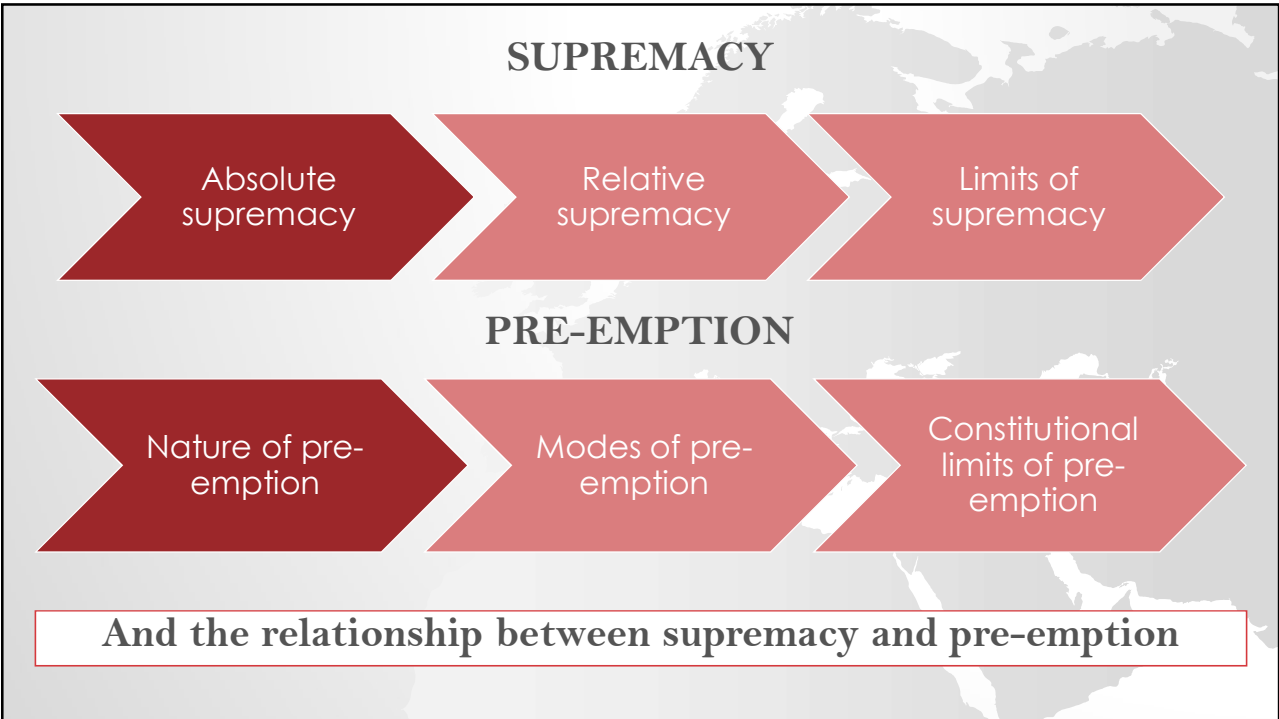




THE EUROPEAN UNION

Supremacy/Pre-emption



SUPREMACY



*“The problem of **pre-emption** consists in determining whether there exists a conflict between a national measure and a rule of [European] law. The problem of **supremacy** concerns the manner in which such a conflict, if it is found to exist, will be resolved.”* Waelbroeck 1982

- Since European Law is directly applicable in member states it must be recognised by national authorities as well as their national law.
- Direct effect can cause EU law to come into conflict with national law.
- The EU’s way of dealing with these conflicts is to **apply the concepts of pre-emption & supremacy** to EU law.
- There is no supremacy without pre-emption;

Pre-emption: is there a conflict?
Supremacy: resolution of conflict.

ABSOLUTE SUPREMACY; EU PERSPECTIVE

- The resolution of legal conflicts requires a hierarchy of norms.
- Federal (central law) v State conflicts = federal law supreme over State law. (Art VI clause 2 of the US Constitution)
- It is possible for a decentralised solution (State Law over Federal Law) and in these circumstances direct effect of a norm will not imply supremacy. (for example customary international law)
- Does the EU law operate Absolute supremacy? (All law from one legal order is supreme to the other.)

*‘The Member States have **definitely transferred sovereign rights** to a Community created by them... The autonomy of the Member States to act as they wish has been **limited by virtue of their membership** of the Community. Furthermore, as accordance to the principle of the Treaty, **no Member States may call into question the status of Community law** as a system to be applied uniformly and generally throughout the Community.’* Costa v ENEL [1964]

SCOPE OF ABSOLUTE SUPREMACY

- The dualist tradition of some states posed a threat to the unity of the Union legal order in 1958. (Sasse, 1965)
- Within dualist states, the status of EU law is dependent on the national act “transposing” the European law/treaties. (possibility of repeal available to member states who do not wish to transpose the EU law)
- The European Court of Justice in ruling upon a series of fundamental cases established the supremacy of EU law over internal national law and then international treaties.

Supremacy
over
Internal
Laws

- To conquer the decentralised approach the ECJ established supremacy as a principle of EU law in *Costa v ENEL* [1964].
- Membership of the EU = binding incorporation of EU law into national law.
- European law is supreme due to the necessity of uniform application. (so is autonomous from ordinary international law.)
- Secondary legislation is supreme (*Internationale Handelsgesellschaft* [1970])
- “**The whole of the European Law prevails over the whole of national law.**” (Kovar, 1981)

Supremacy
over
International
Treaties

- Article 351 TFEU; **EU law could be disapplied by a member state if it impeded their obligations to a prior arrangement.** *Attorney General* [1980]
- Limitation of Art 351; application to only include **obligations towards third States.** *Commission v Italy* [1962]
- *Kadi* [2008] Art 351 does not permit any challenge to the **fundamental principles that are the foundations of the Union.**
- Limited application of Art 351; International treaties entered into after 1958; EU law is supreme. *Commission v Belgium & Luxembourg* [1998]

EXECUTIVE NATURE OF SUPREMACY

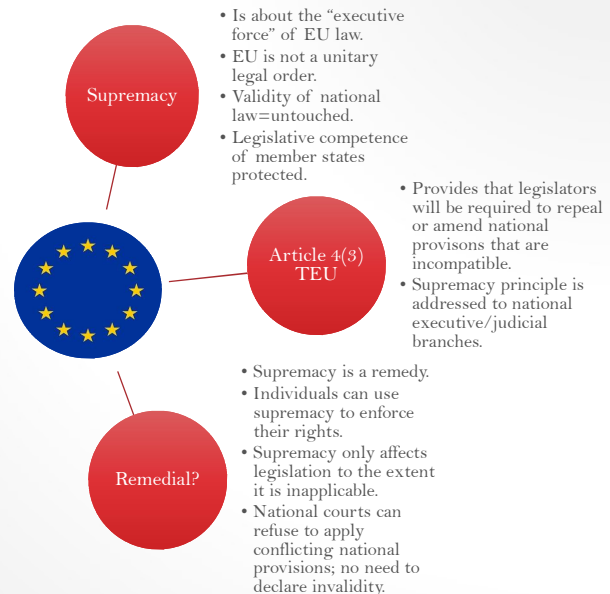
Consequences of Supremacy over conflicting national laws?

- *Simmenthal II (Case 106/77)* [1978]

National courts are under a direct obligation to give **immediate effect** to European Law. This means that national courts must declare the national law as “*incompatible*,” even if at a national level they do not have the power to do this. (para 17)

- *Ministero delle Finanze v. IN. CO. GE '90 (Cases C-10-22/97)* [1998]

According to the Commission in this case provisions that are incompatible with EU law must be treated as non-existent. (para 18) ECJ disagreed and reaffirmed that national courts are only under an obligation to disapply a conflicting provision of national law. (prior or subsequent to the Union law.)



RELATIVE SUPREMACY; NATIONAL PERSPECTIVE

- The European Union is a federal union of states.
- Characterised by political dualism.
- National view on supremacy doesn't match the European "*Absolute Supremacy*," perspective.
- (British) European Union Act 2011 s18; Confirms the status of EU law within the UK is dependant on its continuing statutory basis. (national ^ EU)
- Another perspective; European law is supreme over national legislation but is relative as it is *limited by national constitutional law*.



National views on Supremacy;

- I. European law *could not* violate national fundamental rights. (German Constitutional Court)
- II. Ultra Vires Control. States can ignore *Kompetenz- Kompetenz* (**Solange I** [1974] 2 CMLR 540) & can decide the competences the EU has.

LIMITS OF SUPREMACY: FUNDAMENTAL RIGHTS

EU law v. National Fundamental Principles

Wünsche Handelsgesellschaft
[1987] 3 CMLR 225

Once the European legal order had developed equivalent human rights provisions, the German Constitutional Court would no longer challenge the supremacy of EU law.

• *Internationale Handelsgesellschaft* [1970]

The German Constitutional Court **rejected** the European Court of Justice's absolute supremacy opinion and replaced it with the concept of **relative supremacy**.

While the German Constitution expressly allows the transfer of sovereign powers to the EU under Art 24(1) of the German Constitution, such a transfer was **limited by the constitutional identity of the German State**. Fundamental constitutional structures were beyond the supremacy of the EU.

So long as the European legal order had not developed a equivalent standard of fundamental rights, the German Constitutional Court would disapply conflicting provisions.

The German Constitutional Court recognised the creation of similar fundamental rights and established the **So Long II principle**;

So long as generally the EU safeguards the essential content of fundamental rights, *the Court will no longer review EU legislation in light of these rights*.

So Long II reaffirmed the **limited supremacy of EU law** established in So Long I.

LIMITS OF SUPREMACY: COMPETENCES

Who controls/limits the scope of the European Union? Should national courts be entitled to a decentralised ultra vires review?

Maastricht Decision [1994] 1 CMLR 57.

National courts cannot disapply-let alone invalidate European Law.

German Constitutional Court;

- *Ultra Vires* Review Doctrine
- Union ought not to be able to extend its own competences.
- Clear line, "*between a legal development within the terms of the Treaties and a making of legal rules which breaks through the boundaries and is not covered by valid Treaty law.*" (Para 98)

There is a presumption that the EU institutions would generally act *intra vires*.

Honeywell [2011] 3 CMLR 276

- Creation of new prohibition was *ultra vires* as it read **something into the Treaties that was not there.**
- The principle of supremacy was not unlimited.
- National review limited to specific violations of the principle of conferral.

Lisbon Decision [2010] 3 CMLR 276

National review power of *ultra vires* EU legislation confirmed.

Ultra Vires?

Mangold [2005] Case C-144/04;

Established the prohibition of discrimination on grounds of age.

PRE-EMPTION: NATURE & EFFECT

- Supremacy denotes the superior hierarchical status of the Union legal order over the national legal orders and thus gives European law the *capacity to pre-empt national law*.
- The doctrine of pre-emption **denotes the actual degree** to which national law will be set aside by European law.
- It specifies when conflicts have arisen and to what extent Union law displaces national law.
- The pre-emption doctrine is **relative**; not all European Law pre-empts all national law.



Forms of Pre-emption

Field Pre-emption

- The Court does not investigate any material normative conflict, excludes the Member States on the ground that the Union has exhaustively legislated for the field.
- *Ratti (Case 148/78) [1979]*
- Cannot have different rules for something that is already completely legislated upon.

Obstacle Pre-emption

- Requires material conflict between EU law and national law.
- *Bussone (Case 31/78) [1978]*
- Any obstacle that reduces the effectiveness of the EU may be seen to be in conflict.

Rule Pre-emption

- National legislation contradicting a specific European rule.
- When a national law does not do this, it will not be pre-empted.
- *Gallaher (Case C-11/92) [1993]*

MODES OF PRE-EMPTION



Express Pre-emption

- Union legislator has made their **opinion** on the question at hand clear.
- Union legislation may itself **define to what extent** State law will be pre-empted.
- On the other hand this could also allow the Union legislator to **explicitly allow** national law to be applied that may be in interference. (Known as express saving.)

Implied Pre-emption

- **No express legislative intent**; The Union judiciary needs to imply the type of pre-emption intended by the Union Legislator.
- Interpreted from both horizontal and vertical separation of powers.
- It assembles the federal values that influence the federal judiciary as well as the ordinary means of statutory interpretation.

CONSTITUTIONAL LIMITS OF PRE-EMPTION

Extent of pre-emption can be theoretically limited in two ways;

- I. **Regulation** instead of a Directive.
- II. **Type of competence** given to the Union.



Union Instruments & their Pre-emptive Capacity

Pre-emptive Capacity of Regulations;

- **Binding** in their entirety, instrument of uniformity.
- To protect their direct applicability; Court applied **strong pre-emptive criterion**. *Bollmann (Case 40/69)*[1970]
- Too simple; national laws needed to be examined to establish whether or not they were incompatible with the provisions of the regulation. *Bussone (Case 31/78)* [1978]
- Regulations do not automatically field pre-empt.
- A regulation may confine itself to laying down minimum standards.

Pre-emptive Capacity of Directives;

- Directives shall be binding as to the result to be achieved and left to implementation by national authorities (Art 288(3) TFEU)
- Legislative freedom under a directive; could not pre-empt national legislation. (*Oldekop*, 1972)
- **Pre-emptive capacity=regulations**. As directives can be exhaustive when strict legislative uniformity is required. *Enka (Case 38/77)*[1977]

CONSTITUTIONAL LIMITS OF PRE-EMPTION (cont.)

Pre-emption of International Agreements

Directly effective Union agreements will pre-empt inconsistent national law.

- *Commission v Germany* [1996]
- National law; *Polydor* [1982] Restrictive interpretation of Art 34 of TFEU rather than pre-emption= function of the international treaty will prevail.
- Only when an international norm fulfils the “*same function*” as the internal European norm will the court project the “*internal*” pre-emptive effect to the international treaty.

International agreements will pre-empt inconsistent internal Union Legislation.

- *The Netherlands v. Parliament & Council* [2001] EU law potentially conflicting with higher international treaty.



The union legislator usually can choose what pre-emptive category to apply. The treaty guarantees the ability of the national legislator to adopt higher standards that are above minimum harmonisation requirements. (Schutze,2009)

SUPREMACY & DIRECT EFFECT



- Supremacy and pre-emption are twin doctrines and there is no supremacy without pre-emption.
- Direct effect operates conversely to supremacy; direct effect demands the *application* of EU law/Supremacy demands that a national court *disapplies* conflicting law.
- Supremacy: absolute or relative? Federal nature of the EU would suggest that the European legal order is absolutely supreme to member states.
- Pre-emption: is relative as the question is to what degree does European law pre-empt national law. This doctrine is still developing.