



DR. JUR. KLAUS KAMMERER

Column 8

Dear citizens of Georgia,

With this column, I would like to take a further step - after introducing the topic in the previous column - to introduce you to the legal nature of Union law and in particular the principle of the primacy of European law over the national law of the member states and the different views of the ECJ and the Federal Constitutional Court on this topic. This is done in this column (*Chapter 1*) and a subsequent column (*No. 9 - Chapter 2*).

Legal nature and primacy of Union law

Chapter 1

The legal nature of Union law and the principle of primacy of application

1. The principles of direct validity, direct applicability and primacy of Union legal acts

The question of the legal nature of *supranational* Union law leads us into a legal controversy that has not yet been fully resolved and which, depending on their understanding of the constitution, is not without practical relevance for the national law of the Member States, even if it plays only a minor role in the day-to-day application of Union law by the Member States' authorities and courts.

In the view of the *traditionalists*, Union law has retained its character of international law, based on the founding treaties. This applies equally to the Union's primary law - which was later amended by treaty - and to the secondary law derived from it. The opposing view of the *autonomists*, on the other hand, is of the opinion that Union law as a supranational legal order is an independent legal order that is "separated" from international law and is therefore autonomous, and that in terms of content it is both contract law and constitutional law.

This controversial issue is important in the fundamental understanding of Union law and its characteristics: in the question of *direct effect* and **priority of application**, i.e. *priority over national law*, but especially in the possibility of being able to take binding decisions against the will of the Member States. This is because Union law as a supranational law is characterized by the fact that it is directly binding on the Member States, their individuals and legal entities, and their other bodies, and is applicable with priority over national law - as Union law and not just as law transformed into national law.

The principle of priority of application must be distinguished from the principle of *priority of validity*, which in its effect would lead to the invalidity of national law that contradicts Union law. The priority of application presupposes the *direct applicability* of Union law, which in turn presupposes its *direct validity*. The concept of the direct validity of Union law in the legal systems of the Member States refers to their legal basis. The *national approval laws*, which must meet national constitutional requirements, bring about this validity effect by respecting the *principle of no need for transformation* of Union legal acts into national law as a prerequisite for the legislative act - in other words, the principle that Union law does not first have to be transformed into national law.

The *principle of direct applicability* answers the question under which conditions courts and administrations can derive legal consequences from a norm of primary or (derived) secondary Union law by applying the law, even if only by way of interpretation, and thus the legal acts are applicable in a specific individual case. This is assessed from the *perspective of citizens or legal persons* seeking legal protection as legal entities who assert subjective legal positions under Union law (e.g. one of the fundamental freedoms) against those bound by this legal system, in particular against the addressees of such obligations in the Member States, if necessary through legal recourse. The right of the individual, i.e. his subjective legal position, must result from the concrete content of the norm itself or at least from its interpretation, even if this is implicit in the meaning and purpose of the norm.

According to the **ECJ**, the basic requirement for direct applicability is that the relevant provision of Union law contains a sufficiently precise and unconditional obligation or authorization. This is not the case if a reservation of the norm requires a national implementation act or leaves the obligated parties, in particular the Member States, a discretionary or leeway.

In contrast, the **priority of application** displaces conflicting national law in order to ensure that directly applicable Union law is fully effective.

2. The principle of primacy of application in the Treaty of Lisbon

The Annex to the Treaty of Lisbon explains the principle of primacy of application as follows:

CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

ANNEXES - C 326/331 ff.

DECLARATIONS ANNEXED TO THE FINAL ACT OF THE INTERGOVERNMENTAL CONFERENCE WHICH ADOPTED THE TREATY OF LISBON, signed on 13 December 2007 – C 326/337

A. DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES - C 326/339 ff.

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17. Declaration concerning primacy – C 326/346

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

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

'Opinion of the Council Legal Service of June 22, 2007

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

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(1) "It follows (...) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question." '

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3. The principle of priority of application and the dispute over examination competence

This principle of priority applies to the Union treaties – and now generally to all legal acts of the Union. In the Federal Republic of Germany, the approval laws that bring about the direct application of the Union's legal acts have their constitutional basis in Article 23, Paragraph 1, Sentence 2 of the Basic Law (GG). This article also establishes the *integration power* with which the national legal system is opened up to Union law. However, only transfers of sufficiently defined sovereign rights to the Union are permitted.

The priority of application implies the inherent *question of the compatibility of Union law* - the primary law amended by treaty and the secondary law - with the existing treaties and at the same time with national constitutional law. The question is therefore whether the European Court of Justice (ECJ) as the "guardian of the treaties" has sole power to examine (*so-called competence competence*) the incompatibility of legal acts with the Union Treaties, or whether, in addition and independently of this, the Federal Constitutional Court (BVerfG) as a national constitutional court can invoke its *own power to examine* from the constitutional perspective of the Basic Law, i.e. national constitutional law, with which it can examine the compatibility of the Union's legal acts - on the basis of *constitutional authorization* - with European law and at the same time with national constitutional law and, if a legal act violates it, reject it as an **ultra-vires-act** that is not binding for Germany as a member state.

The answer to this is the subject of the controversial debate on this question between the ECJ and the German Federal Constitutional Court as a national constitutional court. Article 19 of the Treaty on European Union (TEU) transfers the power of review to the ECJ and thus the task of bindingly monitoring the validity and applicability of secondary legal acts of the Union. If the ECJ is granted this **competence-competence**, this includes the possibility of incorrect interpretation of the contractual basis in its case law. The Union and the Member States would then have to accept the consequences that result from this.

The ECJ's powers of review under Article 19 EUV – Consolidated Version 2012

Article 19 EUV

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. *The Court of Justice of the European Union shall, in accordance with the Treaties:*

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

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4. German industrial action law as a legal sociological example of the controversy on the question of review competence

The review competence claimed by the ECJ - in contrast to the case law of the Federal Constitutional Court (see section 6 below) - on the question of the priority of application of Union law (*competence-competence*) may, from a legal theory and legal sociological perspective, demonstrate the controversy in **industrial action law**, which illustrates the different views of both courts on the question of which European legal limits the ECJ can set for national strike law in an industrial dispute that affects sensitive infrastructure (e.g. aviation, rail) and temporarily paralyzes it. The strike measures are aimed at impairing the protected legal interests of third parties, in particular companies in the manufacturing and retail sectors that are urgently dependent on the transport of their goods using this infrastructure and that feel held hostage due to the indirect effects of the strike.

The guest article published in the "**Frankfurter Allgemeine Zeitung**" on February 12, 2025 describes the problem clearly:

"Frankfurter Allgemeine Zeitung" - No. 36, page 16 - Issue Wednesday, February 12, 2025

Is the ECJ threatening to impose a ban on strikes?

By Prof. Dr. Lena Rudkowski

(The author is a professor of civil law, labor law and insurance law at the Justus Liebig University, Giessen)

https://www.uni-giessen.de/de/fbz/fb01/professuren-forschung/professuren/rudkowski/mitarbeiter/prof_leitung

Freedom of association is enshrined in the Basic Law. But the Court of Justice of the European Union does not take it so seriously.

In the past year, strikes in rail transport, local public transport and at airlines have tested customers' patience more than once. This year, too, the population could be faced with some unpleasant wage conflicts: Collective bargaining employees at the federal and municipal level are entering a round of wage negotiations. Deutsche Bahn and the Railway and Transport Union (EVG) are also currently negotiating a new collective agreement. Due to the current agreement, a peace obligation still applies until the end of March. Strikes could therefore take place in April at the earliest.

*However, **European Union (EU) law** has considerable potential to call into question German strike law: For monopoly-like infrastructures where the establishment of parallel structures is not possible for technical or economic reasons - examples are the railway network or airspace - EU law provides for access rights for companies that rely on the respective infrastructure in order to be able to provide their own services to customers. These access rights are intended to ensure that a scarce resource is distributed fairly to all those who rely on it, such as airlines or railway companies.*

Restricting freedom of association has high hurdles

*The national right to industrial action, which is achieved in the absence of a legal regulation by interpreting freedom of association in the Basic Law (**Article 9 Paragraph 3 of the Basic Law**), accepts that a strike paralyses a regulated infrastructure and therefore claims for access cannot be implemented. In principle, this applies even if the infrastructure is central to supplying the population. The exercise of fundamental rights by employees, i.e. the strike, fundamentally legitimises the rights of third parties being impaired. In the case of the railway networks, these would be the rights of the railway transport companies not on strike, which could actually maintain their normal operations with a functioning network.*

Under national law, freedom of association can only be restricted by rights and legal interests of constitutional rank, for example by higher-ranking rights of third parties. This requires a consideration of whether the rights of third parties are disproportionately impaired. For example, a power grid failure caused by a strike would be disproportionate because it would have a significant impact on the entire population and could even endanger the fundamental right to life and physical integrity.

But the balance is rarely so clear-cut when it comes to regulated infrastructure. A temporary closure of German airspace due to a strike is therefore just as possible as a temporary closure of the railway network.

The ECJ narrowly defines the scope of protection of freedom of association

*However, the Court of Justice of the European Union (**ECJ**) has a fundamentally different understanding of freedom of association. Although the **European Charter of Fundamental Rights** guarantees a right to collective action (**Article 28 CFR**), freedom of association plays hardly any role in the ECJ's case law. Two widely acclaimed ECJ rulings from the time before the Charter, "Viking" and "Laval" from 2007 (case numbers:*

C-438/05 and C-341/05), suggest that the Court could generally regard national industrial action law as subordinate to Union law.

The ECJ examined industrial action measures for legality according to its own Union law standards, regardless of whether national law considered them to be lawful. Other ECJ rulings also show that the Court does not consider itself bound by the assessments and evaluations of national industrial action law. Freedom of association is less important to it than to German law.

The ECJ defines the scope of protection of freedom of association rather casually and much more narrowly than in German constitutional law. According to Article 9, paragraph 3 of the Basic Law, it is self-evident that the employer may also reject a collective agreement demand and thereby provoke a strike. However, this must not result in any disadvantages for the employer, for example through claims for damages from third parties due to the loss of performance caused by the strike.

German strike law could come under pressure

*The **ECJ** sees it differently. For passenger rights in the event of a strike, for example, the Court ruled in a 2021 ruling that the employer on strike could do something if he was struck; he could have found a compromise with the union. (**ECJ** – “**Airhelp**”, case numbers: C-28/20). At the same time, according to the ECJ, a right guaranteed by EU law cannot depend on the industrial action law of the Member States.*

In view of this case law, it is obvious that the ECJ would regard the right of access guaranteed by EU law - for example an airline's right to access airspace or a railway company's right to access the rail network - as having priority over industrial action. Otherwise, the right of access to infrastructure under EU law would be impaired by national industrial action law. If this were thought through, there would have to be a ban on strikes in regulated infrastructures, and thus a ban on strikes for air traffic controllers or for those employees who ensure the operation of the railway network.

In terms of content, this result is not convincing because the EU has no legislative powers for industrial action. In addition, Article 28 of the Charter guarantees freedom of association in accordance with "national laws and practices". This transfers the national level of protection to Union law. However, with European case law that has so far shown little understanding of the Member States' traditions of industrial action law, German strike law could come under pressure.

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5. Legal opinion of the ECJ on the priority of application

The **European Court of Justice** (ECJ), as demonstrated by its fundamental judgment in the **COSTA/ENEL** case (ECJ, case 6/64 - judgment of 15.07.1964)

Englische Version:

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=24913973>

or

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006>

and with which it confirms its previous case law (see judgment of 05.02.1963 in the **Gend & Loos** case - case 26/62),

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=24881691>

from an unrestricted primacy of Union law over any national law, including national constitutional law. For its broad understanding of the primacy of Community law, the ECJ relies on the independence of the Union legal order, which is not based on an "ordinary" international treaty. Rather, it has created its own legal order:

Quote (COSTA/ENEL):

"Unlike ordinary international treaties, the EEC Treaty has created its own legal order, which was incorporated into the legal systems of the Member States when it entered into force and is to be applied by their courts. Indeed, by establishing a Community for an unlimited period, endowed with its own institutions, legal capacity, capacity to act internationally and, in particular, with genuine sovereign rights deriving from the limitation of the competence of the Member States or the transfer of sovereign rights of the Member States to the Community, the Member States have limited their sovereign rights, albeit within a limited area, and have thus created a legal body binding on their nationals and on themselves.

The incorporation of the provisions of Community law into the law of each Member State and, more generally, the wording and spirit of the Treaty mean that it is impossible for States to take subsequent unilateral measures against a legal order which they have accepted on the basis of reciprocity. Such measures do not therefore preclude the applicability of the Community legal order. It would jeopardise the attainment of the objectives of the Treaty set out in Article 5(2) and result in discrimination contrary to the prohibition in Article 7 if Community law could have different effects from one State to another depending on subsequent national legislation. ...

The primacy of Community law is also confirmed by Article 189. According to it, the regulation is "binding" and "directly applicable in all Member States". This provision, which is not limited by anything, would be meaningless if the Member States could unilaterally deprive it of its effectiveness by legislative acts which took precedence over Community law."

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This results in a self-imposed limitation of the sovereign rights of the Member States, which means that domestic legal acts must be measured against Community law:

Quote:

“It follows from all of the above that, because of its independence, no domestic legal provisions of any kind can take precedence over the law created by the Treaty, which thus flows from an autonomous legal source, unless it is to be deprived of its character as Community law and the legal basis of the Community itself is to be called into question.

By reserving to Community law, in accordance with the provisions of the Treaty, rights and obligations which were previously subject to their internal legal systems, the States have thus brought about a definitive limitation of their sovereign rights which cannot be reversed by subsequent unilateral measures incompatible with the Community concept. Consequently, Article 177 must be applied without regard to national law when questions concerning the interpretation of the Treaty arise.”

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See the English version

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006>

under the sections (**to Article 177 of the Treaty of March 1957 establishing the EEC**)

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“On the application of Article 177”

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“On the submission that the court was obliged to apply the national law”

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As already explained in section 1, the **priority of application** of Union law presupposes its *direct applicability*, which in turn presupposes the *direct validity* of Union law. If national law therefore contradicts a directly applicable Union law norm, the priority of application supercedes the national norm in order to ensure that Union law takes full effect. This means that all national bodies, the administration and in particular the courts of the Member States, including the national constitutional court, must interpret the relevant national norms in their application of the law "in the light of the overriding Union law" and in doing so must give effect to the interpretation that is "most friendly to Union law" - *the principle of interpretation in conformity with Union law*.

Domestic situations with no connection to Union law continue to be governed by national law, which can lead to a disadvantage for nationals in situations where there is no cross-border

connection. This is because they cannot rely on the favourable Union law (so-called *discrimination against nationals*).

The priority of application refers to *general-abstract regulations*, i.e. to formal domestic legal provisions, in particular laws. Insofar as *concrete-individual* legal acts that are contrary to Union law, such as *administrative acts*, are either void or must be repealed or withdrawn. The only exceptions to the priority of application are final *administrative acts*, because Union law also recognizes the institution of finality.

The priority of application also establishes the duty of the domestic legislature to repeal legal provisions that contradict Union law if, according to their content and interpretation, “there are ambiguities of a factual nature because (*as a result*) the addressees of the norm concerned are left in a state of uncertainty as to the options available to them to rely on Union law” (ECJ).

6. The Federal Constitutional Court's differing legal opinion on priority of application

The Federal Constitutional Court of the Federal Republic of Germany also affirms the principle of priority of application, but bases it on the constitution (the Basic Law). The priority arises "by virtue of constitutional authorization", i.e. the Union Treaties oblige the Member States to bring about domestic priority of application, which is done with the approval laws of the Bundestag and Bundesrat to the Union Treaties. The legal application order contained therein (Article 23 Paragraph 1 Sentence 2 of the Basic Law) extends to this obligation under Union law and in this way constitutively brings about priority of application (*adoption or enforcement doctrine*).

Article 23 – Basic Law for the Federal Republic of Germany [European Union – Protection of basic rights – Principle of subsidiarity]

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. **To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.** The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

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*For the **Integration Responsibility Act of 22 September 2009** (amended on 1 December 2009 – IntVG) as an implementing law to Article 23 Paragraph 1 of the Basic Law, see*

https://www.gesetze-im-internet.de/englisch_intvg/englisch_intvg.pdf
https://www.gesetze-im-internet.de/englisch_intvg/index.html

The Federal Constitutional Court thus subjects the application of Union law to constitutionally verifiable limits and claims for itself, as a national constitutional court, the authority to examine whether Union law exceeds these limits from the perspective of the Basic Law, i.e. whether an **ultra-vires-act** exists. If this is the case and the Federal Constitutional Court has established this in court, the German state bodies may not observe the relevant Union legal acts, which in the specific case removes the Union legal obligations.

However, as already highlighted, this legal opinion is explicitly in contradiction to the case law of the ECJ, according to which the Member States cannot subsequently call Union law into question and annul its binding nature. In this respect, the ECJ, as the "guardian of the treaties", claims the *sole right to examine* whether Union law is compatible with the treaties (*competence-competence*).

The diverging legal opinions of the ECJ on the one hand and the German Federal Constitutional Court on the other hand on the question of review competence reveal a fundamental **conflict** that significantly influences and weakens the **cooperation** between the two courts, but has sometimes also strengthened it in substance. As already explained, according to German constitutional law, Article 23 Paragraph 1 Sentence 2 of the Basic Law (GG) requires that sovereign rights may only be transferred by a formal federal law with the consent of the Bundesrat. Insofar as the contractual foundations as primary law of the Union, its amendments or comparable regulations supplement the Basic Law as a constitution or change its content, the approval laws require the *two-thirds majority* in the Bundestag provided for constitutional amendments (Article 79 Paragraph 2 GG).

7. The Polish Constitutional Court and the primacy of application

Poland, as a member state of the Union, follows the case law of the Federal Constitutional Court and has even increased the political and judicial resistance to the primacy of Union law by the *Polish Constitutional Court* setting even tighter limits on Union law. Union law cannot claim validity over the Polish constitution, only over subordinate ordinary laws (see judgment of 11 May 2005 - Ref. K 18/04, partially published in **EuR** - Journal of European Law - 2006, page 236).

For the Polish Constitution, see <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

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In the next column (Chapter 2) we will go into more detail about the Federal Constitutional Court's (BVerfG) understanding of the constitution on the issue of review competence, concerning the compatibility of Union legal acts with the Treaties of the Union on the one hand and the national constitution, the Basic Law, on the other. The controversy that the ECJ and the BVerfG are leading with their contradictory case law on the issue of review competence (competence-competence) has subsequently become the trigger for a rigid judicial policy and the uncompromising case law of the Constitutional Court in Poland, placing the national, Polish constitution "without ifs and buts" above the Treaties of the Union and its legal acts. This approach gives rise to the fear that other Member States could also follow suit and contribute to the erosion of the European legal principle of priority of application through the complementary jurisprudence of their constitutional courts.

(signed) Dr. Kammerer