ECJ In Relation To The Doctrine Of Supremacy

Throughout this essay I will consider what the Doctrine of Supremacy is and the overall role it performs within the EU. In doing so, I will consider ECJ case law and use such cases to strengthen arguments and views. Overall, I will be discussing how and why the doctrine of supremacy allows EU law to prevail over national law, including national constitutions and how member states react to this limiting of their law making powers.

When the member states signed up to the European Economic Community (EEC) in the original Treaty Of Rome 1957 (TOR) it became evident that it was silent in conjunction with the nature of the EU legal system. This 1957 treaty was both undeveloped and failed to set an agenda. Overtime, however, the ECJ began filling in the gaps, evolving EU law as very distinctive, unlike international law. The ECJ commonly describes EU law as ‘sui generis’ , in other words, ‘of its own nature’, which is very unlike from national and public international law. Moreover, given that there is nothing written into the treaties about the way in which EU constitutional law should be set out, this has created an emptiness, as indicated prior, the court has stepped into this opening in terms of developing an EU constitutional law. This idea is highlighted within the Treaty on the European Union (TEU) , where article 19 states, that the ECJ has a very broad role, and is mainly responsible for the interpretation of the treaties where the it remains silent. This role can be challenging at times for the reason that it is difficult to make such interpretations meaningful. Hence, the court has done much work to give a very dynamic integrationist reading of the treaties. Article 220 of the TEU also describes the role of the ECJ stating, “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed”. Thus, where there is a gap in information within the treaties, the court will fit in a very pro-EU method, adapting a purposive approach. From the ECJ point of view, the EU, EU institutions and individuals of the EU all benefit from this. However member states don’t always agree with this.

Professor T C Hartley, a legal scholar, describes how the ECJ has developed an effective approach to obtain more rule and power to the EU stating, “A common tactic is to introduce a new doctrine gradually: in the first case that comes before it the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the facts of the case before it. The principle however, is now established. If there are not too many protests, it will be reaffirmed in later cases: the qualifications can then be whittled away and the full extent of the doctrine revealed”.

And so, the Doctrine of Supremacy, in the view of the ECJ, is the number one doctrine that have been developed. Simply put the Doctrine of Supremacy views EU law as supreme. Also known as Doctrine of Primacy, it describes the relationship between EU and National Law, asserting that EU law should prevail over national law where conflicts arise. This ensures that EU law regulations are constantly applied throughout the EU. From the ECJ view, the supremacy of EU law if ‘unconditional and absolute’. This principle has been established by the ECJ through various key cases. Such cases have allowed the ECJ along with National Courts to examine the relationship between European law and National Law. While there is no mention of this principle in the founding treaties, in the Treaty of Lisbon (ToL) it was established in Declaration 17 in relation with the case law of the ECJ that, “the Treaties and the law

adopted by the Union have primacy over all member states". Professor Weiler used the word 'bi-dimensionalism' to describe the creation of a general rule by the ECJ then said rule was for the national courts to become familiar with and apply. According to the ECJ, supremacy of EU law is based on the founding treaties developing their own legal system. In fact, in the case of Costa v ENEL the ECJ found that, "the treaty has created its own legal system which on the entry into force of the Treaty, became an integral part of the legal systems of member states".

This notion came about early on in the development of the EEC in the case of Van Gen den Loos where the ECJ stated that, 'the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited field'. The court had also viewed that European Community law, 'not only imposes obligations on individuals but is also intended to confer upon them rights'. This case is seen as the most important constitutional case in EU law. Within this case the ECJ steps into this breach early on to reiterate the principle that EU law prevails over national law, and therefore is supreme. Broadly speaking, this case covers a number of issues including the imposition of customs duties, cross boarder activity and the free movement of goods. To sum up, Van Gend en Loos, a company, imported chemicals from Germany to the Netherlands and upon arrival were asked to pay import taxes by Dutch Customs. This duty authorised by the defendants was lawful under Dutch national law. However, Van Gen den Loos objected to this on the grounds that it was 'indifferent' to the European Economic Communities prohibition on inter-state import duties found in Article 12 of the Treaty of Rome (TOR) , and also breaches Article 30 TFEU in relation to the 'free movement of goods'. The question arose to which law prevailed, the Dutch law which approves this duty as valid or the EU law. Overall the court held that EU law applies over and above any conflicting national law.

Moving forward from this case the same ruling under different circumstances was held years later in Costa v Enel . This case portrayed a conflict between European law and Italian domestic law. Again the question of which is paramount arose. The court ruled that nothing should jeopardise the community nature of EU law. The ECJ held that, 'community law must prevail over conflicting rules of national law, even if enacted subsequently to the Community rules'. This case again highlighs the clear message the ECJ wants to demonstrate in these circumstances.

A supremacy clash occurred in 1970 in the case of Handelsgesellschaft in Germany where concerns were raised referring to the question of if EU law is supreme. The main questions in this case was what would happen if EU law appears to conflict with basic fundamental human rights, and which are contained in the national constitution of a member state. Within this case a measure was introduced for a new deposit system for the exporting of certain goods. The idea was that companies would have to pay a deposit to guarantee they would be exporting a certain quantity of goods. In this way if this was not done they would lose the deposit. However, a critical view arose from this, where it was argued that this community deposit system was in fact a violation of German fundamental rights, as contained in the German constitution, in particular violation of the freedom of economic freedom. Such arguments suggested that there is a conflict between European Law (the deposit system) and fundamental basic law. Yet, the court was consistent with their rulings and held again that the EU law was supreme, the court stated that the, 'validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure'. It therefore makes no difference to the ECJ where the conflict lies. Nevertheless, there was issues with this ruling as

the German Constitutional court failed to accept such a ruling.

It is also important to observe another case which reflected a similar judgement, Simmenthal . This case is an example of a changing point for EU law. In this case the ECJ decided that ‘the validity of a community measure or its effect within a Member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State of the principles of a national constitutional structure’. In Summary, this case describes that the supremacy of EU law cannot be tested, even in national constitutional law. The ECJ ruled in this case that, ‘every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provisions of national law which may conflict with it, whether prior or subsequent to the community rule’ .

While analysing the stance of other member states in relation to the doctrine of supremacy, it is important to also look at how the UK reacts to the notion of supremacy of EU law. From the offset it is clear that they take a more dualist approach. This approach describes the UK only giving EU law affect when enacted by a domestic Act of Parliament. The HOL considered the approaches courts should take where conflict between UK and EU law occur primarily in the case of Factortame. Within this case a clash occurred between domestic law, the Merchant Shipping Act 1988 , and an EU Treaty. The HOL ruled that ‘under the terms of the European Communities Act 1972 Act it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law’. In other words, the courts are again highlighting the supremacy of EU law even where there is direct conflict with UK law. It is important to understand that through the Factortame cases they highlighted instances where Parliament may pass new laws which conflict with EU law, and in such circumstances, national courts have the authority to allow a temporary order discouraging UK authorities from implementing that area of law. And so, in the UK, this idea of supremacy of EU law developing from the implementation of Parliamentary Sovereignty Doctrine is where issues can arise as the UK puts great importance on this believing that ‘Parliament is the supreme legal authority in the UK which can create or end any law’.

To conclude, it is obvious that the idea of the doctrine of supremacy of EU law is adapted throughout the EU with the ECJ enforcing such principles. While the ECJ believes this idea of EU law prevailing over any other national law, some member states are sceptical of this approach as in certain circumstances such EU legislation can be disproportionate and contradictory to national law and even in relation to basic fundamental rights, as I have discussed above. Overall, when analysing the case law brought forward and the ECJ rulings in such cases through there language and confidence in applying such beliefs, it becomes obvious that the case law is consistent to the idea of EU law supremacy. Furthermore, in terms of the member states acceptance of EU supremacy it is clear from the cases I have elaborated on above that the UK have embraced this idea more so than other member states, for example Germany. However, the UK’s stance on this will obviously change with the withdrawal from the EU.