ The latter held in 2007 that the German provision infringed European Union law and finally German courts adhered to this judgment.³¹⁾ The provision was subsequently amended in December 2008.

In this case, it took more than twelve years that the primacy of European Union law was enforced.

c) Unforeseeable case law of the court

Another albeit related aspect that hinders the application of the primacy of EU law stems from the case law of the European Court of Justice. Some of the provisions that are especially relevant for conflict cases are highly abstract and are therefore in need of interpretation. This applies especially to the already mentioned fundamental freedoms of the European Union. The European Court of Justice has to provide national administrative authorities and national courts with guidance for the proper application of these provisions of European Union law. However, the case law in this respect is sometimes inconsistent. The Court often decides merely on a case to case basis. This makes it difficult to draw general consequences from its judgments. Moreover the ECJ often behaved as a political actor which followed a specific agenda to reach specific targets.³²⁾ This led to significant and unpredictable changes in the case law of the court. The *Keck* case law in the area of free movement of goods is only one example. In order to eliminate barriers to intra-community trade with goods, the ECJ widened the scope of applicability of this fundamental freedom in its famous judgment in *Dassonville*.³³⁾ However, this broad scope of applicability led to the fact that all

29) Federal Tax Court, decision of 11 June 1997 in case X R 74/95, 183 BFHE 436; decision of 23 July 1997 in case X R 135/96, not reported; decision of 23 July 1997 in case X R 49/96, not reported; decision of 14 December 2004 in case XI R 1/04, 209 BFHE 48; decision of 5 July 2005 in case XI B 88/04, [2006] BFH/NV 42 et seq.

30) Tax Court Cologne, decision of 27 January 2005 in case 10 K 7404/01, [2005] DSTRE 454 et seq.

31) ECJ, case C-76/05, *Schwarz and another*, [2007] ECR I-6849; Federal Tax Court, decision of 21 October 2008 in case X R 15/08, [2010] 45 Europarecht 378 et seq.; decision of 17 July 2008 in case X R 62/04, 222 BFHE 428.

32) See *Maduro*, *We the Court*, Hart 1998.

33) ECJ, case 8/74, *Dassonville*, [1974] ECR 873, at para. 5: "All trading rules enacted by Member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are considered as measures having an effect equivalent to quantitative restrictions."

sorts of national laws came under the scrutiny of the ECJ court, even those which did clearly not aim at restricting trade in any way.³⁴⁾ Thus, the ECJ at some point had to redefine the boundaries of applicability. For this purpose, the ECJ established the so-called *Keck* formula. Besides limiting the scope of application of free movement of goods, the “clarification”³⁵⁾ in *Keck* can be understood as the Court’s attempt to provide national courts with a practicable test with clear cut rules for deciding whether a measure should be in or out of “Community law scrutiny”. But the *Keck* formula is far away from being clear, as ongoing discussion proves,³⁶⁾ and gives rise to certain questions concerning its application. The first question relates to the importance of the terminology. It is still unclear how to distinguish between product rules and selling arrangements and whether this distinction between product rules and selling arrangements makes any sense at all or if it is merely superficial.³⁷⁾ Another problem is the lack of clarity as regards the circumstances under which market access will be impeded.³⁸⁾ Thirdly it is questionable whether the *ratio decidendi* behind *Keck* can be applied to the other fundamental freedoms. Thus, it may be doubted whether the *Keck* formula provides the national courts with a clear test to assess the limits of applicability.

In practice this may cause the situation that a national administrative authority or a national court who relies on the previous case law of the ECJ for determining whether a provision of national law is contrary to a provision of European Union law may be rebutted by the European Court of Justice in a subsequent preliminary reference procedure. This happened in the latest *Doc Morris* case. Here, the competent Ministry for Justice and Public Health of Saarland (one of the German *Länder*) had to decide whether a provision of the German Pharmacies Act which prohibit enterprises to run pharmacies is contrary to the European freedom of establishment. Even if the ECJ had not already decided on exactly the same question, the case law seemed to show that such a provision of national law constitutes an infringement of European law.³⁹⁾ Thus, the authority decided to set aside the national provision and granted the allowance to run a pharmacy to a Dutch enterprise. The allowance was challenged before national courts. The Lower Administrative Court Saarlouis referred

34) See, for example, ECJ, case 145/88, *Torfaen*, [1989] ECR 3851: national rules prohibiting retailers from opening their premises on Sunday.

35) See *Weatherill*, After *Keck*: Some thoughts on how to clarify the clarification, [1996] 33 CMLRev 885.

36) See *Streinz*, Die Rolle des EuGH im Prozess der Europäischen Integration, [2010] 135 AöR 1, p. 21; *Roth/Oliver*, The Internal Market and the four freedoms, [2004] 41 C.M.L.Rev. 407, p. 410; *Wilsher*, Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market, [2008] 33 E.L.Rev. 3; *Jarvis*, The Application of EC Law by National Courts, p. 119 f.

37) See the criticism of AG *Jacobs*, Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179, para. 38. See also AG *Bot*, C-110/05, *Commission/Italy*, at para. 79 et seq.

38) *Roth/Oliver*, The Internal Market and the four freedoms, [2004] 41 C.M.L.Rev. 407, p. 414.

39) See ECJ, case C-140/03, *Commission/Greece*, [2005] ECR I-3177.

the case to the European Court of justice.⁴⁰⁾ The latter held that the German Pharmacies Act did not infringe European Union law.⁴¹⁾ As a consequence the authority had to revoke the allowance.

d) Hierarchical structure of administration

As regards the mandate for national administrative authorities, another factor comes into play. Administrative authorities are generally embedded in a hierarchical structure. Unlike national courts, they do not enjoy the right to decide on cases before them autonomously. Rather, they are obliged to adhere to administrative instructions issued by their supervisory authority ranked above them.⁴²⁾ Thus, a civil servant who comes to the conclusion that in a case before him a provision of national law infringes European Union law may expect severe consequences if he decides to set aside the respective national provision on his own. He will only set aside a provision of national law if an administrative instruction issued by the supervisory authority advises him to do so. Moreover, the duty deriving from European Union law constitutes a novelty in comparison to the traditional role of administrative authorities. Under constitutional law, national administrative authorities are generally not allowed to set aside provisions of national law autonomously.⁴³⁾ A genuine right to disapply national law does not suit the role of administrative authorities as executive branch of the state. Moreover, such an autonomous right may result in inhomogeneous application of national law. This may cause legal uncertainty. The danger of inhomogeneous application is aggravated by the fact that administrative authorities lack a possibility to refer a case to the European Court of Justice.

These considerations are reflected by the actual behaviour of German administrative authorities. At the moment, I am conducting an empirical research on the question whether national administrative authorities are willing to set aside national law conflicting with European Union law. Unsurprisingly, administrative authorities are very reluctant. They state that they are only willing to do so if they are backed by an administrative instruction issued by the supervisory authority. However, those administrative instructions seem to exist only very rarely. Some supervisory authorities even told me that the administration is not allowed to set aside national law.

The only exception seems to be the German tax administration. Here, the supervisory authorities issue administrative instructions of disapplication (*Nichtanwendungserlasse*) if the European Court of Justice or the Federal tax court held that a provision of national tax law infringes European Union law. However, this practice also seems to be merely reactive.

40) Lower Administrative Court Saarlouis, decision of 20 March 2007 in case 3 K 361/06 and decision of 21 March 2007 in case 3 K 364/06.

41) ECJ, joint cases C-171/07 and C-172/07, *Apothekenkammer Saarland et al.*, [2009] ECR I-4171.

42) See also *Sauerland, gemeinschaftsrechtlicher Anwendungsvorrang versus beamtenrechtliche Gehorsamspflicht? – Zur Auslegung des § 56 Bundesbeamtengesetz*, [2007] ZBR 191.

43) See also *Claes*, *The National Courts' Mandate in the European Constitution*, Hart 2006, p. 268.

That is, instructions are not issued without a judgment of the European Court of Justice or a national court in advance. Thus, it seems that a genuine disapplication of national law by administrative authorities does hardly exist.

3. Solutions

Now, how could the application of the primacy of European Union law by national courts and administrative bodies be improved. In this respect, let me make four recommendations.

Firstly, courts of first instance should more readily involve the European Court of Justice in the determination of a conflict between national law and European law. Since its judgments are binding, this may guarantee a homogenous practice.

Secondly, national courts which have to deal with the same question should be obliged to stay proceedings and await the ECJ's judgment. Until now, it remains at the discretion of the courts to apply the relevant clause of the respective code of procedure (e.g. § 148 ZPO, § 94 VwGO) and stay proceedings.

Thirdly, administrative authorities should seek guidance from the highest supervisory authorities as to whether a provision of national law should be disapplied or not. In Germany, this would be the respective federal ministries or the respective ministries of the *Länder*.

Fourthly, national courts and administrative authorities should be obliged to inform the competent legislator on the national level. The latter may then amend the national law and remedy the conflict.

IV. Conclusion

This essay tried to demonstrate that the concept of primacy European Union law is an important tool to guarantee the uniform application of European Union law within the Member States. As a conflict of law rule, it is also recognised by the highest courts of the respective Member States. However, the actual application of this tool faces some problems. A varying practice may cause legal uncertainty. Moreover, administrative authorities embedded in a hierarchical structure may refuse to disapply national law. The recommendations made could help to resolve these problems.

