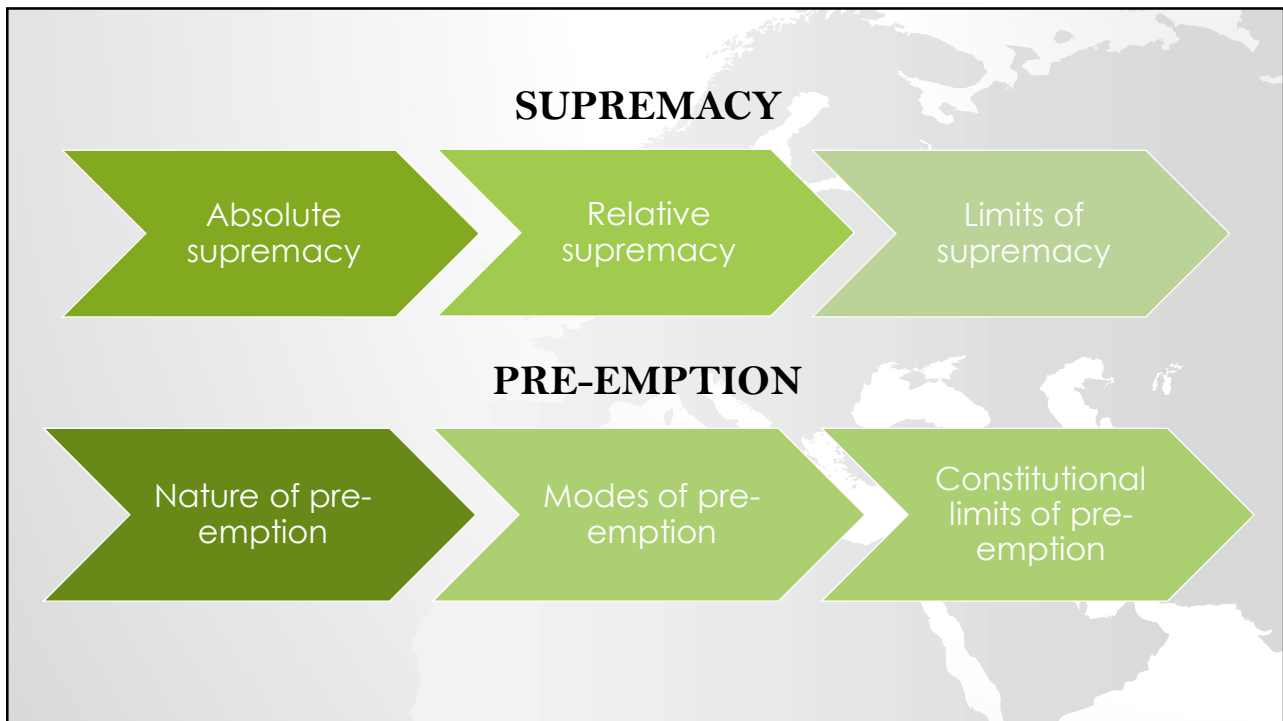


# AN INTRODUCTION TO EUROPEAN LAW

Chapter 6  
*Supremacy and Pre-emption*

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## 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.

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## 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]

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# 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]

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# EXECUTIVE NATURE OF SUPREMACY

## Consequences of Supremacy over conflicting national laws?

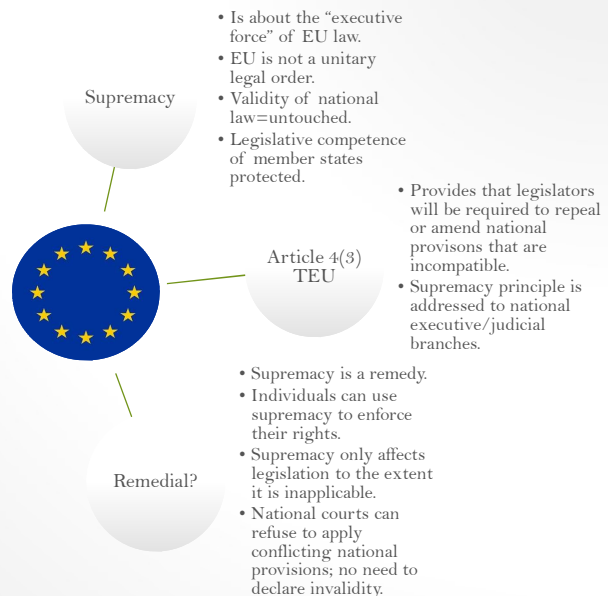
- *Simmmenthal II (Case 106/77)* [1978]

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.)

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## 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.

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## 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.

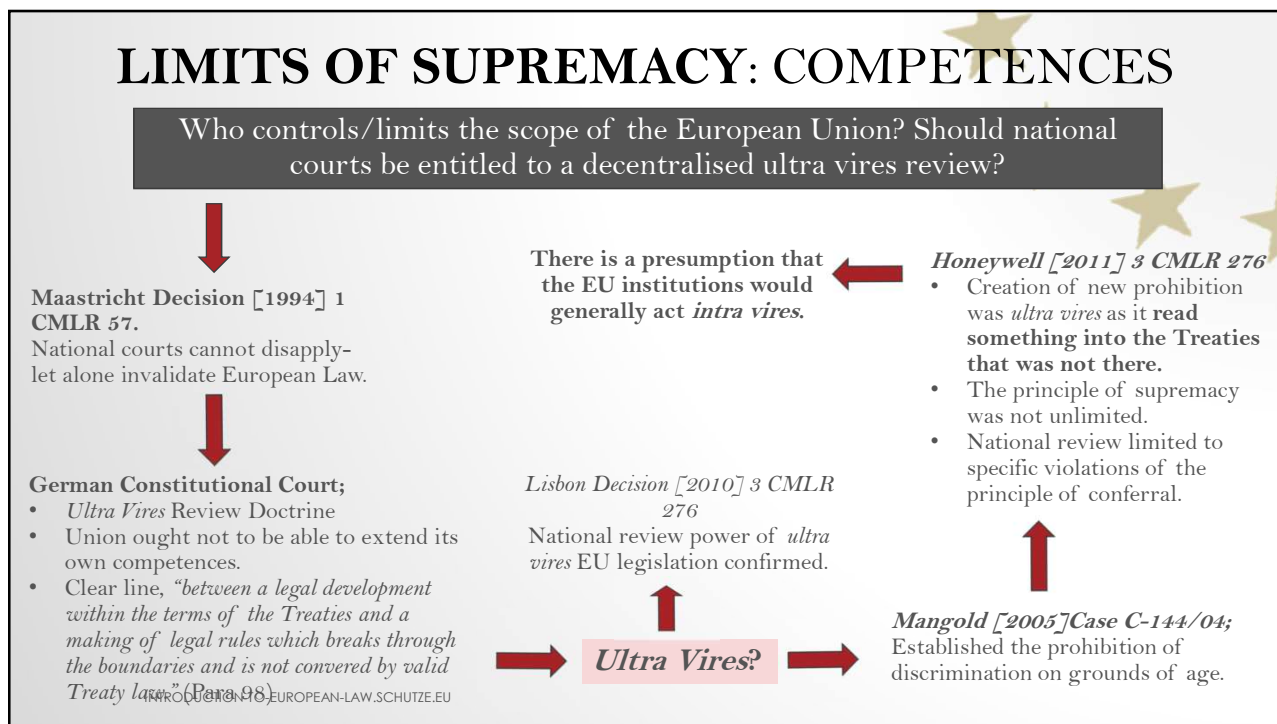
The German Constitutional Court recognised the creation of similar fundamental rights and established the **So Long II principle**;

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**.

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## 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.
- *Gallagher (Case C-11/92) [1993]*

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## 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.

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## 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.



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### *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]*

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## 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)

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## 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.

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