

Chapter 6

(Legal) Supremacy

1. The European Perspective: Absolute Supremacy

- (a) Supremacy over Internal Law of the Member States
- (b) Supremacy over International Treaties of the Member States

2. Supremacy's "Executive" Nature: Disapplication, not Invalidation

3. National Challenges I: Fundamental Rights

4. National Challenges II: Competence Limits

Conclusion

Introduction *

Since European law is directly applicable in the Member States, it must be recognised alongside national law by national authorities. And since European law may have direct effect, it might come into conflict with national law in a specific situation.

Where two legislative wills come into conflict, each legal order must determine *how* these conflicts are to be resolved. The resolution of legislative conflicts requires a hierarchy of norms. Modern federal States typically resolve conflicts between federal and state legislation in favour of the former: federal law is supreme over State law. This "centralised solution" has become so engrained in our constitutional mentalities that we tend to forget that the "decentralized solution" is also possible: local law may reign supreme over central law. Supremacy and direct effect are thus *not* different sides of the same coin. While the supremacy of a norm implies its direct effect, the direct effect of a norm will *not* imply its supremacy. Each federal legal order must thus determine which law prevails. The simplest supremacy format is one that is absolute: all law from one legal order is superior to all law from the other. Absolute supremacy may however be given to the legal system of the smaller *or* the bigger political community. Between these two extremes lies a range of possible nuances.

When the Union was born, the European Treaties did not expressly state the supremacy of European law. Did this mean that supremacy was a matter to be determined by the national legal orders; or was there a *Union* doctrine of supremacy? We shall see that there are *two* perspectives on the supremacy question. According to the *European* perspective, all Union law prevails over

* All footnotes omitted.

all national law. This “absolute” view is not shared by the Member States. Indeed, according to the *national* perspective, the supremacy of European law is relative: some national law is considered to be beyond the supremacy of European law. National challenges to the absolute supremacy of European law are traditionally expressed in two contexts. First, some Member States – in particular their Supreme Courts – have fought a battle over human rights within the Union legal order. They claim that European law cannot violate *national* fundamental rights. The most famous battle over the supremacy of European law in this context is the conflict between the European Court of Justice and the German Constitutional Court. A similar contestation occurred in a second context: ultra vires control. In denying the Union an unlimited competence, Member States here insist that they have the last word with regard to the competences of the Union.

This Chapter analyses the supremacy doctrine within the Union legal order in four steps. We shall start with the European doctrine of absolute supremacy in Section 1, before looking at the effect of the principle on national law in Section 2. The subsequent sections, by contrast, analyse the national perspective on the supremacy principle in the form of two challenges to the supremacy of European law. Section 3 explores the national claim asserting the relative supremacy of European law in the context of fundamental human rights. Section 4 extends this analysis to the contested question of who is the ultimate arbiter of the scope of the Union’s competences.