Supremacy or Primacy of EU Law—(Why) Does it Matter?

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Abstract: Even 50 years on the principle of supremacy or primacy is still surrounded with ambiguity, which is apparent already on the level of semantics. The principle has not carried a single name, but three. This paper argues that a disparity in the denomination of the principle amounts to much more than semantics. It exhibits conceptual differences. Different conceptualisations of the principle of primacy or supremacy entail different models of structural principles of EU law: the hierarchical, the conditionally hierarchical and the heterarchical model. These are no mere theoretical constructions; rather they have influenced concrete practices of EU law, including the most recent Küçükdeveci case as well as the Lisbon decision of the German Constitutional Court. While none of the three models has yet found an unequivocal and conclusive endorsement in the EU practice, there are compelling theoretical and practical reasons for which one of them should be preferred over the others. Whether EU law has supremacy or primacy therefore matters.

I Between Semantics and Conceptual Differences

It has been almost five decades now since the European Court of Justice (ECJ) laid down the so-called principle of supremacy of EU law. However, even after all this time the principle continues to be surrounded with a considerable degree of ambiguity. This is visible already on the level of semantics. The principle has carried not a single name, but three. Not a small number of legal commentators have consistently addressed it as supremacy; the majority has referred to it as supremacy or primacy, using both labels interchangeably; while the minority of scholars has stuck to the language of primacy. This disparity in the denomination of a fundamental principle of EU law would be of little interest, was it not so strongly entrenched and simultaneously so much at odds with the actual jurisprudence of the ECJ. There have been only two judgments in which the ECJ has employed the language of supremacy: the *Walt Wilhelm*¹ and the *Fratelli*...
Variola case. Yet, even in these cases the word supremacy appears only in the English translation. In other language versions, as indeed in the ECJ’s case-law in general, the principle is addressed as primacy.

This discrepancy between the language used by the legal commentators and the ECJ combined with terminological disparity among the legal commentators themselves calls for explanation. Is it only about semantics? Does it mean that different actors only dress up in different terminological garbs what is essentially one and the same principle? Or is there something more to it? Is it that the difference is not just in the name, but in the concept itself? Do different legal actors use uneven terminology because they understand the EU legal structure differently? If it is the latter, what precise conceptual distinction then lurks behind the various denominations of primacy, and most importantly, does or could it have any practical consequences for the functioning of EU law?

This article will, first, argue that the unsynchronised linguistic approach to supremacy or primacy on a closer reading indeed goes beyond semantics and exhibits a conceptual difference. Differences in the linguistic conveyance of the principle tend to presuppose its different nature, which in turn defines the principle’s scope and consequences. This comes, however, with further effects. Disparate conceptualisation of the principle affects all other structural principles of European integration: all those legal norms and principles that constitute, enable and provide for a specific way that the overall legal structure of integration may function. In other words, different conceptualisations of primacy or supremacy entail different models of structural principles of EU law.

It will be, secondly, demonstrated that these different models of structural principles of EU law are no mere theoretical constructions, rather their presence and influence can be clearly discerned in practice, national and supranational. Whether the EU law is supreme or has primacy over national law therefore matters. Examples taken from the national constitutional revision process in one of the new Member States as well as from the ECJ and national constitutional courts’ case-law will serve to substantiate this point. It will be argued, in conclusion, that while none of the competing models of structural principles has yet found an unequivocal and conclusive endorsement in practice, there are compelling reasons why one of them should be preferred over the others.

II Three Models of Structural Principles of European Integration

The principle of primacy or supremacy is marked by its four defining features: etymology of the principle, its nature, scope and consequences. The etymology of the principle exposes different forms in which the principle has been conveyed linguistically. The nature of the principle affects two sets of relationships. On the one hand, it determines the quality of the relationship between the EU and national law, namely the absence or presence of hierarchy and conditionality among the two. On the other hand, it also defines the rapport between the principle of primacy or supremacy and the remaining structural principles, which can range from subsumption and conditionality to autonomous functioning. The scope of the principle identifies the number and type of EU legal

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2 Case 34/73, Fratelli Variola v Amministrazione delle Finanze [1973] ECR 981, para 15 that emphasises the ‘fundamental principle that the Community legal system is supreme’.

acts that enjoy primacy or supremacy over the applicable number and type of national legal acts. Finally, the consequences of the principle stand for the requirements that follow in the event of conflict between the EU and national law and encompass (un)conditional disapplication and/or invalidation of the national law. These four defining features of primacy or supremacy have been combined in three different ways and can be therefore seen as forming three different models of structural principles of European integration: the hierarchical model, the conditionally hierarchical model and the heterarchical model.

A The Hierarchical Model

In the hierarchical model, the principle of supremacy, as it is consistently called, is conceived of as an all-encompassing, absolute, unconditional, hierarchical and inherent facet of integration. All EU law\(^4\) is regarded as a supreme body of law,\(^5\) which prevails over the entire body of national legal provisions,\(^6\) irrespective of their position in the national legal hierarchy, and as a logical consequence renders any contravening national law invalid.\(^7\) The principle therefore operates as a grand structural principle of integration from which all the other structural principles derive and are in turn subsumed into it.

First of all direct effect, which is understood as an element of a federal doctrine of the law of the land\(^8\) and considered as self-evident in any ordinary state of the law.\(^9\) Due to supremacy, all EU law, not just its directly effective provisions, is anyhow the law of the land and hence *per se* part of the national legal orders. The existence of direct effect as a distinct structural principle is therefore superfluous, almost a truism,\(^10\) and can be best explained as a symptom of an infant disease that will disappear as the Union comes of

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The principle of supremacy similarly affects the principle of attributed powers, which requires all competences that have not been explicitly conferred on the Union to remain with the Member States. However, as the competences can never be laid down in a watertight way so to exclude any conflicts about their exact allocation in concrete cases, the supremacy mandates that a final resolution of such conflicts (Kompetenz-Kompetenz) is a prerogative of the EU level, eg of the ECJ acting as its supreme judicial authority.

By the same token, supremacy also generates the principle of pre-emption and the duty of consistent interpretation. The former dictates that in the fields where the Union has policy making competences the Member States are not only precluded from enacting the legislation contrary to EU law, but are furthermore not allowed (ie are preempted from) to take any action at all. Moreover, like in the statist legal environment, where the lower norms must be interpreted in line with the higher norms, the principle of supremacy is also said to bind the national authorities in the supranational environment to construe all national legal provisions in compliance with the superior EU law as far as possible. In the opposite case and again as a consequence of the fact that the EU law is hierarchically supreme, they have to be prepared to face pecuniary sanctions.

In short, the maxim of the hierarchical model can be best captured as sine supremacy parem mundus. Without the grand principle of supremacy the very existence of the integration is believed to be at stake and the intrinsic, indispensable features of EU law: normative ideals of uniformity, coherence and efficiency imperilled. From the peak of the European hierarchy the world of integration is thus one-dimensional. There is no scope for considering or even recognising a more intricate, pluralist and dynamic relationship between the national and the supranational level. Whatever unfortunate frictions between them there might exist at present, they are nothing else than transitional signs of an emerging unity of EU law secured by supremacy whose full realisation is just a matter of time.

B The Conditionally Hierarchical Model

Unlike the hierarchical model, the conditionally hierarchical model is less rigid and categorical, but simultaneously also less sharp-edged and intelligible. This is confirmed by its treatment of the principle of primacy or supremacy. Firstly, there is a degree of terminological fuzziness as the same principle is described by two terms, primacy and supremacy, often used interchangeably. This fuzziness is then amplified further by the model’s effective endorsement of the hierarchical model of supremacy, while simultaneously admitting that it would be ‘more correct to read supremacy (in the EU context) not as an absolute principle, but one according to which each law, EU and national, is supreme within its own sphere’.

Nevertheless, as in the hierarchical model, primacy remains supremacy. They are considered as one and the same concept and a line between the two is not drawn.

11 ibid.
12 Arts 3/6 and 4, TEU.
14 See, Claes supra n 4, at 116.
15 ibid, at 117.
16 See, Weiler, supra n 5, at 20.
However, the absolute nature of supremacy is cast into doubt. The conditionally hierarchical model, as its name suggests, therefore allows for, or even requires, some limits to the supremacy of EU law. These are first of all factual, set unilaterally by the national (constitutional) courts’ willingness to comply with the EU law, but supremacy is also legally constrained by the conditions stemming from the EU law itself. These are of three different kinds. First, the EU law can only enjoy supremacy if it is enacted within the scope of the EU competences that have been exercised in accordance with the principles of subsidiarity and proportionality. Second, the supremacy of EU law is limited by the respect for the member states’ identities. Finally, the supremacy of EU law does not affect the rights and obligations stemming from the agreements between the member states inter se and the third countries entered into prior to 1958 or before the accession in case of those member states that joined later.

All these exceptions make the principle of supremacy somehow specific, novel a concept, which does not entirely coincide with the supremacy clause in the federal constitutions, rather it is ‘something in between’. While the exact character of the principle is therefore elusive, the advocates of the conditionally hierarchical model infer from the ECJ’s jurisprudence that it is at least a rule of conflict resolution. It mandates that in case of a conflict between the EU and national law the former shall prevail.

Yet, the principle of supremacy does not stop at the conflict rule’s edge. There is more to it: ‘Community law is supreme and has primacy’. It consequently takes precedence before national law because it is supreme. Primacy of EU law is a consequence of its supremacy, which denotes its hierarchical nature. Indeed, it is a tacit background assumption of the conditionally hierarchical model that the EU law is in a hierarchical structural relationship with national law. This assumption becomes explicit when the model outlines its understanding of the consequences and of the scope of the principle of supremacy; and a fortiori when it makes a logical bridge to the other structural principles.

In regard to the consequences of supremacy, the conditionally hierarchical model distinguishes between its more benign and a stronger conception. According to the former, supremacy remains fairly narrowly tied to the idea of a conflict resolution, so that it does not require more than disapplication of the conflicting national law. In contrast, pursuant to the stronger conception in the instance of a conflict between the EU and national legal norm, not only should the latter be left unapplied, it should be also invalidated. Whether the conflicting national provision is perhaps rendered invalid.

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19 Art 4/2, TEU.
20 Art 351, TFEU.
22 See, Kumm supra n 8, at 268.
25 See, De Witte, supra n 18, at 199.
26 ibid.
automatically by the very decision of the ECJ,\(^27\) or whether a national court must invalidate it in accordance with the national autonomous procedural rules\(^28\) is subject to some disagreement inside the conditionally hierarchical model, which is, however, of little importance. Drawing a distinction between solving the conflict in the sphere of (dis)application and in the sphere of (in)validity of the national law is namely regarded as unsustainably formalistic,\(^29\) technical endeavour, which ‘does not tell us too much about the essence of the (legal) system (of European integration)’.\(^30\) In either way, a hierarchy between the EU and national law is presupposed.\(^31\)

The conditionally hierarchical model therefore advances a much broader conception of supremacy that considerably transcends a ‘mere’ conflict rule.\(^32\) As such it does not operate only as judicial supremacy which would be directed solely against the national courts, but it is binding on all national organs, including the administration\(^33\) and the legislative body.\(^34\) The scope of primacy in the pre-Lisbon time was moreover not limited to the first Community pillar, but it also applied, albeit in a less orthodox way, across the two other pillars as well.\(^35\) Their more intergovernmental nature, as opposed to the first pillar’s supranational character, was not seen as an obstacle in that regard. If international law has important legal consequences for the states despite its predominant intergovernmental nature, this must be a fortiori so in the case of EU law whose primacy is after all nothing else than an emanation of a broader international law principle of supremacy.\(^36\)

It is consequently a prevailing position in the conditionally hierarchical model that supremacy institutes a hierarchy and operates as an umbrella structural principle,\(^37\) which however does not subsume, but certainly conditions or at least underpins all the other structural principles of integration. The principles of conform interpretation and state liability are thus, like in the hierarchical model, portrayed as flowing from the hierarchical principle of supremacy.\(^38\) The same applies to the principle of pre-emption. While the conditionally hierarchical model admits that the latter in fact does not exist in EU law, as the ECJ has never used it in its classical federal sense,\(^39\) it ascribes its absence to a conceptual mistake—to a faulty coupling of supremacy and pre-emption.\(^40\)

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\(^{28}\) See, Claes, supra n 4, at 110.

\(^{29}\) ibid at 110, fn 152.


\(^{31}\) ibid.


\(^{34}\) See, Claes, supra n 4, at 98.

\(^{35}\) ibid, at 108; see also Lenaerts and Corthaut, supra n 27, at 288–289.


\(^{38}\) See, Lenaerts and Corthaut, supra n 27, Regueiro, supra note 32.

\(^{39}\) See, Schütze, supra n 5, at 1032 and 1036, fn 51, also S. Weatherill, Law and Integration (Clarendon Press, 1995) 136.

\(^{40}\) See, Schütze, supra n 5, at 1033.
It is said, that the two principles, though related, ought to be kept apart.\textsuperscript{41} The principle of supremacy, as a sign of the EU legal order’s superior status, is a precondition for EU law’s capacity to pre-empt the national law, but the exact scope of pre-emption is determined by the principle of pre-emption, not by supremacy.\textsuperscript{42}

Such a broad conception of supremacy leaves a correspondingly limited role for the principle of direct effect, too. Being explicitly modelled after the French legal doctrine of exclusion and substitution,\textsuperscript{43} the principle of direct effect shall be severed from its broader function of invokability to become again just ‘about rights’. As such it shall cover only those cases, in which a directive, if it was correctly implemented, would confer on an individual a new right that does not yet exist in the national legal order.\textsuperscript{44} A directive of this kind could not be relied upon in horizontal relationships.\textsuperscript{45} However, the same reservation shall not apply when a directive creates a right that \textit{already exists} in the national legal order, only is its exercise frustrated by some national legal rules that are contrary to EU law. This kind of situation is not governed by the principle of direct effect, rather it falls within the ambit of supremacy. National courts must follow the superior EU law and exclude the conflicting national legal provision, enabling an individual to use the existing national right which simultaneously stems from the unimplemented EU directive. As a result, direct effect in the conditionally hierarchical model figures as ancillary to supremacy.\textsuperscript{46} While the two principles still operate separately, the supremacy extends way beyond the clear, precise and unconditional norms literally to all the provisions of EU law.\textsuperscript{47}

\subsection*{C The Heterarchical Model}

The first distinctive feature of the heterarchical model is terminological. The principle of primacy of EU law is always referred to as primacy. Any conflation with the notion of supremacy is excluded. The two notions must be distinguished and kept apart because they stand for two different concepts. Supremacy is the feature of supreme legal acts in the legal orders of the Member States and of the EU; it is an \textit{intra-systemic} feature. It is limited to the ambit of a respective legal order and does not extend beyond it. The relationship between the legal orders in European integration is consequently not determined by the supremacy of any of them. While each legal order is internally hierarchically structured with the supreme legal act on the top of its hierarchical legal pyramid, there is no hierarchy \textit{between} the legal orders. The autonomous legal orders of European integration constitute a common whole, but are not part of a single European classical hierarchical pyramid of legal sources. The relationship between them is heterarchical and is instead of principle of supremacy governed by the principle of primacy.

The principle of primacy is a \textit{trans-systemic} principle, which regulates the relationship between the autonomous legal orders, ie between the two sovereign levels in European integration. Primacy is a unique feature of EU law, the consequence of its
recognised special autonomous nature. Without primacy, the uniform executive force of EU law in every Member State as well as its effectiveness as a prerequisite of being law (effet utile), would be hampered and its very existence would be called into question. To avoid that the principle of primacy requires that in the case of a conflict between the EU and national law the conflicting national legal provisions, irrespective of their form and time of entry into force, must be disapplied. Disapplication is thus an exclusive outcome of the principle of primacy. The consequences for national law beyond disapplication are left to the discretion of national authorities and to their procedural autonomy exercised within the limits set by the national law. Primacy is therefore not about validity and can not lead to the national law’s invalidation, the same, of course, applies vice versa. As the ECJ can never invalidate national law, so the national courts cannot invalidate EU law.

The principle of primacy is, moreover, not absolute and even less a property of the entire body of EU legal norms. The duty to disapply arises only after three conditions have been met. First there must be a conflict between EU and national law. Primacy is a rule of conflict resolution, which is in the absence of conflict redundant. Only if there is a conflict identified in a given case, the EU law can be applied instead of a conflicting national provision. However, the EU law must be applied when it fulfils the following two conditions: EU legal norms must be capable of producing direct effect and they must be validly adopted within the scope of the EU competences.

The first of the last two conditions is self-explanatory. If the EU norm is not capable of producing direct effect, which means that it cannot be invoked by anyone in front of the national authorities against the competing national legal norms, the conflict does not arise. The scope of primacy of EU law is thus dependent on the principle of direct effect, which acts as its trigger. In contrast to the broad supremacy conception of primacy, the principle of primacy is non-hierarchical, it is conceptualised narrowly and instead of conditioning all the remaining structural principles, it alone depends on one of them, namely on direct effect.

The second condition of primacy, according to which the EU law must be validly adopted within the scope of EU competences, is also self-evident and flows directly from the principle of attributed powers. The latter can, however, raise a question of who decides, which competences have been transferred to the EU and where their scope ends (Kompetenz-Kompetenz). While this question has already received at least

50 See, W. van Gerven, ‘Of Rights, Remedies and Procedures’, (2000) 37 Common Market Law Review 501, 509. However, a mere disapplication of the contravening national laws will be insufficient when the Member State has failed to discharge its duty of harmonisation, which has explicitly required a legislative intervention on its side. See, de Witte supra n 18, at 190.
54 See, Dougan supra n 52.
55 See, also, Claes, supra n 4, at 115.
56 Art 4/1, TEU.
five distinct answers, the heterarchical model endorses yet another one. In the pluralist European legal common whole, there is simply no one to hold or who should hold the Kompetenz-Kompetenz. In the autonomous EU legal order the ECJ is in virtue of the Treaty the ultimate umpire of its legality and in that capacity also decides about the limits of the EU competences. In the national legal order the constitution usually entrusts the equivalent task to the constitutional court. Each authority is thus supreme within its own sphere, within its own legal order, without having the pretension to extend their EU or national constitutional supremacy to the other legal order. Not only is this because none of them would be strong enough to prevail, it is because this is simply not why they participate in the integration in the first place. From the perspective of the heterarchical model, the integration is not about subordination and consequent uneasy, grudging co-existence of plurality of constituent entities. It is a voluntary Union of the Member States and of the supranational level based on the mutual recognition of each others’ continuing legal autonomy that should work for the benefit of the integration as a whole.

This is, essentially, what another important structural principle, the principle of loyalty or sincere co-operation requires. While this principle is due to its redundancy absent from the hierarchical model and it ultimately functions exclusively in a pro-EU way in the conditionally hierarchical model, it is central to the heterarchical model. All structural principles of European integration depend on its intrinsically Janus-faced nature. The Treaty of Lisbon therefore envisages sincere co-operation as the right and the duty of both sovereign levels. In so doing, the Treaty itself functions as a shield for the autonomy of the Member States’ legal orders, but the national constitutions do the same in relation to the EU legal order.

However, the heterarchical model does not fail to recognise that loyalty between the legal orders and consequently the principle of primacy itself are not unbounded. Their limits are defined by an irreducible epistemic core of a legal order, which stands for the essential formal and substantive features in whose absence it cannot exist qua a specific autonomous legal order. Standing for the very identity of an autonomous legal order, exclusively an organ within the autonomous legal order, which shares knowing and understanding of its own irreducible epistemic core, can determine what the latter

59 See, Avbelj, supra n 57, at 149–150.
60 Art 4/3, TEU.
65 ibid.
67 In its judgment BverfGE 34 (1972), 9 (19), the German Constitutional Court developed an identical concept of a ‘Hausgut, das unentziehbar verbleibt’ when grappling with minimum constitutional conditions of a German Land.
really requires and what its identity consequently amounts to.68 The ultimate legal authority (supremacy) therefore has to remain with each autonomous legal order unless its autonomy is bound to fade through a gradual hollowing out of the essence of its irreducible epistemic core by another legal order.

In more concrete EU terms, this means that national (constitutional) courts are clearly entitled to police the boundaries of their legal orders and to determine what their irreducible epistemic core requires and what the identity of their legal order ultimately is.69 If in an unlikely event they come across EU laws or practices that could encroach on their legal order’s irreducible epistemic core, the national supreme act—the constitution—will not allow for its own removal and the court will not be able to accord precedence to the EU law. By using its claim to the ultimate legal authority as a means of defence of its legal order’s autonomy, the contentious EU legal provision will remain fully valid, but it will not be applied in the territory of that Member State. However, if the Member States feel that their membership in the Union continuously strains or even threatens their very irreducible epistemic core, the Treaty also allows for their lawful withdrawal from the Union in accordance with their constitutional requirements.70 Similarly, the EU irreducible epistemic core’s formal and substantive dimensions are also protected by the Treaty and the ECJ. The latter has developed the EU’s own rules of recognition, change and adjudication,71 whereas the Treaty authorises the EU organs to suspend the membership rights of a Member State, which could seriously infringe the Union’s core values.72

By conferring a different meaning on the principle of primacy, the heterarchical model consequently alters the status of the remaining structural principles; most notably that of pre-emption. As primacy is not about supremacy, the EU law is not hierarchically supreme over national law and consequently does not have the capacity to pre-empt it. In its absence, the exercise of shared competences has been governed by the principles of subsidiarity and proportionality.73 Following the recent amendments to the Treaty, securing compliance with these principles is primarily entrusted to the political process, which also includes an active role of the national parliaments.74 However, if the political process does not deliver, the issue will be again seized by the judiciary. The ECJ decides about the limits of the EU competences and the national courts heed its decision as long as it does not detract from their irreducible epistemic cores. This indicates that primacy as a relational rule of conflict resolution does not answer only a formal question, ie which rule applies in a particular situation, but also a substantive one, ie to what extent the situation, in which the rule is applicable, is covered by it. The scope of the ‘used’ and of the ‘remaining’ competences is consequently not determined top-down in a hierarchical

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68 This is not necessarily saying that no other authority from a different epistemic site could ever truly grasp what another legal order’s episteme requires. For this view, see P. Legrand, ‘European Legal Systems are not Converging’, (1996) 45 International and Comparative Law Quarterly 52, 78.
70 Art 50, TEU.
71 In particular in its Opinion 1/91. For more, see, Avbelj, supra note 57, at 156–157.
72 Art 7, TEU.
73 Art 5, TEU.
manner as the classical pre-emption requires, rather in a relational, mutually reflexive, double-conditioned manner.75

Another difference relates to direct effect. The latter plays a constitutive role in the European Union and has a narrower and a broader function. The narrower function is expressed in its role as a trigger of primacy: direct effect stands for the capacity of the EU legal norms to be invoked by the individuals in front of the national organs.76 Its broader function, on the other hand, affects the norm-making powers of the EU institutions and through that radiates into the wider questions of structural relationships between the Member States and the EU. One particularly important aspect of it is a preservation of the distinction between regulations, as acts of unification, and directives, as a diversity-managing77 as well as diversity-preserving mechanism. Was this distinction blurred, so to make directives indistinguishable from the regulations, the EU legislative function could become increasingly difficult78 or overly encroaching on the Member States’ competences.

The principle of direct effect is supplemented by the principle of consistent interpretation, which is not a consequence of the EU law’s hierarchical status, rather it stems from the duty of sincere co-operation or loyalty of the Member States to the integration, informed by the requirements of rule of law and by the concerns for sufficient effectiveness of EU law. Since the EU and national legal orders are two distinct autonomous legal orders, this duty of national organs is not unlimited. As always, there is a limit set by the irreducible epistemic core of a national legal order, but there are exceptions allowed for by the EU law itself as well. In the instances in which the principle of consistent interpretation can not apply, it is supplemented by the principle of state liability.79 This has been, again, deduced from the principle of sincere co-operation, the requirements of rule of law and effet utile and not from the fact that EU law is supreme.80 The Member States must comply with their EU duties not because their EU membership has put them in a hierarchically inferior position, but simply because they have agreed to it when entering the Union and because their national constitutions authorising their membership require them to do so as well. As this is a genuine legal obligation, and not just a matter of international comity, it is natural that its disregard entails legal sanctions in the form of a pecuniary penalty.81 The latter deters the Member States from violating their EU obligations and hence works in favour of the EU law’s effectiveness. Moreover, the Member State’s liability for the damages caused to the individuals also compensates for the absence of a horizontal direct effect of the non-directly applicable EU acts.82

76 See, van Gerven, supra n 50, at 506.
78 ibid.
80 ibid, para 30–37.
81 See, in particular, Case 304/02 Commission v France [2005] ECR 6263.
82 Admittedly, this compensation could have been more substantial had the Court so far not regarded state liability as a remedy of last resort. See, A. Dashwood, ‘From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?’ (2006–2007) 9 Cambridge Yearbook of European Legal Studies 81, 90.
III The Models in Action

Having outlined the three models of structural principles, we now move to identify their traces in practice. Among them the hierarchical model has had the least impact in practice. The hierarchical, broad and unconditional conception of supremacy that was clearly inspired by the American constitutional idea left its footprints in the first two decades of integration that witnessed most of the landmark cases constituting the ECJ’s so-called supremacy jurisprudence. However, this understanding of supremacy hit at a growing discontent of the national highest judicial authorities that reached its peak during the ratification of the Treaty of Maastricht when the hierarchical model was practically laid to rest. Yet, its theoretical influence has not completely waned out, for almost a decade later it resurfaced in Slovenia.

A Slovenian Case for Supremacy

Like the majority of the new Member States, Slovenia too had to amend its constitution prior to entering the Union. The process of constitutional change took place amidst a considerable ambiguity about the character of EU law and what precisely the latter requires in its relationship with national law. The problem was circumvented by opting for an abstract and minimalist amendment, following which EU law shall apply in Slovenia in accordance with the EU’s own internal rules. At the time of drafting, the exact understanding of the requirements stemming from the EU’s internal rules was nowhere articulated explicitly, but it could be inferred from the scholarly writings of the experts involved that it had been strongly influenced by the classics of EU law: supremacy understood as hierarchy.

This understanding has materialised itself first in the Slovenian translation of the Treaty Establishing a Constitution of Europe (TC) and after its demise also in the Treaty of Lisbon. The former’s Article I-6 read that ‘Constitution and law, adopted by the EU institutions in exercising their competences, are above the law of the member states’, whereas the Declaration on Primacy attached to the Treaty of Lisbon similarly proclaimed that ‘in accordance with the ECJ’s jurisprudence and under conditions set therein, treaties and law adopted on the basis of the treaties are above the law of the member states’. The Slovenian version of the TC and the Treaty of Lisbon thus instituted an explicitly hierarchical relationship between EU law and national law. While this did not pass unnoticed, it raised only little concerns. The prevailing belief was that the hierarchical model is the right one. The translation was therefore deemed correct and ways had to be found to reconcile it with Slovenian constitutional law.

However, it soon turned out that the hierarchical model ensued only from the Slovenian translation of the said legal documents, while in other languages the decisive paragraphs spoke of primacy of EU law. Initially even this conspicuous discrepancy had not been taken seriously, so that it was only at the eleventh hour in the corrigenda

86 Art 3a, Constitution of Republic of Slovenia.
of the Treaty of Lisbon that the Slovenian version has been brought in line with other languages. In that way the hierarchical model has lost its last, even if an unintended, textual grounding. Henceforth speaking of actual hierarchical supremacy of EU law over national law is not merely unrealistic, it is clearly incorrect as a matter of standing EU and national positive law.

B Conditionally Hierarchical Model—Supranational and National

The same conclusion can not be drawn in case of the conditionally hierarchical model. Especially the ECJ’s direct effect jurisprudence contains some proof that it might be grounded in the conditionally hierarchical model. As is well known, this jurisprudence has evolved through a couple of stages. Being first about the creation of individual’s rights, it has latter moved in the direction of invokability and justiciability, so that it currently stands for the capacity of private actors to rely on the clear, precise and unconditional EU norms and to invoke them directly before the national courts irrespective of their explicit status of a legal right. The number of EU legal acts capable of producing direct effect has incrementally increased. At first this capacity was recognised to the Treaty provisions, regulations and decisions that were clear, precise and unconditional, and was later extended to encompass directives as well, but only when they are invoked in the so-called vertical relationships, that is, between the individual and the state or a public authority in a broader sense. This means that the same directive, which can be relied on by the individual against the state, cannot be relied against the other individual. Due to concerns for legal certainty and out of reluctance to collapse a Treaty based textual distinction between the regulations and directives the ECJ has maintained a ban on the so-called horizontal direct effect of directives.

However, in so doing it has been far from consistent. The ECJ has carved out exceptions from the general prohibition of the horizontal direct effect of directives, such as the ‘mere adverse repercussions for the individuals in triangular situations’, incidental direct effect permitting individuals to rely on the unimplemented directives even in purely horizontal relationships. Yet, many influential academic voices, supported by the Advocate Generals, have strongly argued in favour of full scale recognition of the horizontal direct effect of directives. While this has not taken place yet, the ECJ, in conformity with the conditionally hierarchical model, has recently started moving into that direction.

The first step was taken in Mangold. This case involved a horizontal employment relationship whose constitutive element was the age of an employee. The employment

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88 P. Craig and G de Burca, EU Law, Text, Cases and Materials (OUP, 2003) 180.
was concluded in compliance with the German Employment Act but contrary to the Council Directive 2000/78/EC whose implementation period in Germany, however, did not expire yet. Faced with the difficulty of an apparent need to give horizontal direct effect to a directive that the member state could still implement in good time and in its chosen way, the ECJ decided to get around it by recognising direct applicability to the prohibition of discrimination on the basis of age as a general principle of EU law. For obvious reasons the case spurred a lot of controversies in the affected Member State and it has been even criticised by Advocate General Mazak in his Palacios de la Villa opinion that was followed by the ECJ. Nevertheless, on this basis developed predictions that Mangold is more an aberration than good law has turned out false.

Not only has the ECJ subsequently confirmed the Mangold doctrine, in the Kücküdeveci judgment it has taken it even a step further. The case, again, concerned an employment dispute in a pure horizontal relationship that was this time brought by an employee who was granted a shorter dismissal period because of her age. This was in line with the applicable German laws, but again apparently contrary to the Directive 2000/78/EC whose period of implementation, differently than in Mangold, had already expired. Faced with one difficulty less, the ECJ nevertheless still had to find a way of giving a full effect to a directive in a horizontal relationship. To do so, it seized all legal bases at its disposal: general principles of EU law, Charter of Fundamental Rights (even if it clearly did not fall within the ratione temporis of the case) as well as the directive, but ultimately the reference had to be made to the primacy itself:

By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied. In other words, a national law, which regulates an issue falling within the scope of EU law contrary to the EU rule, must be disapplied irrespectively of the legal character of an EU legal act in which the rule is contained: be it directly effective or not. Precisely as envisaged by the conditionally hierarchical model, primacy thus operates as an independent, self-standing principle, which is not conditioned by direct effect. The Kücküdeveci case has therefore effectively endorsed the conditionally hierarchical model on all counts, save one. The consequences attributed to primacy in this case do not entirely coalesce with those required by the conditionally hierarchical model as the latter ought to stretch beyond a mere disapplication to include invalidation of the conflicting national laws. Yet, even this requirement is not entirely unsupported by the ECJ’s jurisprudence. It is part of its settled case-law that ‘the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended.’

Having said that, it is important to add that the elements of the conditionally hierarchical model are not present only in the ECJ’s jurisprudence, but can be found in

94 ibid, para 76–77.
95 See, for example, R. Herzog and L. Gerken, ‘Stop the European Court of Justice’, (2008) EUObserver, 10 September.
97 Case 555/07, Kücküdeveci [2010] ECR 0000.
98 ibid, para 54.
99 See, for example, C-367/98, Commission v Portugal [2002] ECR I-4731, para 41.
the national courts’ practice as well. Only the focus is different: rather than EU law, it is the national law which is ultimately considered supreme. The German Federal Constitutional Court (FCC), a pioneer in this field, thus stressed in its Maastricht decision that not only application, but also validity of EU law in Germany depends on the German act of accession. In its Lisbon decision it furthermore added that EU law is not autonomous, rather merely a derived fundamental order. This national strand of the conditionally hierarchical model, as it were, thus expresses itself through the practice of suspended, but nevertheless ultimate supremacy of the national constitutions, which is not infrequently combined with a more or less open distrust to the actions of the EU institutions that are feared to be driving the integration towards the super-state like entity.

C The Heterarchical Model in Practice

The conditionally hierarchical model has therefore clearly taken some practical roots, both in the ECJ’s jurisprudence and beyond it. But so has the heterarchical model. Its clearest endorsement came from the Spanish Constitutional Court (the Tribunal) in its Opinion on the TC. The Tribunal recognised that in Spain an autonomous EU legal order co-exists with an equally autonomous Spanish legal order. It stressed that while the EU founding Treaties were concluded by the Member States in accordance with their constitutional requirements following the procedures of international law, once the EU legal order came into existence its validity cannot be assessed against the constitution of any of the Member States, but exclusively against the EU Treaty itself. This co-existence of two autonomous legal orders is possible in virtue of a distinction drawn between primacy and supremacy, which are two different categories that belong to two different orders.

Supremacy is about hierarchical validity and law-making, whereas primacy is not necessarily based on hierarchy, but on the distinction between the scopes of application of different norms, in principle valid, one or several of which, however, may lead to the non-application of others by virtue of its prevailing application. Supremacy always implies primacy except in the cases where the superior norm provides, in specific areas, for its own removal or disapplication. The Spanish Constitution, like most of the constitutions of the member states, was amended to enable the entry of EU law on the Spanish territory. As a result, the Tribunal found the supremacy of the Spanish Con-

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100 See, for example, the German Maastricht decision (BverfGE 89, 155) para 112, in which the FCC implies that German law is hierarchically supreme over EU law.
102 ibid.
104 ibid. [These legal orders] are meant to co-exist with the internal legal order, as legal orders which are originally autonomous.
105 ibid, at 1176.
106 ibid, at 1178. This distinction is captured well in the German jurisprudence (see Lütticke judgment BverfGE 31, 145) and scholarship that draw a line between the Geltungsvorrang (precedence in validity) and Anwendungsvorrang (precedence in application), see, F.C. Mayer, ‘Supremacy—Lost?’ (2005) 11 German Law Journal 1497, 1498.
108 ibid.
109 ibid.
stitution compatible with application systems that confer priority to the application of norms of other legal systems, such as EU law, as long as these do not detract from certain national constitutional limits that could under no circumstances become unrecognisable. At the same time these written and unwritten national constitutional limits should not be construed broadly.

A very similar approach has been adopted by a great majority of other national constitutional courts, most recently by the FCC in its Lisbon ruling. Among many things that can be found in this extensive judgment, one can also spot a clear endorsement of the heterarchical model. The FCC stressed that, contrary to federal legal arrangements, the primacy of application of European law does not affect the claim to validity of conflicting law in the Member States rather it only forces it back as regards its application. It noted that while this construction is rather theoretical, it affects the relationship between the Member States and the EU. Bodies of jurisdiction with a constitutional function may not, within the limits of the competences conferred on them, be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inalienable constitutional identity. Consequently, while the FCC recognised the legal autonomy of EU law, it exceptionally reserved for itself the right to disapply EU law under special and narrow conditions. The FCC opined that while this is familiar both to the international legal relations as well as to the ECJ in its relation to international law, it moreover corresponds to the idea of contexts of political order that are not structured according to a strict hierarchy.

The absence of strict hierarchy, or better: presence of heterarchy, can be also deduced from the ECJ’s jurisprudence. From early on the ECJ has been asserting the autonomy of EU law without, however, denying it to national legal orders. Already in Costa the ECJ made clear that its decisions shall be given not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the Treaty. The ECJ and the national constitutional courts have therefore been unanimous that EU law and national law remain two distinct legal orders that, however, co-exist in the national territory as the EU law has become part of the national legal heritage. The ECJ has thus never spoken of supremacy of EU law within the meaning of hierarchical validity, as to make EU law superior to the national law and hence its criterion of validity. In the ECJ’s own words: ‘it is settled case-law that the Court has no jurisdiction to decide

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110 ibid.
111 ibid, at 1177.
112 ibid.
113 For an overview, see Avbelj, supra n 57, at 153–154.
114 FCC, BverfG, 2 BvE 2/08, 30 June 2009, para 335.
115 ibid, para 336.
116 ibid, para 333.
117 ibid, para 340.
118 ibid.
120 The FCC, for example, already in its first EU law related case (1 BvR 248/63 and 216/67 EEC Regulations Constitutionality Case) in the beginning of the 1960s held that Community is neither part of international law nor of national law. It recognised it as an independent legal order, which flows from an autonomous legal source. Similar positions have been adopted by the French Cour de Cassation and the Italian Constitutional court.
whether a national provision is compatible with Community law. As a result, the principle of primacy does not require the invalidation of national rules that conflict with EU law, they only need to be disapplied. Yet, as pointed out above, the ECJ has sometimes additionally to disapplication required a removal of the conflicting national legislation, but it has not done so on the grounds of primacy of EU law, rather by following the latter’s requirements of legal certainty and effectiveness.

The ECJ has also made clear that the principle of pre-emption is not part of EU law. In the same vein, the ECJ has not based the principles of conform interpretation and state liability on the principle of primacy, rather it grounded them in the duty of sincere co-operation or loyalty of the Member States to the integration, informed by the requirements of rule of law and by the concerns for sufficient effectiveness of EU law. Yet, the latter is not an absolute requirement either. The ECJ has allowed for the exceptions both to the efficient as well as to the correct application of EU law, moving another step further away from the purported absolute and unconditional supremacy. Last but not least, the fact that the Advocate Generals have so far failed to convince the ECJ to endorse the conditionally hierarchical model’s conception of direct effect, can be also interpreted as the ECJ’s sign of preference for the heterarchical model.

IV Making a Choice

The analysis of the actual implementation of the three models of structural principles of European integration in the practices of national and supranational (judicial) actors reveals that these oscillate between the conditionally hierarchical and the heterarchical model. In contrast to the hierarchical model, which is sociologically implausible and also lacks a legal basis, they have both shaped the practices that, however, remain unsettled. Neither the conditionally hierarchical nor the heterarchical model has been implemented to the extent that one could speak of its final and conclusive practical endorsement. The choice is therefore yet to be made and it is important to make one—at least for two reasons.

First, because of the unsettledness of the practices themselves. This entails uncertainty for the holders of rights and duties under EU law. Moreover, it is also detrimental for the judicial authority, if jurisprudence is torn between two visions of the

125 Case 10-2297, IN.CO.GE. 90 Srl [1998] ECR I-6307 para 18, 19. ‘[The] Commission infers that a Member State has no power whatever to adopt a fiscal provision that is incompatible with Community law, with the result that such a provision and the corresponding fiscal obligation must be treated as non-existent. That interpretation cannot be accepted’.
127 Exceptions from full effect of EU law are allowed when this requires interpreting and applying national law contra legem, if it leads to the breach of certain general principle of Community law, such as: legal certainty, non-retroactivity and res judicata.
128 Joined Cases 397/01-403/01, Pfeiffer [2004] ECR I-8835 and joined cases 387/02, 391/02 and 403/02, Berlusconi and others [2005] ECR I-3565, in which the ECJ explicitly ruled contrary to the opinions of AG. Ruiz-Jarabo Colomer and AG. Kokott; see, also, Dashwood, supra note 93, at 102, 109.
129 The decision in Case 378/08, ERG, para 45 appears to confirm this point.

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integration’s legal structure, so that one judgment swings in that, another into the opposite direction; or that one and the same judgment mixes both models. Second, choosing between the two models also has direct practical implications in terms of justification of a concrete judgment. A choice of a model of structural principles means deciding how to justify a particular judgment. The quality of the judgment, its correctness or at least persuasiveness, thus depends on the chosen model. For example, in the Kücükdeveci case the ECJ opted for a conditionally hierarchical model and justified the judgment thereon. If this model is the best suited for European integration, then Kücükdeveci is good law that ought to be followed in the future. In the opposite case, if the heterarchical model is preferable, Kücükdeveci is an aberration that shall be avoided.

As the choice between the two models is therefore clearly important, the question is posed as to how it should be made. There must be certain criteria that should enable us to opt for that or another model. It will be suggested that these criteria are of two sorts: theoretical and practical. The theoretical criterion measures sustainability and coherence of a model as a theoretical construction on its own terms, whereas the practical criterion is a criterion of the model’s fit with practice and is of two kinds: backward and forward-looking. The former is about the analysis of the model’s institutionalisation in the past and present practices, whereas the latter stands for evaluation of the model’s capacity to make the best of the integration practices in the future.

Applying these two sets of criteria to the models, we discover that the conditionally hierarchical model exhibits considerable theoretical shortcomings. Its unique conception of a conditional hierarchical supremacy of EU law openly begs a question of theoretical coherence. As a matter of logical consistency, can EU law be conditional, hierarchical and supreme at the same time? The answer appears to be no. One would think that EU law can either be unconditionally hierarchical and hence supreme; or it is conditional, which means that it is consequently neither hierarchical nor supreme. In other words, supremacy is either about supremacy or it is not supreme. Anything else appears to be a contradiction in terms. It is therefore even in theory hard to see how supremacy could be something ‘in between’. The practice envisaged by the conditionally hierarchical model confirms this point. Should a genuine conflict arise between the EU and national law, the conditionally hierarchical model leaves no doubt, EU law must prevail. The relationship between the EU law and national law is to be ultimately decided by the ECJ,130 whose pronouncements shall carry a presumptive weight.131 At the end of the day the unique conditional hierarchical supremacy thus converts into supremacy proper and the conditionally hierarchical model collapses into the hierarchical one.

Regarding the backward-looking practical criterion the score between the conditionally hierarchical and the heterarchical model seems to be tied. As we have seen, both of them, if sometimes to varying degrees, are corroborated by practices and therefore exhibit a plausible degree of fit with the reality of European integration. Consequently, the scale can not be decisively tipped in favour of any model on this descriptive basis alone. The choice will rather need to be made on the explicitly normative grounds, by

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131 See, Kumm, supra n 8, at 302.
evaluating which of the two models could put the future practices of European integration in the best light, all things considered. We shall argue, also taking into account the revealed theoretical weaknesses of the conditionally hierarchical model, that this role belongs to the heterarchical model.

The future practices of European integration will be put in the best light by maximising the interests of all three levels involved: the national, the supranational as well as the interests of the European integration as a whole. The latter's prime interest is in securing its long-term viability, which can be best achieved in the environment that is as little as possible prone to generate conflicts and crises. This kind of environment is in function of the satisfaction of the involved actors' interests. The more these are met, the fewer conflicts can there be expected. The interests of national actors, as expressed in legal terms by the judicial authorities, are twofold. The member states want to preserve the autonomy of their legal order, the core of their national identity and distinctiveness, but at the same time they want to efficiently pursue many of their policies together with other Member States within the European common whole. The interests of the supranational level, as represented by the ECJ, are a mirror image of the national ones: efficient pursuit of the objectives for which the Union has been created in the way autonomously decided and controlled by the Union's own institutions within the competences conferred on them.

The heterarchical model achieves all these goals. Supremacy grants the autonomy to all legal orders involved, whereas primacy relates them into an efficient common whole. Since they are distinct legal orders whose autonomy, procedural and substantive, ought to be preserved, primacy and with it efficiency of the common whole can not be limitless. The supremacy-based exceptions to primacy are allowed, but, because of all actors' commitment to the common whole, they can not be frequent or broad. In this way the interests of all three levels are served and, what is more, it appears that the main judicial actors are unanimous about it. All national court's have claimed for themselves the right to protect what we have called the irreducible epistemic core of their legal orders and so has done the ECJ against its external environment of international law. If the ECJ could exercise the right to exception due to some core substantive reservations stemming from its legal autonomy in relation to international law, it can not deny the same right to national courts in relation to EU law.

On the other hand, the conditionally hierarchical model can operate in the way of maximising the interest of one level only, be it national or supranational. As one of them must eventually prevail, the other must consequently play a subordinated role. The result is an environment, characterised by rivalry of purported sovereigns, distrust between them, their self-centredness and defensiveness. In this anxious atmosphere the focus moves away from building on the commitment to the common whole to the development of conflict avoiding strategies. It goes without saying that this does not work at the advantage of the desired long-term viability of European integration. At its best it preserves the status quo. Therefore the unconditional supremacy of EU law is not indispensable for efficient and uniform application of EU law across the Union. It might actually be its main obstacle on the way there. Similarly, the national courts, which attempt to preserve the final say for themselves including in the Union matters, have not only gone beyond the constitutional requirements, indeed limits, of their legal orders, rather they run the risk of exhibiting the lack of commitment to the common

132 Case C-402/05P, Kadi.
whole, whose constant presence is a *conditio sine qua non* for the very existence of European integration.

Finally, we fear that at the bottom of the conditionally hierarchical model lies a fundamental misunderstanding that EU law, as expounded by the ECJ, requires the subordination of the national law, and vice versa: that national law, as construed by the national constitutional courts, demands the submission of the EU law. This is so because each of the actors is said to be able to see merely its side of the story. They are believed to be exclusively grounded in their own supremacy perspective, without having the capacity to see beyond the requirements of their own legal order to consider the interests of the others and of the common whole in which they partake. Therefore it is allegedly natural that the ECJ perceives itself to be ultimately supreme from its own perspective and that national courts do the same from their perspective. The imminence of conflict is thereby laid into the very structure of the integration. It forms its essential part.

Yet, this ‘description’ of reality is false on the factual grounds, for we have seen above that the courts have shown that they can act in a mutually reflexive way. Moreover, it inevitably comes with adverse normative prescriptions that act as encouragement of the judicial actors to strengthen the pursuit of their own rightness at the expense of the competing judicial authorities. Again, the focus turns on the maximisation of one’s own interests only, which is, to use the law and economics language, an overall inefficient, practically non-durable and therefore normatively undesirable solution for European integration.

To conclude, for all the above stated reasons, theoretical and practical, the heterarchical model is preferable to the conditionally hierarchical model and the future practices of European integration, both national and supranational, should more determinately move into its direction. On the national constitutional courts’ side this would entail some more open-mindedness, combined with less parochialism, distrust and unwarranted fear of the purported *Entstaatlichung*, whereas the ECJ should tame its expansionist case-law that has by now made its integration in disguise more than conspicuous and as such increasingly unfounded.

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133 See, Baqueiro Cruz, *supra* n 30, at 392.