

Chapter 6

Limits to EU legislative powers

Context for this chapter

'The National Courts share responsibility for enforcing EU law with the European Court of Justice. Any person or company has a right to take the UK Government (or in some cases another person or company) to a UK court for failure to comply with EU law. Where a domestic court finds that someone has breached EU law, it will take the necessary steps to ensure EU law is given effect, which may include disappling national legislation that conflicts with it.'

HM Government, 'Rights and obligations of European Union Membership' (April 2016)
para 2.30.

Discuss the supremacy of EU law in light of this quote.

Approaching the question: taking a position

The quote at the start of the chapter appears to be a relatively neutral description of what the roles of national courts are once a country joins the EU. However, it fails to fully capture the *obligations* inherent to the doctrine of supremacy. It almost suggests that in the UK, in any event, domestic courts are *choosing* to give full effect to EU law. Is this an accurate way to describe how supremacy operates?

Once you have taken a clear **position** on that question, you can (as you did in Chapters 1, 2, and 4) proceed to use Chapter 6 to compile **evidence** to build the **arguments** that support your **position**. There is no right or wrong answer to this question: a good understanding of supremacy will justify both agreeing and disagreeing with the quote. Those who think the quote accurately reflects the working of EU law will need to stress that supremacy only works with the *consent* of the Member States and their courts—and as such, suggesting that this is a *choice* on the part of the courts accurately reflects reality. Alternatively, those who think the quote does *not* accurately reflect the extent of obligation inherent to the doctrine of supremacy will need to respond by stressing that this is not a 'choice' but an expectation, and one that significantly changes the role and restricts the freedom of national courts.

Again, the one thing that we wish to avoid is that you engage in what we call **sitting on the fence**: rather than adopting a position, you try to write an answer that basically just *defines* the principle of proportionality, or only *shows* how the principle has been received in the UK and in Germany. A detailed summary of the *Solange* case law or Lord Denning's summaries of what supremacy requires does not help you answer the question! The question's core is directed at ensuring you think about the extent to which the Member States have a *choice* to accept the supremacy of EU law—can they challenge it, or are challenges futile? If you fail to develop a clear **argument** in light of the instructions

underneath the quote, you will end up writing very descriptive material that does not actively support a **position** on the contestable wording of the quote.

Examples of possible positions you could take include, but are not limited to:

Agreeing with the description of supremacy: *'The doctrine of supremacy of EU law sounds like it is absolute, but in practice, it would not work without consent from the Member States. Protests from states like Germany over the years make this abundantly clear, and even in the UK, the principle of parliamentary sovereignty is not really threatened by supremacy. EU law is supreme in the Member States because the Member States agree that it needs to be at best.'*

Disagreeing with the description of supremacy: *'A flattering view of what the CJEU has asked domestic courts to do over time is one whereby they assist the EU in applying EU law. In reality, of course, this is not a matter of choice: they are told that they have to set aside incompatible national law or their Member State will find itself in breach of EU law. The reach of the doctrine of supremacy, whereby even constitutions and overarching constitutional principles of parliamentary sovereignty have to make way for the EU, is not one to which any Member State would reasonably consent.'*

Building your argument: evidence

Writing a good response to this question will require you to be selective in what you cover. The formatting of Chapter 6 will make it easier for you to make decisions on what to include and what to exclude. There are two 'case studies' discussed in detail; and beyond that, the doctrine itself and its development in the case law is discussed. The latter is an essential part of responding to the quote, but trying to cover all of the judicial developments on supremacy in both the UK and Germany is likely to result in the very descriptive answer that we are trying to avoid! Part of building a coherent and consistent argument in response to this question is ensuring that only the best evidence is raised and detailed. The alternative is likely to be little more than a long list of cases.

A first step to building a good argument is determining what, specifically, the question *needs* you to discuss. The excerpt from the government report flags up two **key issues** for you to discuss in light of the instructions given:

- 1) 'The National Courts share responsibility for enforcing EU law with the European Court of Justice': does this accurately capture the relationship between the CJEU and domestic courts, in your view?
- 2) 'Where a domestic court finds that someone has breached EU law, it will take the necessary steps to ensure EU law is given effect, which may include disappling national legislation that conflicts with it': do national courts *choose* to do this? Do they have to? What does case law tell us about what happens if a national court disagrees with the CJEU or with what EU law requires?

Now that you know what key issues you need to discuss, you can start thinking about what the best **evidence** is for your position. This will depend on your position. Depending on how much time and space you have to write, in the absence of being told you *must* discuss the UK and Germany, you may decide to go into detail on only one of them.

If you somewhat agree with the description, you should argue that national courts will not ‘cooperate’ with the CJEU if they genuinely do not want to—and so there is general evidence of consent. Germany is good evidence of this. The UK can likewise be used as an example of a country where domestic law principles (like parliamentary sovereignty) sit awkwardly with supremacy of EU law, but in practice, the courts have found ways to ensure the domestic and EU legal orders can exist alongside each other. This all suggests a cooperative relationship, and so, in terms of German or UK case law, you should focus on whatever you feel most comfortable discussing.

The ‘**Discussing the quote**’ boxes throughout both this chapter and Chapter 5 are there to help you consider what material in the chapter can work as evidence for different arguments, so referring back to those will be helpful when compiling your evidence.

For those of you who instinctively disagree with the quote, you are going to be tackling the same case law but from a different angle. You will probably focus more on the CJEU’s own development of the principle as a sign that national courts did not *per se* consent to cooperate, but were forced to. Germany’s seeming continuous *threat* to ignore EU law, but its failure to act on it, can also work as evidence for you. Likewise, the UK’s re-framing of supremacy as something that *Parliament* has asked the courts to enact, as opposed to the EU, can be dissected to demonstrate that, while the Member States may wish to act like there is a ‘choice’ in abiding by supremacy, in reality they have no choice.

The ‘**Discussing the quote**’ boxes throughout the chapter should have already started you reflecting on the following points that you might want to use as evidence:

- How the CJEU *itself* thinks of supremacy, and whether the national courts have any degree of choice in complying with it;
- What the German *Solange 2* and *Brunner* cases tell us about the relationship between national courts and the CJEU;
- What the UK’s ECA 1972 and the *Factortame* and *Thoburn* cases tell us about the UK view of the relationship between the UK courts and the CJEU, prior to Brexit.

For the purposes of making your approach workable, the emphasis here is on selecting your **best** evidence. Again, setting out what all the discussed cases did will not demonstrate engagement with the core issue of whether national courts have willingly taken on the role assigned to them by the CJEU. While you will *have* to address case law in order to answer the question, which aspects of it you focus on will be key in ensuring that you build up for argumentation, rather than description. A general tip is to focus on the key findings in those cases, rather than their specific facts.

Dealing with counterarguments

In building an **argument**, it is important that you are consistent in arguing for the **position** you start your essay with. If you are not, you risk falling into the ‘**fence-sitting**’ trap, whereby you describe a number of different views but do not clearly argue in favour of one.

That said, you cannot ignore the arguments that you disagree with! Doing that would make you far less persuasive to anyone that you are arguing with (including your future markers).

As such, anyone arguing that supremacy only works because the Member States and their courts have consented to it will need to consider why, for example, the German Constitutional Court has never *actually* overruled a piece of EU law, or whether the UK's pretense that supremacy applies in the UK because Parliament wills it so is fully persuasive.

Likewise, if you believe that supremacy is not a matter of 'choice' for the Member States and their courts, you have to consider why, for example, none of the Treaty amendments to date have resulted in a limiting of the CJEU's case law on supremacy. You should also consider that the *Solange* saga can be seen as a judicial dialogue, rather than a top-down imposition by the CJEU, and explain why you disagree with that view. In discussing the UK, you should consider to what extent the fact that supremacy in the UK *could* not work without domestic enabling legislation suggests that the UK has effectively consented to supremacy of EU law. Doing this, even if in just a few sentences, means you will not have ignored evidence that is inconvenient for your **position**. Instead, you will have made it clear why that evidence does not *change* your **position**.

Again, in terms of identifying possible counterarguments to your position, having another look at the material you wrote up for the '**Discussing the quote**' boxes should help you identify counterarguments—and will give you a chance to dismiss them before they can be raised.

Answer the question!

As a final and general note on essay-writing at university, it is imperative that you *conclude* your argumentation by ending on your **position** again. Be sure to explain how what you are discussing *proves* your **position**, and conclude with a firm statement of the position that you have by now proven to be correct. You can follow this up with a short summary of the **evidence** you have discussed, but in general, you need to ensure that the reader comes away from your essay with a clear understanding of your position on the quote.