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THE EFFECT OF EUROPEAN LAW

THE PROBLEM OF PRIORITIES

In the situation of conflict between national and EU law, which law is to prevail? The EU Treaty does not contain any guidance on the question of priorities. The matter has been left to be decided by the courts of Member States, assisted by the ECJ.

The question of priorities will primarily depend on how EU law has been incorporated into domestic law:

- If the Member State is **monist** in its approach to EU law, it will become binding and part of national law from the moment of its formal approval, without the need for further measures of incorporation, eg as in France.
- If the Member State is **dualist**, EU law will not become binding internally, as part of domestic law, until it is turned into a domestic statute, eg as in the UK, Germany, Belgium and Italy.

However, this does not settle the question of priorities. This will depend on the extent to which the Member State has provided for this, either in its constitution or in its statute of incorporation. Because of the wide variation in the way Member States have provided for this question of priorities, and to ensure uniformity of application, the ECJ developed its own constitutional rules to deal with the problem of the principle of supremacy or primacy of EU law.

THE DECISIONS OF THE ECJ

In a series of important rulings the ECJ has developed the doctrine of supremacy of EU over national law.

1. The first case established the EU as an independent legal order from the Member States: ***Van Gend en Loos*** [1963] ECR 1.

2. However, it was the case of ***Costa v ENEL*** [1964] ECR 585, which introduced the doctrine of supremacy.

3. EU law is supreme even over provisions of national constitutions*:* ***Internationale Handelsgesellschaft*** [1970] ECR 1125.

4. The ECJ emphasised that supremacy of EU law affects both prior and future legislation, in ***Simmenthal*** [1978] ECR 629.

5. The obligation to ignore conflicting national law was demonstrated more pointedly in ***Factortame*** [1990] ECR I-2433.

6. Governments will be liable for financial loss suffered as a result of their breach of EU law. See: ***Brassiere du Pechier*** and ***Factortame (No 4)*** [1996] 2 WLR 506.

THE RESPONSE OF THE UK

Some States, such as Belgium, managed the doctrine of supremacy of EU law with relative ease. Other States, including the UK, France and Italy have accepted supremacy gradually, after a long process.

According to Charlesworth & Cullen, *European Community Law*, for the UK, the stumbling block has been the sovereignty of Parliament. As a result, for most of the period of British membership of the Community, the courts have derived the right to apply Community law from the European Communities Act 1972 rather than from Community law itself (*Macarthys Ltd v Smith* [1980]). The courts have treated the 1972 Act as a permission by Parliament to apply Community law. However, under the usual rules of statutory interpretation, legislation which is subsequent to the European Communities Act 1972 would prevail over it. The courts nonetheless have been able largely to avoid the problem of absolute conflict of Community and British law (partly through interpretation, as in *Garland v BR Engineering* [1983]).

The European Communities Act 1972

The status of EU law derives from the ECA 1972. The most important provisions are sections 2 and 3:

- Under **s2(1)** all rights, powers, liabilities, obligations and restrictions created or arising under the Treaties and all such remedies and procedures provided by or under the Treaties are without further enactment to be given legal effect in the UK.

- Under **s2(2)** Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision for the purpose of implementing any Community obligation.

- Under **s2(4)** any enactment passed or to be passed, shall be construed and have effect subject to the foregoing provisions of this section [ie, obligations of a Community nature].

- Under **s3(1)** any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law and, if not referred to the ECJ, be determined in accordance with the principles laid down by the ECJ.

The Approach of the UK Courts

1. In 1979 the Court of Appeal were prepared, on the basis of s2(4) European Communities Act 1972, to give EU law priority in ***Macarthys Ltd v Smith*** [1979] ICR 785.

2. The House of Lords adopted the 'rule of construction' approach to s2(4) in ***Garland v BR Engineering*** [1983] 2 AC 751.

3. The House of Lords interpreted UK legislation against its literal meaning, in order to achieve a result compatible with EC law, in ***Pickstone v Freemans plc*** [1989] AC 66.

4. In ***Factortame (No. 2)*** [1991] 1 All ER 106, the House of Lords gave 'priority' to EC law, disapplying Part II of the Merchant Shipping Act 1988 as invalid.

5. More recently, the House of Lords ruled that the differing rights of full-time and part-time workers' entitlement to unfair dismissal and redundancy payments were incompatible with EC law, in ***R v Secretary of State for Employment, ex parte Equal Opportunities Commission*** [1995] AC 1.

6. The Spanish fishermen involved in the Factortame saga were entitled to compensation, according to the Court of Appeal and the House of Lords. See **Factortame (No 5)** (28 October 1999).

"Thus our courts, led by the House of Lords, have shown a clear willingness to accord supremacy to directly effective Community law, either by a (fictional) 'construction' of domestic law, or, where necessary, by applying EC law directly, in priority over national law." (J. Steiner, *Textbook on EC Law*). Note, however:

The Possibility of Express Repeal

Lord Denning in ***Macarthys Ltd v Smith*** (and Lord Diplock in ***Garland***) have made it clear that if Parliament were expressly to attempt to repudiate its EU obligations our courts would be obliged to give effect to Parliament's wishes. Whilst this is unlikely to happen as long as we remain members of the EU, it is a theoretical possibility and the principle of Parliamentary Sovereignty remains intact.