

# FAILING TO HOLD BACK THE INCOMING TIDE:

★ Why EU law has supremacy  
over national law and why  
attempts at reform will  
never succeed ★



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# 1. Introduction

## 1.1 Cameron's proposition

In late 2015, the Prime Minister David Cameron made a speech to Chatham House outlining the parameters of his planned renegotiation with the EU. There were two elements to his plan:

- The first was to renegotiate aspects of the EU Treaties and existing secondary legislation in four areas: sovereignty, competitiveness, free movement and economic governance.<sup>1</sup> The goals Cameron set himself were much less ambitious than those presaged by the Prime Minister in his 2013 Bloomberg speech.<sup>2</sup> The outcome of the re-negotiation has been widely acknowledged as insignificant and falling below the low ambitions that the Prime Minister had set himself;<sup>3</sup>
- The second was domestic reform aimed at putting some limits on the supremacy of EU law and putting the UK in a similar constitutional position to Germany.<sup>4,5</sup> In the Chatham House speech he stated that:

*'We need to examine the way that Germany and other EU nations uphold their constitution and sovereignty.'*

*For example, the Constitutional Court in Germany retains the right to review whether essential constitutional freedoms are respected when powers are transferred to Europe.*

*And it also reserves the right to review legal acts by European institutions and courts to check that they remain within the scope of the EU's powers...'<sup>6</sup>*

It is noticeable that since the referendum date was announced there has been little sign of this proposed domestic reform alongside the re-negotiation package. This is probably, as the constitutionalist Michael Pinto-Duschinsky has observed, because:

*'The Government's legal advisors have been considering various possible ways to circumvent this inconvenient reality [the supremacy of EU law and in particular the EU's Charter of Fundamental Rights], but it is no coincidence that long-promised proposals have not yet been published.'<sup>7</sup>*

## 1.2 What the Cameron proposal will not do

Despite the lack of progress so far, it is nevertheless, worth exploring the idea of whether there would be any point in Cameron introducing measures aimed at upholding the constitution and sovereignty of the UK and protecting essential constitutional freedoms and if the German model would be an effective model to copy to achieve these ends.

This paper aims to show that there is little point in Cameron bringing forward such proposals, as they

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1 A brief overview can be found here: <http://www.politico.eu/article/david-cameron-eu-reform-deal-scorecard-brexiteu-referendum-agreement/>

2 In his Bloomberg speech the Prime Minister argued for *'...fundamental, far-reaching change...'* Source: Cameron, D (2013). *'Prime Minister David Cameron discussed the future of the European Union at Bloomberg'*, can be accessed at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>

3 LfB (2016). *'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>. See Annex I for a summary of the Lawyers for Britain detailed critique of the re-negotiation agreement.

4 Cameron, D (2015). *'Prime Minister's speech on Europe'*, given at Chatham House, London, can be accessed at: <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe>

5 Supremacy of EU law means that, in the areas mandated by the Treaties, EU law takes precedence over both the existing and future domestic laws of Member States. It also means that the supreme legal institution of the EU is the Court of Justice of the EU (CJEU). The CJEU is the ultimate arbiter of the scope and nature of EU law and effectively directs the domestic courts in how to interpret EU law. The domestic courts therefore are subservient to the EU. See Section 2.1 for more detail on the four elements that need to be in place for there to be a complete legal supremacy.

6 <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe>

7 Pinto-Duschinsky, M (2016). *'The great illusion: why we are still Europe's fall Guys'*, Standpoint, Issue 81, pg 45.

would not be able to achieve anything of any practical value.<sup>8</sup> There are three reasons why this is the case:

- The German system is not as strong and effective as some might think and not as robust as Cameron is trying to suggest. As a result, measures based on this model would likely protect very little;
- The UK already has some protections in statute and common law which may offer some limits at the margins on the supremacy of EU law and which have some similarity with the German model. These push up against the limit of what is possible while remaining a member of the EU; and
- Measures, which genuinely upheld the UK's constitution, sovereignty and essential constitutional freedoms, would necessarily lead to legal action against the UK by the EU.<sup>9</sup> This is because such measures would require the UK to repudiate key principles of EU law in order to restore the core principle of the British constitution: the sovereignty of Parliament.

### 1.3 What real reform would do

An approach which took seriously the aim of upholding the constitution and sovereignty of the UK and defended the 'essential constitutional freedoms' of the British constitution, as Cameron put it, would need to restore Parliament to its position of being a sovereign body. That would mean:

*'...no limits to the legislative competence of Parliament. Each Parliament... absolutely sovereign in its own time and may legislate as it wishes on any topic and for any place. That which is enacted by Parliament has supreme force and cannot be invalidated or changed by any other domestic or external authority...'*<sup>10</sup>

In order to achieve this end, Cameron's policies would have to:

- Re-assert the primacy of Parliament and the laws it passes over other sources of law, including overturning the established integrationist case law of the Court of Justice of the European Union (CJEU).<sup>11 12</sup>
- Significantly re-balance the current distribution of competences between the UK and the EU i.e. authority over key policy areas would have to be returned.
- Prevent the few remaining domestically controlled policy competences from being ceded to the EU.

The content of Cameron's speech did not suggest any changes along the lines described above.

This paper will try to illustrate that the clearest conclusion to be drawn is that Cameron does not seriously intend to achieve the aims he has set himself: upholding the constitution and sovereignty of the UK and protecting the essential constitutional freedoms of the country. The Prime Minister has form in this regard. His rather 'limp' re-negotiation package, which fell very short of his original aims or at least

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8 The question naturally arises as to what is the key element or elements of the British constitution and sovereignty that would need to be upheld and what are the essential freedoms at the heart of the British constitution? The answer to both these questions is the same. It is the sovereignty of Parliament: *'...sovereignty... is that there are no limits to the legislative competence of Parliament. Each Parliament is absolutely sovereign in its own time and may legislate as it wishes on any topic and for any place. That which is enacted by Parliament has supreme force and cannot be invalidated or changed by any other domestic or external authority... the doctrine has been the very foundation of the British constitution...'* Source: Carroll, A (2009). 'Constitutional and Administrative Law: 5<sup>th</sup> Edition', pg 93.

9 As noted by the EU legal scholar T C Hartley, if: *'...in a future Act...[Parliament passes a law which overrode]...Union law. This, of course, would constitute a repudiation of the Treaties and would lay the United Kingdom open to proceedings in the European Court for violation of a Treaty obligation'*. Source: Hartley, T C (2010). 'The Foundations of European Union Law', pgs 282-283

10 Carroll, A (2009). 'Constitutional and Administrative Law: 5<sup>th</sup> Edition', pg 93.

11 The CJEU describes the three courts of the EU (see footnote 12). The new name was given to the judicial institutions of the EU in the Lisbon Treaty 2007. This paper will refer to the ECJ, the Court of Justice and the CJEU interchangeably.

12 The Court of Justice of the EU consists of three courts: The Court of Justice, the General Court and the Civil Service Tribunal. Article 19 of the Treaty on European Union sets out structure and the role of the CJEU. The Court of Justice is tasked with: hearing and deciding upon preliminary references from Member States courts wanting a definitive interpretations of EU law (Article 267 of the TFEU), enforcement actions brought by the Commission or Member States, sanctions for failure to comply with Court judgments, Judicial Review of EU institutions and appeals from the General Court on points of law. The General Court is effectively the EU's administrative court and hears: actions brought by individuals or companies against EU institutions for the legislative and other acts that they have implemented (including actions for damages), actions based upon contracts with the EU which give jurisdiction to the General Court and appeals on points of law from the Civil Service Tribunal. The latter is fairly self-explanatory, it heard disputes between EU employees and the institutions of the EU. Source: Chalmers, D et al (2015). 'European Union Law', pgs 157-163.

the rhetoric of his original aims, showed a similar lack of ambition.

Given that the mooted domestic reforms are unlikely to achieve very much of substance, the only conclusion that can be drawn about the real driver behind such proposals is that they are merely political spin. The real aim is to create a facade of protection over the constitution and UK sovereignty and make it appear that there are greater levels of democratic and legal accountability than there are in reality. All to hide the fact that authority is centred elsewhere, not in the UK.

#### 1.4 Structure of this paper

This briefing is divided into five sections:

- Section 1 is the introduction setting out the background and an overview of the remainder of the paper;
- Section 2 will describe briefly what the constituent elements of supremacy are and how the supremacy of EU law over Member State law was established. It will then set out how the doctrine of supremacy was consolidated and extended over time.<sup>13</sup> Understanding this story and the way the EU self-identifies i.e. as a unique supra-national entity, is an important first step to understanding the impact that EU law and the CJEU have had on the constitutions of Member States in general and the UK in particular;
- Section 3 will briefly outline the constitutional position in Germany. It will attempt to show that, while the German Constitutional Court has erected some 'constraints' to the expansionist tendencies of the CJEU in particular and the EU more generally, in practice these 'constraints' have achieved very little. The largely ineffective nature of the German model offers clear evidence of why following such a model more closely would likely achieve very little in terms of upholding the British constitution and sovereignty. The fact that it wouldn't achieve very much is a strong indication that Cameron's suggestion that Germany is a model to follow is merely a marketing exercise rather than a serious policy;
- Section 4 will set out how EU law has fundamentally altered the British constitution. At the same time some limits on the supremacy of EU law do exist in the common law and statute. In some ways, these 'limits' resemble aspects of the constraints established by the German Constitutional Court described in section 3. The existence of these limits adds further to the evidence that Cameron is unlikely to produce serious proposals that will genuinely uphold the UK's constitution and protect essential constitutional freedoms. Rather all that might happen is Cameron will re-iterate the existing minor limitations pretending they are creating, in the UK, German-style constitutional protections. In reality, Cameron will be unable to uphold the British constitution and sovereignty in any significant way because the measures required to do so would necessarily over-turn key aspects of the EU law e.g. the principle of legal supremacy. Such reform would risk almost certain legal action by the EU against the UK as two incompatible legal positions came up against each other. It would probably end with the UK leaving the EU;
- The final section will summarise the points made in sections 2, 3 and 4. Based on the evidence outlined in preceding sections it will argue that any measures Cameron may come forward with (during or after the referendum) should be treated with a high degree of scepticism.

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13 In their paper, Beal and Hickman describe the Charter of Fundamental Rights (CFR) as a '...sledgehammer...' for litigators. Source: Beal, K and Hickman T (2011). 'Beano No More: The EU Charter of Rights After Lisbon', *Judicial Review*, 2, pg 126.

Others have also tackled the issue of the CFR directly. This paper will therefore not delve into this particular issue. The CFR is a sub-issue (albeit a very important one) of the wider principle of EU legal supremacy. For overviews of the legal power of the CFR and the constitutional destruction it is already reaping, please see:

• Beal, K and Hickman T (2011). 'Beano No More: The EU Charter of Rights After Lisbon', *Judicial Review*, 2, pg 113 - 141.

• Wheeler, M (2016). 'Cavalier with our Constitution: a Charter too far', can be accessed at: <http://ukhumanrightsblog.com/2016/02/09/cavalier-with-our-constitution-a-charter-too-far/>

## 2. Supremacy of EU law

The revolutionary nature of what the CJEU has achieved in establishing EU legal supremacy cannot be overstated.<sup>14</sup> The story of the emergence of the supremacy of EU law is a story of audacious expansion of legal authority enabling the CJEU, in the words of the scholar Karen Alter, to effectively become the 'master of the Treaties'.

The CJEU has become 'master' by awarding itself considerable latitude over the interpretation of the Treaties and the balance of competences between Member States and the EU.<sup>15</sup> However, it has not done this entirely on its own. At different times the collusion and acquiescence of Member State governments and other key domestic institutions and actors has been vital.

In order to tell this story of 'supremacy', this section offers a brief overview of:

- The elements which need to be in place to have total legal supremacy;
- The methods employed by the CJEU to establish legal supremacy;
- The factors that have enabled the establishment of EU legal supremacy;
- The unique way in which the EU sees itself and consequently why it thinks it can legitimately assert its legal supremacy over the Member States; and
- The 'tensions' that have and still do, to some degree, characterise aspects of the relationship between the EU legal supremacy and domestic constitutional orders.

### 2.1 The 'elements' of supremacy

Legal scholars Damien Chalmers, Gareth Davies and Giorgio Monti, in their textbook 'European Union Law: 3rd Edition' argue that there are four inter-dependent elements that should be in place for there to be legal supremacy.<sup>16</sup>

These four elements are present within the EU's legal order, which has been constructed through the EU Treaties and in large part by the highly activist CJEU.<sup>17 18</sup> Those elements are:

- Primacy - EU law must take precedence over the law of Member States.<sup>19</sup>
- Autonomy - EU law determines the issues over which it applies.<sup>20</sup>
- Pre-emption - EU law decides where there is a conflict between EU and Member State law and which law must win-out.<sup>21</sup>

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14 See Annex II for a brief outline of some of the most revolutionary decisions of the CJEU, which have put in place the key elements of the framework of legal supremacy.

15 Alter, K (1996). 'The European Court's Political Power: the Emergence of an Authoritative International Court in the European Union' and Alter, K (1998). 'Who Are the Masters of the Treaty?: European Government and the European Court of Justice', in Alter, K (2010). 'The European Court's Political Power: selected essays'.

16 Chalmers, D et al (2015). 'European Union Law', pgs 204-215.

17 Chalmers et al do not delve into the issue of 'degrees of supremacy' and it maybe something of an academic point to suggest that the four elements imply that there can be degrees of supremacy as a result of the different elements that constitute supremacy being in place to varying extents. In other words, there could be situation whereby in relation to three of the elements the relevant legal framework was extensive and powerful but in relation to a fourth it may be less developed and thus less extensive and as a result be less powerful. However, as long as there was 'Primacy' the other three would necessarily be in place to at least some significant degree. Their inter-connectedness means that you could not have one without some degree of the others.

18 See Annex II for a table of key cases that have helped put in place the four elements, which constitute supremacy.

19 *Costa v ENEL* [1964] and *Melloni* and *Case 106/77 Amministrazione delle Finanze dello stato v Simmenthal* [1978] CR 629, although primacy was established in *Costa v ENAL* and *Melloni* the *Simmenthal* case established that EU law has primacy wherever there is a conflicting statute or administrative act by a Member State. In such circumstances, the courts have the power to review the Act or regulation in contention for compatibility with EU law. Consequently, the power of courts have been expanded significantly. This has been most noticeable in Member States such as the UK, where courts have traditionally not had such a powerful role in relation to monitoring the legislative output of the legislature.

20 *Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation cv Council and Commission* [2008] ECR I-6351. This case the CJEU decided that the autonomy of EU law mean that international law could have precedence over secondary law it could not have similar superiority over the Treaties.

21 Chalmers, D et al (2015). 'European Union Law', pg 209-213.



- Fidelity - For there to be supremacy Member States must not implement measures which are counter to the requirements of EU law.<sup>22</sup>

Once 'Primacy' has been established the other three elements of supremacy are necessarily implied but have themselves been established and reiterated in various CJEU cases over the decades and in the case of 'Pre-emption' Treaty Articles. Together they ensure that there is a comprehensive legal framework in place, which is supreme to those of the Member States' own laws and legal systems, and which consequently:

- Constrains the independent action of Member State governments, parliaments and courts;
- Obliges the governments of the Member States to undertake particular policy measures, which may or not be desired by the electorates in the Member State(s) or suitable;
- Requires Member State courts to adapt their legal doctrines and their judgements to conform to EU law;
- Ensures that Member States adhere to the constraints and obligations created by EU law.

## 2.2 The methods used by the EU to obtain legal supremacy

The legal scholar Professor T C Hartley has described how the CJEU has deployed a highly effective piecemeal approach to accrete more authority and power to the EU:

*'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.'*<sup>23</sup>

What can only be described as audacious 'power grabs' have been conducted by the CJEU over the last six decades, wrapped up in technical and often obscure legal decisions. This has happened time and time again, with the ingredients needed for complete legal supremacy built-up case-by-case.

## 2.3 Other factors which have enabled EU legal supremacy

### 2.3.1 The nature of EU law

There are a number of factors, which have facilitated the EU in establishing legal supremacy. Perhaps the most obvious can be found in the inherent nature of the Treaties and the system of law (the civil law tradition) and associated legal culture, which the CJEU is part of:

- The wording of the Treaties is broad and consequently vague. This gives activist judges a wide canvas on which they can develop their integrationist legal doctrines;
- Like all civil law systems, the judges of the CJEU take a so-called 'purposive' or 'teleological' approach to judicial decision-making. 'Purposive' interpretation describes a method of legal decision making that sees judgements about the law made on the basis of 'policy' considerations rather than a literal interpretation of the relevant legal text.<sup>24</sup> For CJEU judges that 'policy' is more integration.

22 Pre-emption is set out in article 4(2) of the Treaty on the Functioning of the European Union (TFEU) and is where the principle of 'the occupied field' is found. As Chalmers et al describe it: '*Field pre-emption occurs...where a piece of EU legislation has been adopted. This is deemed to occupy the field of activity and Member States are pre-empted from legislating on the activity in question*'. It has also been explicit and implicit in a number of CJEU cases over the decades. One of the more recent ones established that Member States are under a duty to refrain from measures that undermine an EU objective. This applies both to internal measures as well as external activities i.e. international treaties. The latter was recently established in: Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805. Source: Chalmers, D et al (2015). '*European Union Law*', pg 213.

23 Hartley TC (2010). '*The Foundations of European Union Law*', pg 74.

24 As Lord Denning observed: '*[European judges] adopt...a method which they call...the 'schematic and teleological method of interpretation...it means that the judges...go...by the design or purpose...behind it'*'. While Lord Bingham described the EU judicial approach as a '*...more creative process...[where]...the choice between alternative submissions may not turn on purely legal considerations, but on a broader view of what the orderly development of the Community requires*'. Sources: *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107 and *Commissioners of Customs and Excise v ApS Samex* [1983] 1 All ER 1042, cited in Bennion, F (2001). '*Understanding Common Law Legislation: drafting and interpretation*', pg 147.

As a result, the CJEU makes decisions that further integration, expanding the authority of the EU.<sup>25 26</sup>

The vagueness of the Treaties and 'purposive' interpretation have been and remain important drivers of the steady accretion of legal authority by the CJEU on behalf of the EU. However, on their own these two factors would not have been enough to achieve the 'iron grip' of legal supremacy over the Member States that has come to pass.

### 2.3.2 Collusion and acquiescence by Member State Governments

Achieving and consolidating legal supremacy has also required, at various times, the collusion and the collective acquiescence of the Member State Governments.

The collusion by the Member States has come most significantly in the guise of new treaties. The Member States agreed a long series of Treaty revisions that began in the mid-80s with the Single European Act.<sup>27</sup> In 1992 and 2007 the Member States went further and agreed new Treaties entirely. At Maastricht the Treaty on European Union was agreed. The Lisbon Treaty saw the replacement of the Treaty on the Functioning of the European Community (and the abolition of the European Community) and its replacement with a new treaty called the Treaty on the Functioning of the European Union. Cumulatively, these treaties have:

- Increased significantly the range of competences of the EU offering much more scope to integrationist judges (with the help of litigants and interest groups) to develop their doctrines further and increase their power;<sup>28</sup> and
- Altered dramatically the decision-making processes within the EU, instigating a sustained shift from unanimity in the Council of Ministers to routine use of Qualified Majority Voting (QMV), and from a situation where the Council of Ministers was the senior decision making body on most policy issues to a system of co-decision between the Council of Ministers and the Parliament on the vast majority of policy issues.

The acquiescence has manifested itself in the failure of the Member States to effectively challenge and reverse many of the decisions of the CJEU that extended and consolidated the CJEU's power and the supremacy of EU law. Even in the face of judgments by the CJEU that asserted the supremacy of EU law over Member State constitutions and other vital aspects of national policy and taking power from the legislatures and courts of the Member States, the latter have made remarkably little effort to try to reverse these 'power grabs'. This is despite the Member States often disagreeing with particular court decisions at the time. Neither has there been any serious general attempt to circumscribe the role of the CJEU. Scholars have suggested that the Member States have failed to wrest control back because the hurdles to doing so are too high.<sup>29</sup> They have been high enough to put even the Member States, who have had the most difficulty with the CJEU, (and its assertions of authority) off trying. On those rare occasions when some Member States have tried, initiatives have largely failed to get off the

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25 As Professor T C Hartley as observed: the '*...policies of the European Court...may be summed up in one phrase: the promotion of European integration*'. Hartley TC (2010). '*The Foundations of European Union Law*', pg 72.

26 Lord Neill of Bladen QC (previously Sir Patrick O'Neill QC) pointed out in a paper for the European Policy Forum entitled '*The European Court of Justice: a case study in judicial activism*' (1995) that the CJEU '*...is a court with a mission, namely pushing the Community...forward towards the goals enshrined in the...various treaties. With this aim it has gone far beyond literal interpretation*'. Source: Bennion, F (2001). '*Understanding Common Law Legislation: drafting and interpretation*', pg 148.

27 Those Treaties are the: Single European Act, Maastricht Treaty, Amsterdam Treaty, Nice Treaty and the Lisbon Treaty.

28 See Annex V for the list of policy areas where the EU has competence.

29 The scholar Karen Alter has suggested that one of the main reasons for this lack of challenge, or rather acquiescence, by Member States has been the much shorter 'political cycle' that Member State Governments operate on compared to the longer-term legal cycle of the law, the CJEU and the institutions of the EU. This mis-alignment if you like is combined with the inherent difficulties of changing the Treaties e.g. unanimity among the Member States for a change, agreement on what that change should be and then the process of ratification of that change by each Member State, through their own constitutional process. Source: Alter, K (1998). '*Who Are the Masters of the Treaty?: European Governments and the European Court of Justice*', in Alter, K (2009). '*The Political Power of the European Court*', pg. 118-121.

The scholar Alec Stone Sweet has made a similar observation, noting that: '*Treaty amendment requires the unanimous vote of the Member States... followed by ratification in each Member State, according to diverse procedures, including referenda*'. Source: Stone-Sweet, A (2004). '*The Judicial Construction of Europe*', pg 66.

ground.<sup>30</sup>

The CJEU has used these barriers to reform, to its considerable advantage. The scholar Alec Stone Sweet has observed how the interaction of three factors - the arbiter of EU law role given to the CJEU in the Treaties, the significant barriers to curtailing its authority and the CJEU's judicial activism - have:

*'...served to shield the process from direct interference on the part of the Member States. At the same time constitutionalisation strengthened the Court's position as trustee, expanding the zone of discretion of both the Court and national judges.'*<sup>31</sup>

The CJEU has largely 'slipped the chains' of the Member States. As a result, over time, the Member States have found it almost impossible to 'tame the beast' of the CJEU and the CJEU's position has become unassailable.

A good example of the CJEU's almost untouchable 'mastery' over the Treaties, due to its trustee position, can be seen in the example of the 'Barber Protocol'. In the early 1990s a CJEU decision regarding pension rules and sex equality risked creating significant additional pension liabilities. To lessen the consequences of the ruling, the Member States agreed a protocol to the Maastricht Treaty called the 'Barber Protocol'. It was aimed at limiting '...the impact of a recent decision...[by the CJEU]...on equal pay in pensions schemes for men and women.'<sup>32</sup> However, as Karen Alter points out, the scholar Mark Pollack:

*'...examined the policy area covered by the Barber Protocol, concluding that the Protocol had no long-term impact on the ECJ's equal pay jurisprudence.'*<sup>33</sup>

It is clear that even on those rare occasions that the Member States are able to get together and agree that the CJEU needs to be challenged and reined-in it has proved very difficult to do so. In the case of the 'Barber Protocol', a supposedly legally binding instrument was agreed and appended to a Treaty. Yet, within a short period of time, the CJEU was still able to continue much as before, with little impact on its authority.

### 2.3.3 Buy-in from powerful domestic institutions

Establishing supremacy required the buy-in from important groups in civil society and Member State institutions such as the law courts, the legal profession and lobby groups. Only through litigation and referrals of cases by Member State courts have the legal disputes come to the CJEU in sufficient numbers for them to build their position as 'master of the Treaties'. Notably:

- Litigants, lobby groups and lawyers bought-into the system of EU law and supra-national courts

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30 A clear example of the difficulty of curtailing the power of the CJEU, and the ease with which attempts to curtail the CJEU can be blocked by others is given in Karen Alter's paper: *'Who Are the Masters of the Treaty?: European Government and the European Court of Justice'*. An attempt to circumscribe the power of the CJEU by making it more politically accountable was instigated by the British Government as part of the negotiations over the Maastricht Treaty. An Intergovernmental Conference (IGC) was promised to the UK to discuss the reform of the EU's institutions. However, the UK's modest proposals to make the CJEU more politically accountable were vetoed by the: Germans, French, Dutch and the European Council's Legal Service before the IGC even began. A subsequent and even more modest proposal for there to be an appeals body, above the CJEU, and to limit the liability of Member States when cases of infringement of EU law were brought against Member States was also rejected by the other Member States. Source: Alter, K (1998). *'Who Are the Masters of the Treaty?: European Government and the European Court of Justice'*, in Alter, K (2010). *'The European Court's Political Power: selected essays'* pg 129-130.

31 Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 66.

32 Alter, K (1998). *'Who Are the Masters of the Treaty?: European Government and the European Court of Justice'*, in Alter, K (2010). *'The European Court's Political Power: selected essays'* pgs 128-129.

33 Pollack, M (2003) pgs 354-359, cited in Alter, K (1998). *'Who Are the Masters of the Treaty?: European Government and the European Court of Justice'*, in Alter, K (2010). *'The European Court's Political Power: selected essays'* pg 129.

and have been willing to use EU laws to challenge Member State laws and policies;<sup>34</sup>

- National courts accepted the doctrines of the CJEU (albeit not always straight away) and were happy to refer cases to the CJEU for adjudication, content to accept the judgements of the CJEU and willing to enforce EU laws against their own governments.<sup>35</sup> An important enabler of this was the 'preliminary reference procedure' in the Treaties.<sup>36 37</sup> Use of this procedure is explicit acknowledgment that the CJEU has the final say over the interpretation of EU law in the Member States. What the CJEU says 'goes'.<sup>38 39</sup>

## 2.4 Building EU legal supremacy through judgements

The supremacy of EU law was not put-in place by one or two judgments of the CJEU but through a series of judgements over a number of decades. Scholars have described this phenomenon of establishing supremacy as one of 'constitutionalisation'. As the academic Alec Stone Sweet has highlighted, the Court of Justice:

*...has implicitly treated the Treaty as a constitutional text from the start, and in 1986 (Parti Ecologist 'Les*

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34 Academic Alec Stone Sweet has highlighted how a number of factors work together to create opportunities for the CJEU to make new legal principles and expand existing ones through CJEU case law. The role of litigation along with lobby groups is central. As he states: *'...as EU secondary legislation was produced, in more and more domains, an increasing number of lobby groups...choose to set-up in Brussels...[the result is]...more legislation in the arenas in which they operate...[while]...new regulations and directives...give private actors new grounds on which to plead rights under EC...[now EU]...law'*. Source: Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 55

Highlighting the symbiotic relationship between lawyers, litigation, lobby groups, EU legislation and intra-EU trade, Alec Stone Sweet has also observed that: *'...trading, litigating, legislating, and lobbying – key indicators of European integration and supranational governance- grew overtime, along roughly similar paths'*. Source: Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 60.

The scholar Karen Alter has similarly highlighted the central role of litigants and lawyers. She has shown how the ideological commitment to EU integration among lawyers and litigants have also contributed significantly to creating the supremacy of EU law: *'Litigants are more likely to mobilise around a litigation strategy where there is a deep social commitment to objectives the rules promote...'* Source: Alter, K (2009). *'The European Court's Political Power Across Time and Space'*, in Alter, K (2010). *'The European Court's Political Power; Selected Essays'*, pg 23.

Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 70.

Karen Alter, as part of her expose of the role of ideology in driving litigation and interest groups at the EU level, has described the specific role of jurist advocacy movements that were and are committed to EU integration. They were vital not only in bringing cases which the CJEU could use to make new law with but in creating an intellectual climate in legal circles which supported the expansion of EU law and legitimised the CJEU's expansionist tendencies. As she notes: *'The activities of Euro-law associations are known among European Law scholars...Ignoring the role of legal associations served a purpose...revealing extensive coordination that gave rise to the ECJ's early successes could have implied conspiracy...undermining efforts to portray support for an active European court as spontaneously spreading'*. Source: Alter, K (2009). *'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953-1975)'*, pg in Alter, K (2010). *'The European Court's Political Power; Selected Essays'*.

35 *'The ECJ...imagined...a working partnership in the construction of a rule-of-law Community. In that partnership, national judges become agents of the Community order. The Court obliges national judges to uphold the supremacy of EC law against conflicting statutes...even where parliamentary sovereignty holds sway; encourages them to make references concerning the...interpretation of EC law to the Court...empowers them, even without a referral, to interpret national rules so that these rules will conform to EC law and set aside national law that does not...The effectiveness of the system...depends critically on the willingness of national judges to refer disputes...and to settle those disputes in conformity with the Court's case law'*. Source: Stone Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 70.

In a similar vein the scholar R Schutze has described how the consequences of the doctrine of supremacy and direct effect has been to transform *'... every single national court into a 'European' court'*. Source: Schutze, R (2015). *'An Introduction to European Law: second edition'*, p162.

36 The 'preliminary reference' Article is Article 267 of the Treaty on the Functioning of the European Union. More information about it can be accessed at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A14552>

37 In 2014 the CJEU had 622 new cases brought before it. Preliminary references took on average 15 months to decide. Direct actions 20 months. Appeals 14.5 months. Source: Court of Justice of the European Union (2015). *'Annual Report 2014: Synopsis of the work of the Court of Justice, the General Court and the Civil Service Tribunal'*, pgs 9-10.

38 Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 70.

39 Karen Alter has described how it was the ability to litigate on points of EU law in the lower courts of the Member States, combined with the willingness of the lower courts to make references to the CJEU and their happiness to enforce CJEU interpretations that helped the CJEU expand and consolidate its controversial competence extending rulings: *'With individuals able to bring cases...directly to national courts, and national courts referring these cases to the ECJ [CJEU]...all sorts of legal disputes...made it to the ECJ for decision. National court support also made ECJ decisions enforceable. Disobeying an ECJ decision meant disobeying national courts...With national courts willing to enforce ECJ jurisprudence...the ECJ became emboldened'* Source: Alter, K (1996). *'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union'*, in Alter, K (2010). *'The European Court's Political Power; Selected Essays'*, pgs 93-94.

Alter has gone further and described why this happened: *'...lower courts found for themselves few costs and numerous benefits in making referrals to the ECJ and applying EC[EU] law...It allowed lower courts to circumvent restrictive jurisprudence of higher courts, and re-open legal debates...[for example, it enabled]...pro-women industrial tribunals to circumvent the Employment Appeals Tribunal and the Conservative Government, and to get legal outcomes which helped them promote [their objectives]...The ECJ...encouraged the dynamic...It defended the right of lower courts to refer any question...and encouraged lower courts by giving serious evaluations of their questions, while dismissing higher court refutations of their authority...Because of the actions of lower courts, EC law expanded into new issue areas and came to influence national law'*. Source: Alter, K (1996). *'The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union'*, in Alter, K (2010). *'The European Court's Political Power; Selected Essays'*, pgs 99-101.

*Vert' v European Parliament) the Court began to refer to the treaties as a 'constitutional charter'.<sup>40</sup>*

'Constitutionalisation' has taken place in as at least two, probably three, waves. The vital foundational elements were put in place in a series of judgements by the CJEU between 1963 and 1979.<sup>41</sup> This was followed by a second wave in the 80s and 90s of acquiring more tools to strengthen the application of EU law and consolidate legal supremacy.<sup>42</sup> There is a good argument to be made that a third wave has also occurred in the 2000's around issues such as:

- The place of international law in the EU's legal order;
- The consolidation of the EU's supremacy over Member States constitutions; and
- The authority of the EU over essential policy areas such as criminal law (which, along with the power to tax and social security, is perhaps the ultimate manifestation of the authority of the state).<sup>43</sup>

Crucially, and to illustrate how this has been achieved largely in the absence of democratic consent by the peoples of the Member States:

*'...the Court initiated and sustained [the constitutionalisation of the EU Treaties and law] in the absence of express authorisation of the Treaty, and despite the declared opposition of Member State governments.'<sup>44</sup>*

The CJEU started to put the elements needed for supremacy in place as early as 1963. The first wave of 'constitutionalisation' began with two technical disputes (one Dutch, one Italian) reaching the CJEU. Neither, on their merits, suggested cases of seismic constitutional significance, yet both turned out to be just that. These two cases: *Van Gend en Loos* [1963] and *COSTA v ENEL* [1964] saw, respectively, the creation of the doctrines of 'direct effect' of EU law and the necessary corollary doctrine to 'direct effect', that of 'primacy' of EU law.<sup>45 46</sup>

These two cases illustrated that the EU (then the European Economic Community – EEC) saw itself as an autonomous legal order separate to but 'of' the Member States. In the words of the CJEU itself, it was *sui generis*:

*'By contrast with ordinary international treaties, the EC Treaty has created its own legal system which on entry into force of the Treaty became an integral part of the legal systems of the member states and which their courts are bound to apply...the member states have limited their sovereign rights...and have thus created a body of law which binds both their nationals and themselves...The transfer, by member states from their national orders in favour of the Community order...carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the community cannot prevail...it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by do-*

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40 Stone Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 66.

41 Stone Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 68.

42 Stone Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 70.

43 Cases such as C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 established the superiority of EU Treaty provisions over potentially rival international laws. This 'ordering' of types of law is typical of a 'dualist' constitutional state. See footnote 118 for more on what a 'dualist state' is.

Case C-176/03, *Commission of the European Communities v Council of the European Union*, ECR [2005], p-I-7879 required Member States to put in place criminal sanctions in order to protect the environment. Despite the fact that the European Community at the time did not have competence over criminal law issues.

44 Stone-Sweet, A (2004). *'The Judicial Construction of Europe'*, pg 66.

45 The Direct effect principle was created by the CJEU in: Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

*'Direct effect'...refers to the actual enforceability of EU law, of whatever type, in the national courts of the Member States'. Direct effect applies to Treaty Articles, Regulations and to Decisions but less easily to Directives. Where direct effect applies, directly enforceable rights are created for individuals and organisations. Direct effect applies both 'vertically' i.e. it creates rights against the state but it also works horizontally i.e. it creates rights exercisable against other private parties, like domestic Member State law. These '...two types of direct effect' were identified by the CJEU in *Defrenne v SABENA* [1976]. Source: Storey, T and Turner, C (2011). *'Unlocking EU Law: 3<sup>rd</sup> Edition'*, pgs 134-137.*

Direct effect should not be confused with 'direct applicability'. The latter describes the *'...legal standing of the measure. A measure that is directly applicable automatically becomes law in the Member States...'* Source: Storey, T and Turner, C (2011). *'Unlocking EU Law: 3<sup>rd</sup> Edition'*, pg 133.

46 'Primacy' is self-explanatory: *'...in areas where EU law is relevant to a case...EU law prevails over national law...wherever there is a conflict between national law of a Member State and EU law itself it is EU law that must be applied.'* Source: Storey, T and Turner, C (2011). *'Unlocking EU Law: 3<sup>rd</sup> Edition'*, pg 116.

mestic legal provisions...'<sup>47</sup>

The most audacious aspect of it, and the key reason why the CJEU has proven above all other institutions to be the 'master of the Treaties' and such a powerful body is the fact that supremacy has been established largely outside the wording of the Treaties. Infamously, the decision establishing 'primacy of EU law' was 'made up' by the CJEU judges.<sup>48 49</sup> Similarly conjured up by the judges of the CJEU was the principle that Treaty provisions having direct effect.<sup>50</sup> As legal scholar Henri de Waele has written:

*'...the judgments on supremacy and direct effect carry an indelibly activist mark, as the doctrines...not enshrined in the Treaties themselves, are products of judge-made law, created purely for the benefit of... European law. Thence, the subsequent case-law expanding the scope and gist of these notions further, carries an activist stamp as well.'*<sup>51</sup>

This conceptualisation (by the EU itself and in particular the CJEU) of the EU as an autonomous legal order, which 'reaches behind the border', is highly unusual.<sup>52</sup> It makes the EU a supranational organisation not a normal international body.<sup>53</sup> What is more, this impact is not limited to the 'ordinary law' of Member States e.g. the day-to-day rules governing commerce and other areas of policy. Although many mistakenly believe economic issues to be the primary focus of the EU's activity. The EU's remit extends to issues of fundamental rights and constitutional authority too.

The move into fundamental rights, like the establishment of direct effect and primacy, was done without explicit consent from the Member States and wholly through the activism of the CJEU. The scholar Henri de Waele has highlighted this point clearly:

*'The Courts fundamental rights jurisprudence forms another renowned contribution to the constitutionalisation process. Again, even though the Treaties originally contained not a single line on the subject, the ECJ progressively fleshed out a 'bill of rights' in cases such as Stauder (1969), Hauer (1979) and, more recently e.g. Omega (2004).'*<sup>54</sup>

The build-up of legal supremacy over the Member States, it could be argued, reached its zenith when the CJEU asserted the superiority of EU law over the very basic laws i.e. the constitutions, of the Member States.<sup>55</sup>

Not only were these flagrant power-grabs by the CJEU with little or no legal basis but were harbingers of more to come in a wide range of areas, with the CJEU grabbing with both hands the precedent of making law without a Treaty basis that it itself set, and running with it. There has been a steady stream of legal decisions that have expanded the authority of the EU and its law in a wide range of areas such

47 Case 26/62, NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

48 Primacy is not in the Treaties. It remains a creature of case law. However, its existence is now recognised in Declaration 17 attached to the Lisbon Treaty. Chalmers D et al (2015). 'European Union Law', pg 216.

49 As the legal scholar T C Hartley has observed: 'It is a basic rule of Union law that...a directly effective provision of Union law always prevails over a provision of national law. This rule, which is not found in any of the Treaties but has been proclaimed with great emphasis by the Court, applies irrespective of the nature of the Union provision (constitutive Treaty, Union act, or agreement with a non-Member state) or that of the national provision (constitutions, statute or subordinate legislation); it also applies irrespective of whether the Union provision came before, or after, the national provision: in all cases the national provision must give way to Union law'. Source: Hartley, T C (2010). 'The Foundation of European Union law', pg 243.

50 'Direct effect...is not mentioned anywhere in the Treaties. It is entirely the creation of the ECJ...The Court of Justice has developed the principle of direct effect so that it applies generally to most types of EU law, both primary and secondary...'. Source: Storey, T and Turner, C (2011). 'Unlocking EU Law: 3<sup>rd</sup> Edition', pgs 134-137.

51 de Waele, H (2010). 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', Hanse Law Review, Vol 6, No 1, pg 5.

52 Albi, A (2007). 'Bringing Parliaments into the Equation of Co-operative Constitutionalism' in European Constitutional Law Review, 3, pgs 25 – 67.

53 As the scholar Holgar Fleischer states: '...supranational organisations distinguish themselves from international organizations by the fact that their legal instruments are able to bore through the 'armour of sovereignty' of Member States'. Source: Fleischer, H (2010). 'Supranational corporate forms in the European Union: Prolegomena to a theory of supranational forms of association', Common Market Law Review, 47, pg 1671.

54 de Waele, H (2010). 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', Hanse Law Review, Vol 6, No 1, pgs 5-6.

The cases cited are: Case 26/69 Stauder v Ulm [1969] ECR 419; Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727; Case C-36/02 Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

55 This was first clearly asserted in the case: Case C-11/70 International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide [1970], ECR 1125. More recently the principle of supremacy over constitutional provisions has been re-asserted in Case C-399/11, Stefano Melloni v Ministerio Fiscal [2013].

It is worth noting that in the former case, the CJEU also asserted that proportionality was also to be a key tenet of EU law. Source: Sauter, W (2013) 'Proportionality in EU Law – a Balancing Act', Cambridge Yearbook of European Legal Studies, Vol. 15.

as Citizenship, competition and Single Market policy, often with a tenuous legal basis at best (and at worst none at all).<sup>56 57 58</sup>

## 2.5 The tension between EU law and domestic constitutions

Once the elements of supremacy are in place or at least while they are being out in place in order to be truly effective, they need to become accepted and internalised by those that are subject to the doctrine of supremacy of EU law. In other words:

- Be routinely incorporated into the everyday planning and activity of Member State governments, regulators and courts; and
- Be relied upon by organisations, groups and individuals within the Member States.

As might be expected, the audacious legal decisions of the CJEU have not taken place without concerns being raised in some quarters. Consequently, internalisation by the Member States has not been a straight forward process, although it is one that has happened. There have been tensions between the CJEU and in particular the constitutional courts in some Member States. Scholars often refer to this tension as a 'dialogue' between the EU and Member State courts.<sup>59</sup> Others describe it as a negotiation, recognising that the trajectory of the CJEU's case law establishing legal supremacy has not always been smooth.<sup>60</sup>

In some ways there still remains unresolved legal tension in aspects of the relationship. This has been most famously observed in the relationship between the German courts (and the German Constitutional Court in particular) and the CJEU. There is more on this in section 3 of this paper.

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56 In a paper for the Hanse Law Review, the legal scholar Henri de Waele describes a range of cases where the CJEU '...has become the architect of ever more numerous institutional innovations, transforming and constitutionalising the Treaty architecture, and amending both the horizontal (interinstitutional) and the vertical (EC Member States) division of powers in equal measure... *Les Verts* (1986), *Chernobyl* (1990) and *Francovich* (1991)... little or no foothold was to be found in the Treaties for any of the decisions reached. In *Les Verts* and *Chernobyl*, Article 173 (now 230) EC contained an exhaustive list of 'active' and 'passive' litigants, yet the Court single handedly decided to pry open this provision and broaden the catalogue... *Francovich* then delivered liability of Member States for violations of EC law. All previous attempts at codifying such a rule having failed, the ECJ was happy to proclaim it a principle actually already 'inherent' in the Community legal order...'. An aspect of the constitutionalisation of the Treaties often less commented upon is the creation of EU citizenship, where the CJEU has '...been willing to blaze a trail with most remarkable fury, creating residence rights as well as entitlements to welfare on startlingly feeble grounds, e.g. in *Martinez Sala* (1998), *Grzelczyk* (2001), and *Baumbast* (2002). Almost undreamt of was the brazen rhetoric with which the ECJ, in these and other cases, declared Union citizenship 'destined to be the fundamental status of nationals of the Member States'. Outside the constitutional and citizenship areas e.g. commerce, the CJEU has liberally extended the boundaries of the '...rules on free establishment... by landmark rulings, such as *Reyners* (1974), *Gebhard* (1994) and *Centros* (1999). The liberal approach to the concept of 'worker' also continues to be striking, evident from cases such as *Levin* (1982), *Kempf* (1986), *Steymann* (1988) and *Trojani* (2004), encompassing situations in which one might seriously question the genuine and effective character of the employment activity pursued... in EC competition law, the Court did not shun an activist stance either, though the exact dosage has varied through the years... the judgment in *Continental Can* (1975), though decidedly dated nowadays, provides singularly important evidence of judges that do not necessarily feel constrained by a lack of black-letter law when it comes to furthering 'une certaine idée de l'Europe'. Source: de Waele, H (2010). 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review*, Vol 6, No 1, pgs 5-7.

Cases cited: Citizenship - Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-

691; Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] ECR I-7091. Freedom of Establishment - Case 2/74 *Reyners v Belgium* [1974] ECR 631; Case C-55/94

*Gebhard v Consigliodell'Ordine degli Avvocati Procuratori di Milano* [1995] ECR-4165; Case C-12/97

*Centros Ltd v Erhvervsog Selskabsstyrelsen* [1999] ECR I-459. Concept of a 'worker' - Case 53/81

*Levin v Staatssecretaris van Justitie* [1982] ECR 1035; Case 139/85 *Kempf v Staatssecretaris van*

*Justitie* [1986] ECR 1741; Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159; Case C-456/02 *Trojani v CPAS* [2004] ECR I-7573.

57 As the legal scholar Gunnar Beck points out in a blog post on the *Pringle v Ireland* case heard before the CJEU in 2012: 'In the landmark 2012 *Pringle v Ireland* case the ECJ was asked to examine whether the establishment of the permanent euro rescue fund (known as the ESM, or 'European Stability Mechanism') was compatible with the EU Treaties. Predictably, the Court found that the ESM did not violate the so-called 'no bail-out' clause (Article 125 TFEU) of the EU Treaties. Yet the Court's interpretation is impossible to square with the literal meaning of Article 125 which states that neither the Union nor a member state should 'be liable for or assume... the commitments... of another Member State... the ordinary meaning of legal rules, the conventions of legal argumentation and the 'no bail-out' principle all gave way to the overriding political commitment to 'break the law to save the euro'. Source: Beck, G (2013). 'ECJ legal rulings designed to help the Eurozone are threatening the accountability of European governance', can be accessed at: <http://blogs.lse.ac.uk/europpblog/2014/12/10/ecj-legal-rulings-designed-to-help-the-eurozone-are-threatening-the-accountability-of-european-governance/>

58 'Britain officially opposes 'competence creep' by judicial law-making. Yet, in *Pringle [v Ireland]* the UK government intervened to countenance a manifest treaty breach'. Source: Beck, G (2013). 'ECJ legal rulings designed to help the Eurozone are threatening the accountability of European governance', can be accessed at: <http://blogs.lse.ac.uk/europpblog/2014/12/10/ecj-legal-rulings-designed-to-help-the-eurozone-are-threatening-the-accountability-of-european-governance/>

59 Chalmers, D et al (2015). 'European Union Law'.

60 Alter, K (2002). 'Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe', pg 38.

Other national courts have accommodated EU law in different ways, depending on their national constitutional positions.<sup>61</sup> IN some cases the different national constitutional situations may create an impression that aspects of the supremacy of EU law could be challenged by Member State constitutional courts (perhaps on arcane points of law around the margins of the meanings of the Treaties). In practice, as the scholar Alec Stone Sweet has identified, the doctrine of supremacy has been accepted despite the reservations:

*'Although national judges embraced the various logics of supremacy with differing degrees of enthusiasm, by the end of the 1980's every supreme court in the EC had formally accepted the doctrine.'*<sup>62</sup>

The position, is in-fact worse, as the 'dialogue' has not just failed to prevent the shift in the locus of authority and power from the Member States to the EU but it has helped it, as academic Alec Stone Sweet who specialises in studying the CJEU has observed:

*'...the dialogue...[between Member State courts and the CJEU]...has served to deepen integration, to widen the scope of EC [now EU] constitutional politics and to strengthen the supranational aspects of the Community [now Union].'*<sup>63</sup>

Even in those areas where some 'tension' may remain between Member State constitutional courts and the CJEU, considerable efforts have been made by domestic courts to avoid bringing potential tensions to the surface.<sup>64</sup> Proving more evidence, if more were needed, of the subservience of Member State courts to the authority of the CJEU.

The fact that the 'dialogue' has not held back the 'tide of integration' but in some cases helped it, highlights a degree of cowardice among judiciaries in Member States as well as among politicians. It is also symptomatic of the near wholesale acceptance and internalisation by the Member State legal systems of EU law i.e. its supremacy. The consequence is that the CJEU juggernaut moves ever-forward without serious challenge and no prospect of the reversal of its legal power.

## 2.6 The end result

Despite the 'tension' or 'dialogue' between domestic courts and the CJEU, the end result has been the construction of a unique form of post-democratic governance, displaying a long list of characteristics redolent of a state. At its heart sits a unique legal system, built in large part by a supreme court, seemingly impervious to significant challenge. The result has been a legal-constitutional revolution for many Member State, including the United Kingdom.

The current condition of this unusual governing entity has been succinctly described by the legal academic Stephen Sieberson. Since the signing of the Lisbon Treaty in 2007 and its ratification by Member States, the EU has become an institution, which is:

*'...state-like, resembling...a national government...[with features such as]...legal personality, legal capacity...privileges and immunities...legislative, executive and judicial institutions...its own budgetary resources...In addition to its internal activities it engages in external relations with other countries. Significantly...many legislative decisions...are made by majority vote...since these characteristics exist separately from their counterparts in the Member State governments, it is fair to describe them as supranational elements in a dual-federal system. Underscoring the idea of the Union as the central government in a federal set-up is the fact that the Union's legal acts have primacy over Member State law.'*<sup>65</sup>

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61 See Annex IV for a brief outline of some of the constitutional positions of a selection of other Member States.

62 Stone Sweet, pg 70-71, citing Slaughter, A M, Stone Sweet A and Weiler, J H H (eds) (1998). *'The European Court and the National Courts – Doctrine and Jurisprudence: Legal Change and its Social Context'*.

63 Stone Sweet, A (2004). *'The Judicial Construction of Europe'*, Pg 90

64 Chalmers et al highlight this point in their textbook: *'European Union Law'*. They offer two examples of cases (R v MAFF, ex parte First City Trading [1997] 1 CMLR 250 and 1 BvR 1215/07 Counter-Terrorism Database, German Constitutional Court, Judgement 24 April 2013) whereby *'...national courts had...threatened that EU measures might be ultra vires but not actually declared any measure to be so'*. Source: Chalmers, D et al (2015). *'European Union Law'*, pg 230.

65 Sieberson, S C (2010). *'Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon'*, Virginia Journal of International Law, Volume 50, No 4, pg 926.



## 2.7 A summary picture of the forces that have enabled supremacy

As this section has tried to show, this revolutionary change in political and legal structures in Europe has primarily come about through the symbiotic interaction between:

- Broadly drafted Treaties creating scope for considerable interpretation;
- A legal system based on civil law traditions and as a result legal decisions that are made using a 'purposive'/'teleological' approach;
- A protected position in the EU's constitutional order for the CJEU, with a 'policy' agenda of promoting integration;
- Litigation by lawyers, businesses, lobby groups and individuals pursuing both their self-interest and ideological ends;
- The Member State courts who have been complicit in the ascension of EU legal supremacy through accepting it in principle and going along with it in practice by making referrals to the CJEU and enforcing CJEU decisions;
- Member State governments at various times colluding with the ambitions of the EU e.g. through agreeing new Treaties and revisions to Treaties; and
- Member States acquiescing to the actions of the EU institutions such as the CJEU e.g. failing to revise laws post contentious judgements by the CJEU or challenge the role of the CJEU sufficiently in the face of its activism as a result of the barriers to achieving change.

## 3. EU legal supremacy: the view from Germany

In his Chatham House speech, the Prime Minister suggested that the UK might emulate the German model of upholding the constitution and sovereignty and protecting essential constitutional freedoms. He intimated that the German model has done so in Germany and could do in the UK.

No doubt the Prime Minister thought that by raising the prospect of a German-style series of constitutional protections against the supremacy of EU law, he hopes to convince the British people that:

- The UK is in some meaningful way still a self-governing nation;
- The EU is not after-all an overbearing institution dominating large swathes of public policy; and
- Being in the EU is not an open-ended commitment with a deeply embedded commitment to ever greater integration that cannot be stopped and is driven, in an un-democratic way, by an unchecked 'activist' court expanding its remit into new areas and concomitantly shrinking further and further the scope for individual action by the Member States.

However, the 'German model' is not as clear cut as the Prime Minister's enthusiasm may suggest. The so-called protections that the German Constitutional Court (FGCC or BverfG) has established over a number of decades have resulted in a highly nuanced situation. If they ever did, the German model no longer appear to offer a robust protection of the sovereignty of the German constitution, law, parliament and people, except perhaps at the very margins. For example, the German model no longer protects the fundamental human rights of German citizens in practice and it has failed to check any accretions of power by the EU institutions at the expense of the German parliament and people, despite its claim to exercise a 'right of review and reservation'. On the contrary it has found ways to acquiesce to the EU's expanding authority while claiming to still have some form of final say over that expansion. In other words, the German model is something of a 'paper tiger'.

### 3.1 German law and supranational law

Germany has provisions in its Basic Law, which gives EU and international law dominance over Ger-

man law.<sup>66</sup> The starting point in German law then is one of a high degree of permissiveness towards accepting EU law and its supremacy. Evidence of the embrace of EU law by the German courts (and litigants) can be found in the prolific referencing of cases to the CJEU for decisions, which the German courts have made. Notably it has been the lower courts that have made the overwhelming number of references and not the Constitutional Court.<sup>67</sup>

Despite this highly permissive legal position, the German Constitutional Court has argued that it possesses, what might be described for short-hand purposes as a: 'back-stop' power or 'right of review and reservation' with regards to the scope and authority of EU law. The German Constitutional Court argues that it has this 'right of review and reservation' because EU law has authority in Germany only as a result of German law permitting it to. EU law has no innate primacy over German law due to the mere fact of its existence.<sup>68</sup> Therefore, the German Constitutional Court believes that it remains the ultimate arbiter over the extent of EU authority in Germany.

This 'right of review and reservation' manifests itself in three ways:<sup>69</sup>

- A stated willingness to examine EU measures for violations of fundamental rights and a consequent right of reservation to rule any measure brought in by the EU as invalid in Germany because it breaches such rights;
- A preparedness to look at whether the EU has grossly over-stepped its competency as set out in the Treaties and consequently the power to declare such gross extensions of competences as ultra vires i.e. out of the scope of competence of the Treaties and not within the EU's power.
- A test of 'democratic authority'. Certain 'core' policy competences have to be controlled through a democratic authority as they go to the very heart of what it means to be a democratic political community.

### 3.2 Avoiding clashes and ignoring the tensions

The list of ways in which the German Constitutional Court has suggested it can circumscribe the ambitions of the EU may, at first, appear promising. No doubt this is what Cameron wants observers to think.

However, the protections enunciated by the German Constitutional Court have not been, in practice, particularly effective. The 'red lines', initially seemingly clear, have largely turned out to be 'pale pink' at best. Direct challenges to EU law have been rare. Potential instances where incompatible positions may have arisen between the EU and the German Constitution and Constitutional Court have largely been neatly avoided.<sup>70</sup> This ongoing 'dialogue' or unresolved 'tension' has led to the German Constitutional Court being referred to as the 'dog that barks but never bites'.<sup>71</sup> The German court has never 'bitten' and is unlikely ever to because, in the final analysis:

*...it is absolutely clear that European law takes precedence over conflicting national parliamentary law*

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66 'Article 23 [European Union – Protection of basic rights – Principle of subsidiarity] (1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union... To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat'; 'Article 24 [Transfer of sovereign powers – System of collective security] (1) The Federation may by a law transfer sovereign powers to international organisations...' and 'Article 25 [Primacy of international law] The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'. Source: FRG (2012). 'The Basic Law: for the Federal Republic of Germany', can be accessed at: [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fcb703634dcd/basic_law-data.pdf)

67 Table 2.4 in Alec Stone Sweet's book 'The Judicial Construction of Europe', shows that between 1958 and 1998 the German courts made 1442 preliminary references to the CJEU across a wide range of policy areas, including: free movement of goods, agriculture, competition and dumping, external policy, social security, social provisions, environment, establishment, free movement of workers, taxes, transportation, common policy, approximation of laws and other. Source: Stone Sweet, A (2004). 'The Judicial Construction of Europe', pg 102-103.

Alec Stone Sweet also noted that: 'German judges disproportionately generate references in [the free movement of goods]... domain, relative to... their peers in other national system'. Source: Stone Sweet, A (2004). 'The Judicial Construction of Europe', pg 105.

68 Albi, A (2007). 'Bringing Parliaments into the Equation of Co-operative Constitutionalism' in European Constitutional Law Review, 3, pgs 25 – 67.

69 Chalmers, D et al (2015). 'European Union Law', pgs 225-228 and 229-30

70 Chalmers, D et al (2015). 'European Union Law', pg 23.

71 The phrase was first coined by J H H Weiler in his 2009 paper 'The 'Lisbon Urteil' and the Fast Food Culture', Vol 20, European Journal of International Law, pg 505-9, commenting on the BverG's judgment of 30 June 2009, on the Lisbon Treaty, cited in Emerson, M and Joerges, C (2013). 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis'.

*and government policy. The German government is bound by its European legal obligations...The fact that despite the conflicts between the ECJ and the German Constitutional Court this principle has never been questioned reveals of how firmly entrenched this principle remains.*<sup>72</sup>

Below, a brief overview is offered of how each of the three elements of the 'right of review and reservation' developed. Following the overview is a short summary of how in each case the initial 'bark' has translated, in practice, into very little 'bite' from the German Constitutional Court.

### 3.2.1 Right of 'review and reservation': fundamental rights

The first of the three elements of the 'right of review and reservation' was articulated by the German Constitutional Court in the case of *IHT v Einfuhr und Vorratsstelle fur Getreide un Futtermittel* [1974].<sup>73</sup> The CJEU had, in the earlier case of *Internationale Handelsgesellschaft* [1970], stated that EU law stood supreme over Member State constitutional laws as well as 'ordinary' laws.<sup>74</sup> The German court rejected this in *IHT*. It stated that EU law did not have primacy over fundamental rights protected in the German constitution, in particular where the fundamental rights protection fell below that offered by the German Basic Law. This was a direct challenge to the CJEU's recent extension of the doctrine of legal supremacy to the area of fundamental rights in cases like *Stauder* and over Member State constitutions in *Internationale Handelsgesellschaft*.

After the 1974 challenge to the CJEU's assertion of supremacy over Member State constitutions and fundamental rights, the 'tension' or 'dialogue' between the CJEU and the German Constitutional Court continued for a number of years. However, it came to an end in the 1980s in a case called *Wunsche Handelsgesellschaft* [1987], where the German court accepted that it would no longer examine EU issues for fundamental rights violations, stating that:

*...so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights...the Federal Constitutional Court will no longer exercise its jurisdiction to decide the applicability of secondary Community legislation...and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law.*<sup>75</sup>

Further confirmation of the German Constitutional Court's effective submission on this issue of fundamental constitutional rights came in the mid-2000s when it challenged the implementation of the European Arrest Warrant (EAW). Its challenge was on fundamental rights grounds. The implementing measure violated constitutionally protected rights.<sup>76</sup> However, the Constitutional Court carefully avoided any clash with the EU and the authority of EU law to prescribe such measures, despite concerns about the EAW's compatibility with key due process protections. . As the EU legal scholar T C Hartley stated, the court allowed:

*...effect...[to]...be given to the EU framework decision in Germany if...done in the appropriate manner. Consequently, the case does not constitute a rejection of the Union decision...'*<sup>77</sup>

The Constitutional Court had adhered to its 1987 vow not to challenge EU law on fundamental rights issues. Rather, it focussed its concerns on the domestic implementing legislation. It was emphatically not a rejection of the EU's competency over this policy area.<sup>78</sup> A revised version of the EAW, which took on board the concerns of the German Constitutional Court, was subsequently implemented by the German Government.

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72 Alter, K (2002). '*Establishing the Supremacy of European Law: The making of an International Rule of Law in Europe*', pg 118.

73 *IHT v Einfuhr und Vorratsstelle fur Getreide un Futtermittel* [1974] 2 CMLR 540.

74 Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle fur Getreide un Futtermittel* [1970] ECR 1125.

75 *Wunsche Handelsgesellschaft* (2 BvR 197/83): 73 BVerfGE 339, [1987] 3 C.M.L.R. 225 cited in Chalmers, D et al (2015). '*European Union Law*', pg 227.

76 Although the German Constitution had been amended to allow extradition to other EU Member States the original implementing measure passed by the German Parliament still fell afoul of the constitution and so an amendment, which required '*...fundamental principles of the rule of law to be respected*' was required. Source: White, C (2014). '*National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht*', pg 15-16.

77 Hartley TC (2010). '*The Foundation of European Union Law*', pg 266.

78 Hartley TC (2010). '*The Foundation of European Union Law*', pg 266.

In addition, the CJEU's move into 'protecting' fundamental rights (which led to the German Constitutional Court effectively surrendering this element of their 'right of review and reservation') had the distinct advantage for the EU of offering new opportunities for expanding its authority further. As was noted in section 2.5 above the dialogue between Member State courts and the CJEU has often furthered integration not hindered it. The German experience with fundamental constitutional rights is a clear example of this. While there were initial tensions over whether the EU would sufficiently protect fundamental rights, the 'dialogue' merely encouraged and incentivised the EU to build-up its fundamental rights jurisprudence, taking more authority over another area that was once dealt with by Member States. With the incorporation of the Charter of Fundamental Rights into the Treaties, through the Lisbon Treaty, the role of the CJEU in fundamental rights has become even clearer and more powerful.<sup>79</sup>

### 3.2.2 Right of 'review and reservation': ultra vires

In a decision about the legality of the Maastricht Treaty (*Manfred Brunner and Others v. The European Union Treaty*) the German Constitutional Court established its reserve power to declare EU measures ultra vires i.e. outside the competences of the EU.<sup>80</sup>

The ultra vires test did not give the German Constitutional Court the power to regulate individual interpretations of the Treaties by the CJEU. What it did do was establish (in principle at least) a power for the Constitutional Court to decide whether the EU had, in a particular instance, '...acted within the mandate granted by the Treaties.'<sup>81 82</sup>

The first thing to note is the ultra vires power is not a power to second-guess the CJEU on particular decisions. The CJEU is the final arbiter of the meaning of EU law. The German Constitutional Court continues to accept this fundamental principle of EU law.<sup>83</sup> Rather it is an opportunity for the German Constitutional Court to say, for example if an EU policy initiative is challenged, whether the policy falls within the ambit of EU law and if it should apply in Germany.

To help avoid having to use the ultra vires 'power' and thus the possibility of conflict between the CJEU and the German Constitutional Court, in a case called *Honeywell*, the German Constitutional Court has watered its potential effectiveness down further. In *Honeywell* the ultra vires test established in the original Maastricht (*Brunner*) decision has been modified, nuanced and is now much more difficult to utilise.<sup>84</sup> The *Honeywell* test creates two considerable hurdles that need to be overcome before an ultra vires decision can be reached. Together these tests make the chances of there being a declaration that a particular EU measure is ultra vires very slim indeed.<sup>85</sup> The real consequence of the *Honeywell* decision is to give even more leeway to the EU and the CJEU in particular over how they exercise their authority.

The ultra vires power fails to tackle the real enablers of EU legal supremacy. It does not alter the vagueness of the Treaties. Therefore, one enabler of EU legal supremacy i.e. the nature of the Treaties is not tackled by it. Neither is the wider primacy of EU law, the existing established jurisprudence or the considerable latitude in interpretation that the CJEU has over the Treaties and secondary EU law such

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79 Beal, K and Hickman T (2011). '*Beano No More: The EU Charter of Rights After Lisbon*', *Judicial Review*, 2, pg 113 - 141.

80 Payendah, M (2011). '*Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and EU Court of Justice*', *Common Market Law Review*, 49, pg 9.

81 Chalmers, D et al (2015). '*European Union Law*', pg 229.

82 GFCC, decision from 12 October 1993, 2 BvR L 134/92 and 2159/92, WW (1993) 3047.

83 Anagnostara, G (2013). '*Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*', *German Law Journal*, Vol 14, No 7, pg 967.

84 GFCC, decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*.

85 The criteria set out in *Honeywell* confirmed (if it were needed) the German Constitutional Court's extreme reluctance to disagree with and challenge the CJEU. As Professor Damien Chalmers et al have described it:

*'There is a deep reticence in this judgment [Honeywell] about going against EU law. It is not enough...for the Union to act ultra vires. There are two further tests to be met before the German Constitutional Court will intervene...the breach must be manifest and significant...then...the Court of Justice must have had a prior opportunity to review the offending measure.'*

Source: Chalmers, D et al (2015). '*European Union Law*', pg 231.

as Directives and Regulations.

It could be argued therefore, that the ultra vires element of the 'right of review and reservation' is at best a potential curb, albeit at the margins and unlikely to be used often, on the 'Autonomy' element of the four elements that constitute supremacy (see section 2.1). However, in reality, like the 'fundamental rights' element of the 'right of review and reservation', the ultra vires element looks more like the Constitutional Court creating a largely theoretical challenge to EU legal supremacy but failing in practice.

There is one prospect on the horizon, which may rescue (in part) the remaining 'teeth' in the ultra vires test and show that it is a bit more than a theoretical power. A case was brought to the German Constitutional Court to challenge whether there is the authority in the Treaties to permit the European Central Bank (ECB) to adopt and operate the Outright Monetary Transaction (OMT) programme. This is a programme that allows the ECB to purchase Member State sovereign debt in response to a request for assistance from a Euro-Member State Government.<sup>86</sup> The complainants in the case asked the German Constitutional Court to rule whether such a measure was '...compatible with the prohibition of monetary financing of Member states' in the Treaties.<sup>87</sup> The German Constitutional Court believes that OMT is a manifest violation of the prohibition on monetary financing in the Treaties.<sup>88</sup> The court referred the case to the CJEU inviting the CJEU to decide whether the German Constitutional Court is correct in its view of the OMT programme.<sup>89,90</sup> Notably, this is the first reference by the German Constitutional Court to the CJEU.<sup>91</sup> The fact that the German Constitutional Court has referred a case to the CJEU is an act which confirms (if confirmation were needed) that the CJEU is indeed the supreme interpreter of the meaning of EU law and the Constitutional Court accepts this.

In 2015, in contradiction of the German Constitutional Court, the CJEU ruled that the OMT programme was within the scope of the Treaties and not unlawful. As legal scholar Tomi Tuominen has argued:

*'In Gauweiler the ECJ was able to take a firm stance for the uniform interpretation of Union law... Had the ECJ jumped on the BVerfG's bandwagon and reviewed the legality of the OMT under the criteria posited by the German Basic Law... it would have shown signs of Stockholm syndrome... Luckily, the ECJ did not start to identify with its captors... The ECJ did what was the correct choice for it as the de facto supreme constitutional court of the Union...'*<sup>92</sup>

Whether this presages a real clash between the two courts, after many years of trying to avoid one, is yet to be seen. There is clearly '...still the risk of standoff or stalemate between the two courts' now that the CJEU has decided in the way that it has.<sup>93</sup> At the time of writing the German Constitutional Court is again hearing arguments about the issue.<sup>94</sup>

A number of factors may impact the final outcome of the Constitutional Court's deliberations. The programme has already been set-up, despite the on-going legal debate. Further, the ECB has never used

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86 White, C (2014). 'National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht', pgs 16-18.

87 CJEU (2015). 'The OMT programme announced by the ECB in September 2012 is compatible with EU law', Press Release Number 70/15, pg 2, can be accessed at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-06/cp150070en.pdf>

88 Chalmers, D et al (2015). 'European Union Law', pg 233.

89 'Gauweiler... is significant for legal integration in the EU since... the reference asks for clarification about the legality of the ECB's OMT decision. But that reference is not formulated in terms of a dialogue between Courts, each respecting the other's distinctive powers. Instead, the BVerfG explains why it considers the ECB's decision to be ultra vires of its mandate and asks the CJEU essentially to confirm this interpretation warning about potential consequences in its assessment of the 'constitutional identity' of the Federal Republic of Germany'. Source: Hofmann, H C H (2015). 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', Working Paper, pg 1, can be accessed at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933)

90 Case C-62/14 Peter Gauweiler and Others v Deutscher Bundestag [2015]. The reference by the German Constitutional Court was considered by the CJEU. The judgement was handed down in June 2015.

91 White, C (2014). 'National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht', pgs 16-18.

92 Tuominen, T (2015). 'C-62/14 Gauweiler: How the ECJ avoided Stockholm syndrome but risks either a standoff or a stalemate', can be accessed at: <https://acelg.blogactiv.eu/2015/10/26/c-6214-gauweiler-how-the-ecj-avoided-stockholm-syndrome-but-risks-either-a-standoff-or-a-stalemate/>

93 Tuominen, T (2015). 'C-62/14 Gauweiler: How the ECJ avoided Stockholm syndrome but risks either a standoff or a stalemate', can be accessed at: <https://acelg.blogactiv.eu/2015/10/26/c-6214-gauweiler-how-the-ecj-avoided-stockholm-syndrome-but-risks-either-a-standoff-or-a-stalemate/>

94 EurActive (2016). 'ECB again defends bond-buying programme in Germany's top court', can be accessed at: <https://www.euractiv.com/section/euro-finance/news/ecb-again-defends-bond-buying-programme-in-germanys-top-court/>

the programme, with no Member State having yet met the criteria for its operation.<sup>95</sup> In addition, the programme could still carry on, with or without the Germans. These practical factors may be a factor in the deliberations of the Constitutional Court and offer ways out of the potential for conflict. It is notable that the Constitutional Court did not stand in the way of previous Eurozone bail-out activities, despite strong and numerous legal cases against German participation in such measures as the European Stability Mechanism (ESM).<sup>96 97</sup> The German Constitutional Court has shown a strong pragmatic streak in its deliberations on the ESM and may do so in relation to the OMT. A pragmatic outcome is likely this time.

How might accommodation with the CJEU be found? The German Constitutional Court may require additional domestic measures which try to increase the accountability of the OMT programme to the German parliament, similar to those required by the 'democratic test' (the third element in the 'right to review and reservation' – see section 3.2.3) and in relation to the operation of the EMS. Another option could be to acknowledge the exceptional circumstances of the Eurozone crisis and agree a 'proportionality' limit to deployment of the instrument.<sup>98</sup> Whatever the outcome, two things are almost certain to be the case when the legal arguments are over:

- There will be nothing which alters significantly the fact that EU law remains supreme in Germany across a vast range of policy issues, including over many aspects of the German constitution (Basic Law); and
- The logic of accelerating to a more integrated Eurozone with more EU-level fiscal authority becomes even more clear, if for no other reason than to avoid the possibility of the types of legal tensions that have arisen in this case potentially neutering much needed policy responses, in the future.<sup>99</sup>

### 3.2.3 Right of 'review and reservation': the 'Democratic test'

The third element to the 'right of review and reservation' was set out by the German Constitutional Court in their judgment in a case (Case No. 2 BvE 2/08) challenging the then German Government's signing of the Lisbon Treaty. It has been called the test of 'democratic authority' and is also referred to as the 'identify' provision.<sup>100</sup> By establishing this test, the court suggested that the EU would be excluded from having competence over areas of policy that are of significant importance to the integrity of the German nation as a polity.<sup>101</sup> This principle might, on first glance, be thought of as something akin to a 'reserve powers' law.

However, what initially looked like a potentially strong bulwark against encroachment by EU law into a range of key policy areas it was, in reality, much less than that. The German Constitutional Court immediately undermined the new bulwark by setting out a procedure for how these limits on EU jurisdiction could be negated. What was required by the Constitutional Court was 'democratic consent' before Germany could take part in EU measures in these particularly significant and sensitive policy areas.

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95 EurActive (2016). 'ECB again defends bond-buying programme in Germany's top court', can be accessed at: <https://www.euractiv.com/section/euro-finance/news/ecb-again-defends-bond-buying-programme-in-germanys-top-court/>

96 The ESM is a permanent mechanism for bailing-out Eurozone members who are in financial difficulty or their financial sector threatens economic stability and needs help to re-capitalise. The German Constitutional Court approved Germany's role in the ESM in a decision in 2012. Source: BBC (2012). 'German court backs Eurozone's ESM bailout fund', can be accessed at: <http://www.bbc.co.uk/news/world-europe-19567867>

97 Legal Scholar Gunner Beck notes in an article for the Wall Street Journal that the German Constitutional Court has repeatedly given the go ahead to Germany's participation in various bail-out activities: Beck, G (2012). 'Why Germany's Court Won't Kill the Bailout Fund', 10 July 2012, can be accessed at: <http://www.wsj.com/articles/SB10001424052702303343404577516703171107724>

98 'Proportionality is a long-standing German legal principle adopted a long time ago by the CJEU as a key principle of EU law.

99 'The dispute has therefore brought to light a serious design flaw in the EU's EMU. It is difficult to maintain in extreme situations one monetary union in absence of a common fiscal and economic policy which would be capable of raising itself enough money to back up the ECB's monetary policy actions. This structure limits both the monetary as well as the economic policy options of the EU and the Member States'. Source: Hofmann, H C H (2015). 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', Working Paper, pg 21, can be accessed at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933)

100 GFCC, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08.

101 This stipulates that the EU does not '...have the authority to adopt laws which go...to the political formation of the economic, cultural and social living conditions'. These include the central features of criminal law, deployment of the use of force, central budgetary issues, the central issue of social policy and culturally important fields, in...education and family life'. Source: Chalmers, D et al (2015). 'European Union Law', pgs 238-239.

The EU law scholars Damien Chalmers, Gareth Davies and Giorgio Monti have described the watering down of the 'democracy test' succinctly:

*'There is a further hurdle to be met, the agreement of national parliaments, before a law can be adopted... EU law will only have authority if it...has...been approved by the EU legislature and the national parliament... However...[meeting this criteria]...allows EU measures to be adopted in fields where it might otherwise be precluded on grounds of identity review.'*<sup>102</sup>

The ineffectiveness of this 'democratic' test to protect the sovereignty of the German parliament and people is illustrated by the on-going expansion of EU authority over criminal justice policy and in particular criminal law, the latter being one of the 'sensitive' policy areas identified by the German Constitutional Court.

The importance of the monopoly of the state over the criminal law was recognised by the Constitutional Court. That is why it was listed among the areas of policy most salient to the identity of the German political community. Yet, Germany has applied no brake to EU measures falling within this category of policy. As set out earlier, the German Constitutional Court did not challenge the EU's right to legislate for the EAW, only aspects of the domestic implementation were rules against. There are some that might suggest that the EAW is not an issue of substantive criminal law, despite the fact that the Directive specifically defines a set of crimes, where the surrender of a suspect is expected. Having to recognise categories of crime that a Member State may not otherwise recognise is effectively legislating new definitions of crimes for the Member States. But, even if the EAW point is conceded there are other measures that cannot be argued away. These others explicitly harmonise substantive criminal law in areas such as criminal procedure, financial crime and cyber-crime.<sup>103 104</sup> None of these measures have been blocked by the German Constitutional Court. They may have been voted upon by the German parliament but the principle of competence over crime and justice policy has been acquired by the EU and so too has the practice of legislating on criminal justice policy matters. Whatever the façade of accountability that is placed over this shift by the German Constitutional Court it cannot conceal the fact that the concessions have been made and that there is no chance of halting further EU legislation or reversing any previous legislative acts.

It is hard to avoid drawing the conclusion that all the Constitutional Court has done is create a veil of faux legitimacy with its 'democracy' test or 'identity' provision over the movement of one of the most important areas of policy a state can exercise over its citizens.

## 4. EU legal supremacy: the view from the UK

David Cameron suggested that he would introduce a measure or measures, which sought to:

- Uphold the UK's constitution and sovereignty;
- Protect essential constitutional freedoms; and
- Act as a potential check on the expansion of EU competency.

The Prime Minister added that his reform would likely borrow from the German model. Whatever proposal, if any, emerges from the Government ahead of or after the referendum, it is highly unlikely to change anything noticeable in the UK's constitutional relationship with the EU. This is for three interre-

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102 Chalmers, D et al (2015). 'European Union Law', pgs 240-242.

103 In Case C-176/03 *Commission v Council* decided that it would be appropriate to require Member States to impose criminal sanctions for environmental 'crimes'. Subsequently, in the Lisbon Treaty, the EU moved criminal justice from an inter-governmental competence to a supra-national one, with the power for the EU, under Article 83 of the TFEU, to harmonise criminal laws of the Member States using the expanded co-decision method for agreeing new EU laws and all under the jurisdiction of the CJEU. Since then measures such as the Market Abuse Directive (2014/57/EU) have created what the EU calls 'Euro-crimes'. Other Directives harmonising criminal law include Directive 2013/40/EU, which has harmonised laws on cyber-crime.

104 The Directives: [Directive 2010/64/EU](#) on interpretation and translation and [Directive 2012/13/EU](#) on the right to information were adopted on 20 October 2010 and on 22 May 2012 respectively. Then, in October 2013, a new Directive ([Directive 2013/48/EU](#)) was adopted which aims to ensure that minimum standards on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest are applied throughout the EU. Source: DG Justice (2016) 'Rights of suspects and accused', can be accessed at: [http://ec.europa.eu/justice/criminal/criminal-rights/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm)

lated reasons:

- As has been outlined in section 3, the German model is not as robust as the Prime Minister was, no doubt, hoping to suggest. It is not clear in practice that the German model has protected the constitution and sovereignty of Germany and its essential constitutional freedoms in any significant way. Consequently, trying to adopt the German model would not safeguard or secure very much;
- The current UK position already has elements which have some similarity to the German model. While the UK's basic constitutional model is very different to Germany's, a number of existing laws and rules in both statute and common law have created potential 'checks' on the authority of EU law which have at least some resemblance to those in Germany. Their existence suggests that any proposal to introduce 'German-style' protections would be a re-hash of existing laws rather than anything new. Not least because enhancements of the existing 'checks' would start to create new tensions between the accepted doctrine of EU legal supremacy and UK domestic arrangements;
- Any serious reform that looked to genuinely uphold the UK's constitution and sovereignty would have to go much further than the marginal protections currently in place. Real reform could only involve the restoration of Parliamentary sovereignty. The result of this would almost certainly be infringement action by the European Commission because action along these lines is incompatible with EU law. In the end, the unresolvable tension would likely mean having to leave the EU.

As this section aims to show, the only conclusion that can be credibly drawn from the evidence is that, at best, any measure or measures brought forward by Cameron will:

- Not alter in any way the subservience of law and Parliament to EU power but largely re-affirm the status quo; and
- Be a marketing exercise, trying to place a façade of domestic control and authority over the fundamental constitutional shift that has already taken place in the UK.

## 4.1 Parliamentary sovereignty and EU legal supremacy in the UK

### 4.1.1 The British constitution

Traditionally, the UK has had one basic constitutional rule: the UK Parliament is supreme and it can do what it likes.<sup>105 106</sup> No existing laws nor any external body such as courts or international organisations could inhibit it. The writings of the constitutionalist Professor A V Dicey are perhaps the most famous exposition of the fundamental principle of the British constitution:

*'...Parliament...has under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside legislation.'*<sup>107</sup>

Put a slightly different way, the UK's constitution consists almost entirely of the single rule that Par-

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105 As the renowned jurist Sir William Blackstone remarked in his *'Commentaries on the Laws of England'* in the 18<sup>th</sup> century: *'...repealing, reviving, and expounding of laws...[was the function of Parliament, and Parliament could]...do everything not naturally impossible...[what]...parliament doth, no authority upon earth can undo'*, cited in: Amar, A R (1997). *'Of Sovereignty and Federalism'*, Yale Law Journal, Vol 96, pg 1431.

Similar remarks were made by that other great English jurist Sir Edward Coke, in the 17<sup>th</sup> Century, when he stated in his *'4<sup>th</sup> Institute of the Lawes of England'* that: *'Of the power and jurisdiction of the Parliament, for making of laws in proceeding by Bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds...'*

106 The great constitutional theorist A V Dicey highlighted that sovereignty was subject to some procedural 'rules of the game' which might be considered to emerge from the traditional English view of freedom as being inherent, with everything permitted that is not explicitly prohibited. As Dicey stated: *'...the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by others'*, cited in Carroll, A (2009). *'Constitutional and Administrative Law: 5<sup>th</sup> Edition'*, pgs 47.

These 'procedural rules of the game' that Dicey identified were: absence of arbitrary, wide discretionary power, the prohibition of punishment of people except for a breach of the law and the equal application of the law. Source: Carroll, A (2009). *'Constitutional and Administrative Law: 5<sup>th</sup> Edition'*, pgs 45-47

107 Dicey A V (1885) *'The Law of the Constitution'*, cited by Tomkins, A (2010) *'Written Evidence from professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow, to the European Scrutiny Committee'*, can be accessed at: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633ii/633we02.htm>



liament is sovereign, buttressed by a few additional principles e.g. the equal application of the law. To put it in the terms Cameron's used in his Chatham House speech: UK's most fundamental constitutional freedom is that of Parliament to legislate how it sees fit based on its democratic mandate. It is through this institutional structure that the British people exercise their self-government.

#### 4.1.2 The revolution that followed accession to the EU

The position changed radically in the constitutional revolution that followed accession to the EU. The EU empowers judges (EU and domestic) along with the other decision making and administrative institutions of the EU to direct and bind the UK's Parliament and courts.<sup>108</sup> Parliament and the courts have been very pliant in the face of EU legal supremacy and policy action, which has significantly diminished the autonomy and authority of Parliament, as Lord Hope described in *Jackson v Attorney General* [2006]:

*'Our constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer...absolute...it is no longer right to say that its freedom to legislate admits of no qualification whatever...the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified...For the most part these qualifications are...the product of...the European Communities Act 1972...Although Parliament was careful not to say in terms that it could not enact legislation which was in conflict with Community law, that in practice is the effect of section 2(1) when read with section 2(4) of that Act. The direction in section 2(1) that Community law is to be recognised and available in law and is to be given legal effect without further enactment, which is the method by which the Community Treaties have been implemented, concedes the last word in this matter to the courts.'*<sup>109</sup>

In the seminal series of *Factortame* cases, the subservience of the UK's constitutional order as a result of the supremacy of EU law, and the power this put in the hands of judges, was fully acknowledged by the judiciary in *R v Secretary of State for Transport Ex p Factortame (No.2)* [1991] where Lord Bridge stated:<sup>110</sup>

*'Under the terms of Act of 1972 it has always been clear that it is the duty of a United Kingdom court...to*

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108 The 'iron grip' of EU law over UK law was confirmed in the *Factortame* series of cases. Membership has given the courts (domestic and the CJEU) the authority to dis-apply Acts (or parts of Acts) of Parliament, injunct the implementation of an Act and to fine the Government for non-compliance, with compensation for those parties judged to be 'injured' by the failure to properly implement EU law.

109 *Jackson v Attorney General* [2006] 1 AC 262.

110 It is worth spending a bit of time recalling the numerous phases of the *Factortame* litigation. The litigation went on for around a decade (from 1989 onwards). It had the most profound implications for the UK's constitutional order. The case was an appeal by a number of Spanish owned trawlers against provisions in the Merchant Shipping Act 1988, which prevented foreign-owned trawlers from being registered in the UK and consequently attempting to stop foreign boats from taking up parts of the UK's fish quota under the Common Fisheries Policy. Here is a short summary of the multiple parts of the litigation:

The case was brought before the Divisional Court (*R v Secretary of State for Transport, ex parte Factortame Ltd (No 1)* [1989] 2 CMLR 353) by the Spanish trawler owners. They argued that the Merchant Shipping Act violated their right to freedom of establishment under the EU Treaty. As the issue involved EU law, the case was referred to the CJEU, with a temporary injunction imposed by the court on the implementation of the relevant aspects of the Merchant Shipping Act 1988. The Government appealed the temporary injunction to the House of Lords (*R v Secretary of State for Transport* [1989] 2 All ER 692) which found that a court could not injunct an Act of Parliament. However, whether a court could have such a power in relation to a temporary injunction while a decision by the CJEU was remained pending was required. Therefore, this question was also referred to the CJEU. The CJEU's answer came in *Factortame Ltd v Secretary of State for Transport* [1991] 1 All ER 70. It said '*...interim relief should be given and any rule of national law which sought to inhibit that granting of such relief...should not be applied*'.

The case then went to the House of Lords for the application of the decision by the CJEU. The House of Lords, in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 applied the injunction.

The CJEU then came back with its decision re the original complaint about the Merchant Shipping Act to the Divisional Court. In *R v Secretary of State for Transport, ex parte Factortame Ltd (No 3)* [1992] QB 680 the relevant sections of the Merchant Shipping Act 1988 were declared incompatible with EU law. They were dis-applied. The Merchant Shipping Act 1988 was subsequently amended by Parliament.

The complainants then applied for compensation from the UK Government for damage incurred due to the UK Government's illegal Merchant Shipping Act. After the seminal case CJEU case *Francovich v Italy* (see Table 1 in Annex II) in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 4)* [1996] 2 WLR 506, the CJEU held in a preliminary ruling that the UK Government could be liable for compensation. In *R v Secretary of State for Transport (Factortame Ltd) (No 5)* [199] 3 WLR 1062, the UK Government was ordered to pay compensation to the complainants because the Merchant Shipping Act 1988 '*...was sufficiently serious...to warrant liability because Parliament...manifestly and gravely disregarded the limits of its discretion*' and through the Merchant Shipping Act the UK Parliament had sufficiently seriously enough flouted '*...one of the most basic principles of the Community...'*

Source: Carroll, A (2009). '*Constitutional and Administrative Law: 5<sup>th</sup> Edition*', pgs 112-113.

*override any rule of national law found to be in conflict with any directly enforceable rule of Community law.*<sup>111</sup>

Note the fact that, in his judgement, Lord Bridge pointed out that EU law can: ‘...override any rule of national law...’<sup>112</sup> This was the most explicit description at that time of the powerful legal stranglehold that EU law had over the UK’s constitution, courts and politics.

The position was put in a slightly different but equally powerful way by Justice (later Lord Justice) Hoffman in *Stoke-on-Trent City Council v B&Q PLC* [1990], where EU law was characterised, rightly, as effectively a supreme law of the UK, above any other law:

*‘The EC Treaty is the supreme law of the UK taking precedence over Acts of Parliament. Entry into the EC meant Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on matters...which the Treaty regulated.’*<sup>113</sup>

Perhaps the most tragically poetic description of the impact of EU law and the CJEU in particular, on the UK constitution, was written by the great jurist Lord Denning:

*‘Our sovereignty has been taken away by the European Court of Justice. It has made many decisions impinging on our statute law and says that we are to obey its decisions instead of our own...law...It has put on the Treaty an interpretation according to their own views of policy...the European Court has held all European directives are binding within each of the European countries; and must be enforced by the national courts; even though they are contrary to our national law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all.’*<sup>114</sup>

While the UK is a member of the EU it is difficult to see how the constitutional position could be any other. EU law and its institutions have to be supreme – it is the requirements of membership and the logic of supra-nationalism. As Rouse Ball Professor of English Law David Feldman has pointed out:

*‘Accepting that both Acts of Parliament and directly effective Community law are judiciable in courts in the United Kingdom entails accepting the need for some hierarchically superior judicial body to have the last word on questions of law, and the combined effect of the European Communities Act 1972 and the EU Treaty is to make clear that the Court of Justice of the European Communities is that body. If anyone fails to recognise this it can only be because of an inability to take account of all the perspectives from which the United Kingdom’s constitution must now be viewed.’*<sup>115</sup>

#### **4.1.3 Ways in which the British constitution has been changed by EU membership**

An evaluation of the specific consequences for the British constitution of membership of the EU would be able to identify at least seven significant ways in which it has negatively impacted the traditional principles of the UK’s constitutional order:

- The ECA 1972 and the laws to which the UK becomes subject because of it (i.e. the Treaties, the Regulations, Directives and CJEU case law) has been elevated to a special higher status within the

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111 *R v Secretary of State for Transport, ex parte Factortame Ltd* (No 2) [1991] 1 AC 603.

112 The key fact that EU law could override ‘any’ national law and the tremendous power of that legal position is emphasised by the scholar Danny Nicol in his book: ‘*EU Membership and the Judicialization of British Politics*’. Source: Nicol, D (2001). ‘*EU Membership and the Judicialization of British Politics*’, pg 246, footnote 24.

113 *Stoke-on-Trent City Council v B&Q PLC* [1990] 3 CMLR 897.

114 Denning, L (1990). ‘Introduction’ in ‘*The European Court of Justice: Judges or Policy Makers?*’, cited in Alter, K (1996). ‘*The European Court’s Political Power: The Emergence of an Authoritative International Court in the European Union*’, in Alter, K (2010). ‘*The European Court’s Political Power; Selected Essays*’. Pgs 103-104.

115 Feldman, D (2005). ‘*None, One or Several? Perspectives on the UK’s Constitution(s)*’, *Cambridge Law Journal*, Vol 64, Issue 2, pg 329 cited in: Nicol, D (2010). ‘*The Constitutional Protection of Capitalism*’, pgs 93-94.

constitution.<sup>116</sup> Traditionally there was only one supreme rule in the UK: the supremacy of Parliament. All laws were considered to be equal and repeal-able, both explicitly and impliedly;

- The 1970-74 Parliament, by passing the ECA 1972 and the subsequent application of that Act and the 'special' entrenched status of EU law, have had the effect of binding future Parliaments to a considerable degree. The traditional rule has been that no Parliament can bind its successors;
- The effect of the ECA 1972 has been to turn the UK from a predominantly dualist constitution, in terms of international law, into a more hybrid constitution: a mixture of dualist and monist.<sup>117</sup> The ECA 1972 opens up the UK to the doctrine of the direct effect of EU law and the direct applicability of EU law in the UK. This has eliminated the democratic 'check' that traditionally existed in the constitution as a result of the UK being a dualist constitution. In addition, being a dualist country also meant that international law was subservient to the legislation of Parliament and later statutes i.e. the laws of earlier treaties entered into and ratified by Parliament could be superseded.<sup>118</sup> Under the Treaties, EU law overrides domestic law where there is an inconsistency;
- Parliament has been denuded of day-to-day legal authority over a vast swathe of policy areas (See Annex IV for a full list). In many areas it is prohibited from making new laws or amending existing ones. In others it can only take complementary measures to laws made by the EU. As a result, there are tens of thousands of laws that it cannot amend or repeal. In many ways Parliament has become an implementing body of laws made elsewhere;<sup>119</sup>
- Significant power over what Parliament can and cannot do has shifted to the judiciary, both domestic and EU. In other words, Parliament is subject to the authority of other bodies. Not being subject to the authority of another body was a key hallmark of the sovereignty of Parliament;
- The supreme judicial body in the UK, in relation to a wide range of issues including vital policy areas such as criminal law, human rights, social security etc is no longer the Supreme Court (previously the Law Lords in the House of Lords). It is the CJEU in Luxembourg. Judges in the UK now defer to the CJEU for the definitive interpretation of a large quantity of the laws affecting the UK. Decisions from the CJEU are binding on all;
- The traditional domestic approach to judicial legal interpretation was to take a literal interpretive approach. However, this has been changing under the influence of EU law. Not only is EU law interpreted 'purposively'/'teleologically' by EU judges, but the supremacy of EU law has forced UK judges down a similar interpretive path. This has further strengthened the authority of judges over the legislature.

On its own, any one of these changes has to be considered a significant modification of the traditional

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116 The legal scholar Danny Nicol highlights in his book *The Constitutional Protection of Capitalism* how 'deeply entrenched' EU law is. As he describes: '... the degree of entrenchment is severe. ... the actual formulation of Treaty amendments is the preserve of an elite. ... the modalities of Treaty revision are situated in the realm of international affairs, responsibility for which is an executive function. ... this diminishes both popular consultation and the role of national parliaments in the process. ... Furthermore, Article 48 of the Treaty on the European Union (TEU) mandates heavy entrenchment, generally speaking, the EU Treaties can only be amended by common accord, after being ratified by all Member States. ... even the secondary legislation. ... its regulations and directives – should, from the national perspective, be conceived as entrenched, since the government of a Member State would need to win over a qualified majority or even gain the unanimous support of the Council in order to repeal or amend such legislation, along with a measure of support in the European Parliament. ...'. Source: Nicol, D (2010). *The Constitutional Protection of Capitalism*, pg 83.

117 A dualist constitution acknowledges a difference between domestic and international law: '... international law regulates the relations between states whereas national law regulates the rights and obligations of individuals within states'. As a result, the terms of any international agreement signed by the Government of a dualist state have to then be passed into the domestic law of that state (through some legitimate constitutional mechanism) in order to have effect. In other words, citizens cannot rely on a treaty's provisions nor judges apply its provisions until the treaty has been 'passed' into domestic law. In contrast, a monist constitution describes a very different system whereby: '... International law and national law are simply two components of a single body of knowledge called 'law''. As such, the monist state that agrees to an international treaty immediately accepts that treaty into its domestic law. The provisions of any treaty apply directly and immediately to the citizens of that country and can be applied by the courts of that country. Source: Dixon, M (2013). *Textbook on International Law: 7<sup>th</sup> Edition*, pgs 91-93.

118 The academic Alex Carroll highlights the case of *Mortensen v Peters* [1906] 14 SLT 227 as an example of this aspect of the UK's constitutional system. Source: Carroll, A (2009). *Constitutional and Administrative Law: 5<sup>th</sup> Edition*, pgs 97-98.

119 Some often describe the shift of authority over policy from the UK Parliament to the EU as one of delegation. Describing it as 'delegation' makes the shift sound less significant than it is. Notably, 'delegation' was the term used to describe the moving of policy competences from the UK Parliament to the institutions of the EU, in the Wilson Government's pre-1975 referendum White Paper. As legal scholar Danny Nicol points out through repeating the words of Lord Advocate Ronald King Murray QC in 1975, 'delegation' is entirely the wrong term. It is misleading. It gives the wrong impression to the reader about the new power relationship at work, when a country is a member of the EU: '... delegation meant giving power to a subordinate body for subsidiary ends whereas 'the powers conferred on Brussels are transferred to a superior authority which can overrule British law for... ends which are far-reaching'. King Murray QC, R (1975), *The Times* - 30<sup>th</sup> May cited in Nicol, D (2001). *EC Membership and the Judicialisation of British Politics*, pg 155.

and centuries old understanding of the British constitution that Parliament is supreme. Together (excluding the additional and substantial political and democratic concerns, which would further magnify the detrimental impact) these cumulative effects of EU law can be described as nothing short of a constitutional revolution.

## 4.2 The limits to EU legal supremacy in the UK

Similar to Germany the legal position in the UK has always been that EU law has supremacy because the UK Parliament has enabled that to be the case.<sup>120 121</sup> As a result there are some limits to the legal supremacy of the EU in the UK, despite the acceptance in principle and practice of EU legal supremacy by Parliament and the courts. While on the face of it this seems something of a paradox, the 'limits' are full of holes and can be described optimistically as 'marginal' at best.

### 4.2.1 The traditional limits to EU power in the UK

The first limit, in the final analysis, is the one constitutional freedom that EU law cannot yet overrule, Parliament can repeal the ECA 1972. Short of repeal however, the other 'limits' are to varying degrees weak. Crucially none of these traditional limits can be used retrospectively against the EU's accumulated power and its substantial body of EU law.

The second constitutional limit of sorts, at least in theory, is to be found in the fact that the UK is (or rather was until it joined the EU) primarily a dualist constitution. Being a dualist constitutional system is the logical 'flip-side' to having a sovereign Parliament. In a dualist system, in order for an international treaty to have domestic effect and bind UK courts and citizens, it has to be agreed by Parliament and passed into the domestic body of law. Being a predominantly dualist country, each new treaty since the original Treaty of Rome has therefore had to be assented to by Parliament. This might be seen as a much more crude version of Germany's rather weak 'democratic' test, invented by its Constitutional Court. The comparison is a crude one however. Passing a treaty is not necessarily the same as agreeing to every subsequent measure implemented under the terms of that treaty. Which, under the EU Treaties, tends to be the case, as they have proven again and again, they are essentially a 'blank cheque' for the EU institutions to accrete more authority. As described in section 2.3, this is in part because the treaties are vague, offering a good deal of leeway to the EU's institutions to expand their authority within the terms of the drafting. As has been described in section 2, integration has gone much further than taking advantage of vague wording in the Treaties. Neither unreasonable interpretations of the Treaties, nor the complete absence of authorisation or indeed explicit prohibitions in the Treaties have stopped the EU's institutions and the CJEU in particular extending their powers. The CJEU is perhaps the exemplar in both these practices.<sup>122 123 124</sup> Therefore, it is a considerable stretch to say the least, to

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120 Domestic law has always been clear. EU law has authority in the UK because of the European Communities Act 1972. This position was reiterated in *Thoburn v Sunderland City Council* [2002] and re-affirmed more recently in statute in s18 of the European Union Act 2011. Therefore, conceptually at least, the UK domestic law takes a similar view to the German Constitutional Court about the way EU law has effect in the UK.

121 This was set out in s18 of the European Union Act 2011 (Sovereignty Act). Section 18 merely re-asserted the position in law as expressed in cases like *Thoburn*. S18 of the European Union Act 2011 states that: '*Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act*'. Source: <http://www.legislation.gov.uk/ukpga/2011/12/contents>

122 This is a phrase used by the CJEU in the case: *Case 4-73 J. Nold, Kohlen - und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491. The case was another example of an opportunity for the EU to expand its authority over civil liberties/ human rights issues up to that point dealt with by domestic courts, Member State parliaments or separate international treaties such as the European Convention on Human Rights. It is a very clear example of how the CJEU does not feel constrained by the lack of a clear basis in the Treaties on which to make judgements that are also 'power grabs'. In *Nold* it took 'inspiration' from what the court believed were long-standing principles underpinning Member State constitutions. In its judgement it claimed that: '*...the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised... by... those States*'. Source: *Case 4-73 J. Nold, Kohlen - und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491.

123 Alec Stone-Sweet in his book '*The Judicial Construction of Europe*' highlights how in three policy areas, free movement of goods, sex equality and environmental protection, the CJEU has extended the ambit of EU law beyond that originally envisaged by the authors of the Treaties. Source: Stone Sweet, A (2004). '*The Judicial Construction of Europe*', Pgs 109-234.

124 As has been described in section 2, the vagueness of the Treaties has worked in tandem with the CJEU's 'policy based' approach to decision-making (a 'policy' of furthering integration) and a willingness to baselessly utilise pre-ambles and appeals to the '*...constitutional traditions common to Member States...*' as grounds for widening the competence of the EU's institutions. Source: *Case 4-73 J. Nold, Kohlen - und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491.

claim that because each new treaty or treaty revision has been voted upon by Parliament that that vote legitimises the dynamics of integration and raft of detailed legislative measures which occur after the new treaty is implemented. Any claim to a democratic mandate is even more tenuous because rarely do the political parties put before the people in the General Election their intention to negotiate and agree a particular Treaty.<sup>125</sup> Further, new EU agreements get whipped through by Governments, often without a full understanding of their implications by the MPs who passed them raising additional questions about the legitimacy of such votes. This was certainly the case in relation to the original Treaty of Rome and its passage into UK law through the ECA 1972<sup>126</sup>

These so-called 'political realities' around agreeing and passing into domestic law new EU Treaties should shock and depress anyone who considers it important that legislators are elected to uphold the freedoms and rights of the citizens of the country.

EU Treaties stand in contrast to normal international treaties. The latter tend to be focussed on dealing with a specific issue, therefore are on the whole narrowly drafted and finite. It is much clearer as to what a country is acceding to. Consequently, there are fewer questions to be asked about whether Parliamentarians know what they are consenting to at the time.

In no reasonable sense therefore can the passing of an EU Treaty by Parliament be considered, by any fair-minded democrat, a legitimisation of all that is done at a later date, in the name of that Treaty, by the EU and UK Government.

#### 4.2.2 The European Union Act 2011

More recently, the UK's constitutional position has become more nuanced with the passage of the European Union Act 2011. As a result, some types of future expansions of the EU's power through new treaty changes will face a more directly 'democratic' check. Some will not. Notably the UK's position has not become more 'democratic' in relation to past accretions of authority by the EU nor in relation to the specific and vitally important issue of the power and the position of the CJEU as 'master of the Treaties'.

The European Union Act 2011 created a number of 'safeguards' to ensure that further transfers of competences to the EU were only done with either:

- A referendum;
- An Act of Parliament; or
- An authorising motion in Parliament.

The type of approval or legitimising mechanism depends on what the nature of the transfer of competency

The rules set by the Act are not straight forward. What on the face of it might seem like a strengthening of the 'democratic' hurdles, and something akin to Germany's 'democratic' test, the Act contains

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125 In their 2005 manifesto the Labour Party promised a referendum on the EU's then Constitution: 'We will put it...[the Constitutional Treaty]...to the British people in a referendum...'. Source: Labour Party (2005). 'Britain Forward Not Back', can be accessed at: <http://ucrel.lancs.ac.uk/wmatrix/tutorial/labour%20manifesto%202005.pdf>

This promise was never delivered. The manifesto said nothing about agreeing to the Lisbon Treaty. Either the Labour Party leadership did not have the mandate to agree the Lisbon Treaty from the public because it was not in their 2005 election manifesto, or they had some legitimacy from the public for the Lisbon Treaty but only because it was almost identical to the EU Constitution, in which case they misled the public because they promised a referendum on the Lisbon Treaty and did not give the public one. In which case consent to the Lisbon Treaty was only possible on the basis of a referendum. Which never materialised, denuding the agreement to the Lisbon Treaty of any legitimacy.

126 As the legal academic Danny Nicol points out, few Parliamentarians during the passage of the ECA 1972 realised that they were passing a law that would result in a significant increase in the power of courts over Parliament and a consequent undermining of the sovereignty of Parliament across a wide range of areas. Nicol writes: 'All in all, there was little interest in the ECJ and very little realization by parliamentarians that they were voting for a fundamental change in the constitutional relationship between Parliament and the...courts'. Source: Nicol, D (2001). 'EU Membership and the Judicialization of British Politics', pg 116. This suggests that many Parliamentarians, when voting in favour of EU Treaties are often not fully aware of the full range of powers the EU will acquire, as a result of the Treaty they are voting on and are poor at understanding the consequences for the UK of EU Treaties.

a number of qualifications.<sup>127</sup> To exercise some of the 'democratic' checks in the Act judgments are required about the extent to which a future Treaty change takes powers from the UK or not and how 'significant' the impact on the UK a Treaty change might be.

The ineffectiveness of the Act has already been illustrated. The Act did not stop the EU resuming control over important aspects of the UK's criminal justice policy, when the Coalition Government opted back-into 35 EU Justice and Home Affairs measures towards the end of the last Parliament.<sup>128</sup> The Act only required a mere 'motion' in Parliament to surrender powers over this vital area of policy. Further, there was no scope for voting individually on particular measures. It was a 'package' motion. Further reducing its democratic legitimacy.

There are two glaring gaps in the Act which, if 'plugged', would result in a much more robust and genuine upholding of the constitution i.e. the sovereignty of Parliament. The gaps are:

- A power to alter the current balance of competences so that Parliament could take back control over policy issues; and
- The authority to reverse the existing accumulated jurisprudence of the CJEU. These 'gaps' could be plugged by introduction of usable mechanisms for:

#### 4.2.3 Recent judicial intervention

In addition to the available ways of 'checking' the extension of EU authority, the UK judiciary has also been getting in on the act. They have recently suggested that they too should hold powers of 'review and reservation' to the German Constitutional Court vis-à-vis EU law:

- In a recent case, *HS2*,<sup>129</sup> the UK Supreme Court suggested that in a choice between an EU Directive brought into effect by the ECA 1972 and the UK constitutional principle that the proceedings of Parliament should not be '...impeached or questioned... Under Article 9 of the Bill of Rights 1689' then the latter should hold sway.<sup>130</sup> The Supreme Court highlighted that the proceedings of Parliament remained a domestic constitutional issue and statutes such as the Bill of Rights 1689 could not be impliedly repealed by laws given effect through the ECA 1972. This might be seen as prima facie evidence of the UK courts moving towards a role of policing where and when EU law might have reached its limit.<sup>131</sup> This, it might be argued, resembles the ultra vires element of the German Constitutional Court's 'right of review and reservation'. However, this instance should be seen in context. The point raised was niche, related as it was to obscure Parliamentary process not, for example, more constitutionally existential issues such as policy competence, the existing accumulated jurisprudence of the CEJU or the final authority over the interpretation of EU law. In fact, the suggestion is that this 'check' relates to the implied repeal of domestic constitutional statutes. Consequently, it appears to be a confirmation along with some clarification (albeit useful) of the principle set out in *Thoburn v Sunderland City Council* i.e. that later laws which clash with a small number of domestic 'constitutional' statutes, in order to amend or supersede those 'constitutional statutes', need to be clear that they are doing so.

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127 S's 2,3,4 and 6 of the Act set out the areas where a Government should call a referendum to get democratic consent for future changes in EU competences. These include new Treaties or Treaty revisions, amendments to the TEU using the 'simplified procedure' etc. In s2 and 4 of the Act the need for a referendum is subject to the rather vague 'exemption' criteria i.e. if the revision to the Treaties for example, is judged such that no powers are transferred from the UK there is no need for there to be a referendum. S3 (changes to the TFEU using the 'simplified procedure') is subject to a 'significance' test e.g. only where change is 'significant' to the UK will there be a referendum. S6 lists a set of changes that would automatically trigger a referendum. S7 sets out those areas where only an Act of Parliament is required for the UK to agree a change to EU rules. S8 sets out that exercising Article 352 powers (the so-called 'flexibility' clause) of the Treaties only requires a Parliamentary 'motion' to be passed for the UK Government to agree to its use. S9 similarly only requires a 'motion' to be passed in order for a Government to opt-into Justice and Home Affairs measures, except the European Public Prosecutor, where a referendum is required. Source: <http://www.legislation.gov.uk/ukpga/2011/12/contents>

128 HM Government (2013). 'Decision pursuant to Article 10 of Protocol 36 to the Treaty of the Functioning of the European Union', can be accessed at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235912/8671.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf)

129 *R (Buckinghamshire County Council) v Secretary of State for Transport and linked appeals* [2014] UKSC 3, [2014] 1 WLR 324.

130 Hale, LJ (2015). 'The Supreme Court in the United Kingdom Constitution: lecture to St Andrews University', pgs 20-21, can be accessed at: <http://ilcr.wp.st-andrews.ac.uk/files/2015/10/Baroness-Hale-Opening-Lecture.pdf>

131 In *Wunsche Handelsgesellschaft* [1987] it was the fact that the EU had developed a doctrine of protecting fundamental rights (not an authority given in the Treaties) that enabled the German court to say it would no longer reserve the right to monitor EU measures for violations of 'fundamental rights'. There is a question therefore, whether there is anything in this area for the UK to move towards.

- In a more recent case: *Pham* [2015] Lord Mance, the Supreme Court Judge, made more explicit the implication in *HS2*, when he stated that it is the domestic courts' role to 'patrol' the borders of the Treaties and ensure that the EU institutions do not over-step their competences as set out in the treaties.<sup>132 133</sup> This would appear to be confirmation that the UK courts have something akin to an ultra vires power like the German Constitutional Court. Like the German court it could be argued that it is a weak brake on the exercise of 'Autonomy' (one of the four elements that constitute legal supremacy – see section 2.1) by the EU in general and the CJEU in particular. Similar to the German case, its use is likely to be very, very rare.<sup>134</sup> Which is likely code for 'never'. Not least for the reason that it is difficult to see in relation to what it might be used. All the key elements for the supremacy of EU law are in place and have been in place for some time and are fully accepted by Parliament and the courts. The 'power' is unlikely to be used retrospectively e.g. to unpick the CJEU's previous activism. Indeed, the acceptance of supremacy and the principle of precedent in domestic courts means that the previous activism of the CJEU is not going to be unpicked. The Treaties remain vague and offer considerable licence to the EU institutions. The CJEU remains ensconced in its privileged position as 'master of the Treaties' with all the autonomy that brings.

Despite the handful of relatively weak 'legal checks' to the supremacy of EU law described above, the fundamental position of EU law within the UK constitutional order as described by Lord Justices Hope, Bridge, Hoffman and Denning and Professor Feldman in section 4.1 remains true. In the end Parliament and the UK courts remain subservient to the EU, its law and its supreme court – the CJEU. There is no prospect of reversing any or all of the body of CJEU case law. Nor is there any likelihood of the balance of policy competences between the EU and UK changing in the UK's favour. Among the so-called 'checks' described, it is only repeal of the ECA 1972 that can over-turn the supremacy of EU law, safeguard the constitution and restore the core British constitutional freedom of the sovereignty of Parliament. Arguably there may be a little extra grey around the edges.

### 4.3 A PR exercise of little substance

Section 4.2. has outlined how the UK does have some weak limitations on EU authority at the margins, while the UK remains a member of the EU. To a degree, it can be argued they resemble some of the those that exist in Germany:

- The ultra vires test can be seen as being reflected in the *HS2* and *Pham* case law which suggest domestic courts to 'review' EU measures which may be thought to have reasonably gone beyond the competences of the EU as set-out in the Treaties; and  
Something akin to the 'democratic authority' test/'identity review' can be identified in the European Union Act 2011, which offers opportunities for some future transfers of powers to be blocked through referendums or votes in Parliament.

What the UK has are a handful of weak protections, short of leaving the EU, which do not go anywhere near far enough to safeguard the constitution of the UK or ensure the central constitutional freedom of the UK: the sovereignty of Parliament and in turn the democratic rights of the people, which are the legitimate source of that constitution and sovereignty.<sup>135</sup>

What they might offer to Cameron however, is a façade of 'checks' with which to claim that the British

132 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

133 '*...a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.*' Source: *Barczentewicz, M (2015). 'Judicial Power, the UK and the EU', can be accessed at: <http://judicialpowerproject.org.uk/judicial-power-the-eu-and-the-uk/>*

134 Legal scholar *Mikolaj Barczentewicz*, in a blog about recent case law regarding the EU and the limits of the Treaties, describes how, in the same *Pham* judgment, Lord Mance qualified the use of such a power: '*Lord Mance adds that such situations are likely to be very rare...*' Source: *Barczentewicz, M (2015). 'Judicial Power, the UK and the EU', can be accessed at: <http://judicialpowerproject.org.uk/judicial-power-the-eu-and-the-uk/>*

135 As Dicey described: '*...if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i.e. of the electoral body, or of the nation...[and]...the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation...*' Source: *Dicey A V (1915). 'An Introduction to the Study of the Law of the Constitution', can be accessed at: <http://oll.libertyfund.org/titles/dicey-introduction-to-the-study-of-the-law-of-the-constitution-lf-ed>*

constitution has been and can be safeguarded and its essential constitutional freedoms protected. Cameron may look, for example, at putting the common law protections outlined above into statute law as part of some sort of 'Sovereignty Bill'.

The strongest evidence for the vacuity of Cameron's potential proposal, can be found in the fact that the so-called re-negotiation (see Annex I for more detail) has shown quite clearly that he is not going to challenge any of the key tenets of EU law. Yet, in order to achieve the objectives Cameron has set himself: the upholding of the UK's constitution and sovereignty and the protection of essential constitutional freedoms – he would need to do just that to restore the constitution, sovereignty and essential freedoms that Coke, Blackstone and Dicey described. An attempt at such a restoration i.e. a re-ordering of the constitutional position of EU law would require the UK courts to no longer follow the principles and case law established by the CJEU. A constitutional change along such lines would no doubt be challenged in the courts as a breach of EU law. The question would inevitably be passed, through a preliminary ruling request, to the CJEU. The latter would no doubt assert their legal doctrine of supremacy. The UK courts would then, paradoxically, be bound to say that Parliament's assertion was unlawful.<sup>136</sup> As was evidenced in *Factortame* the UK courts are no longer shy about injuncting primary UK legislation that runs counter to EU legal principles. If the courts did uphold a rejection of the EU's supremacy, the UK would be in breach of its Treaty obligations. As such, it would be liable to legal action by the Commission. In the final analysis, if the breach persisted the UK would have to leave the EU, having rejected the EU's most fundamental tenet – the supremacy of its law. The fact that this would be almost inevitable, unless the rules of the EU changed dramatically, means that the type of reform that would achieve Cameron's self-confessed aims will not be what is proposed, if indeed any are forthcoming at all, in the end.

## 5. Conclusion

The Prime Minister David Cameron suggested in a speech to Chatham House in late 2015 that as an accompaniment to his re-negotiation package he would like to introduce reforms which '*...uphold... [the]... constitution and sovereignty*' and which protect the '*...essential constitutional freedoms...*' of the UK.<sup>137</sup>

This paper has attempted to show that this domestic part of his EU reform agenda is, like his re-negotiation, likely to be a damp squib, achieve very little of substance and fall short of his own stated ambitions for the policy. In reality, raising the possibility of domestic legal reforms to uphold the constitution, sovereignty and protect essential constitutional freedoms is marketing and political spin, nothing more substantive than that. Empty domestic reform does however, nicely complement the vacuity of the claim that Cameron has achieved reform in the EU.

Before identifying why Cameron's reforms are likely to be nothing more than rhetoric and PR, it is important to understand the roots of the issue: the supremacy of EU law. Therefore, in section 2, the paper gives a brief overview of how EU legal supremacy was established and consolidated and the central role of the CJEU in that process.

In a series of cases (with more detail given in Annex II about some of the most salient ones) the CJEU has 'constitutionalised' the Treaties. This has involved driving forward with a revolutionary legal doctrine, which has denuded the Member States of large amounts of their political and legal autonomy and subjugated them to a new system of supreme law. This supremacy of EU law has been achieved (in large part) without a basis in the Treaties or by utilising very tenuous interpretations of the Treaties.

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<sup>136</sup> As scholar Danny Nicol has written: '[Professor David] Feldman... provides the more likely prediction of what would happen in the event of express Parliamentary defiance of an EU rule, especially in view of inevitable making of a preliminary reference to the ECJ on the matter, which would undoubtedly reiterate its position that EU law prevails over any national law 'however framed'... We can therefore largely discount the idea of wide-ranging British defiance of EU law whilst remaining a member'. Source: Nicol, D (2010). 'The Constitutional Protection of Capitalism', pgs 93-94.

<sup>137</sup> Cameron, D (2015). 'Prime Minister's speech on Europe', given at Chatham House, London, can be accessed at: <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe>



In some cases, such as *Pringle v Ireland* [2012], it has been done by disregarding quite clear prohibitions in the Treaties.

The CJEU has been able to achieve its 'mastery of the Treaties' because of the symbiotic relationship between its 'protected' position of 'trustee-ship' within the EU's institutional set-up, the nature of the Treaties and the system of law on which they are based, both the collusion and acquiescence of Member State Governments over the decades, the buy-in by key domestic institutions (e.g. the courts) to the CJEU's authority and doctrines and the utilisation of EU law by litigants, legal professionals and lobby groups pursuing their sectional interests and sometimes pro-EU ideological ends.

Cameron suggested in his Chatham House speech that the German model, which supposedly protects Germany's constitution, sovereignty and essential constitutional freedoms, offered a system for the UK to follow. In section 3 therefore, this paper examined the German model and its robustness in defending the constitution, sovereignty and essential constitutional freedoms of the German people and parliament. The model consists of a 'right of review and reservation' over EU law, asserted across a number of cases by the German Constitutional Court. It has three elements or components:

- Fundamental rights protections;
- An ultra vires test; and
- A 'democracy' test otherwise called an 'identity review'.

Despite, *prima facie*, the 'right of review and reservation' looking potentially like a series of substantive protections, on closer inspection of how they have worked in practice, the epitaph given to the German court by scholar J H H Weiler appears very apt. It is '*the dog that barks, but never bites*'. Essentially the protections supposedly erected by the German Constitutional Court have been largely window dressing. Consequently, the clear implication of emulating the German model is that the UK would get a system that upheld very little indeed. EU law would continue to reign supreme.

Understanding the German model and its ineffectiveness is only part of understanding why what Cameron is suggesting is some rather shabby window dressing, which will not genuinely protect the British constitution and uphold essential constitutional freedoms. Section 4 illustrated further reasons for believing that Cameron's reforms are merely 'spin'.

Protecting the UK constitution, sovereignty and upholding fundamental freedoms would require, under any reasonable understanding of the UK's constitution and the meaning of those terms in the British context, that Parliament and the underlying authority of the electorate, along with the traditional balance between courts and legislature be restored to the position described by Dicey et al. Yet, this seems highly unlikely to happen with Cameron's reforms.

The UK's constitutional position, fully accepted and internalised by Parliament, the courts and wider Governmental institutions, is as EU membership requires, that EU law is supreme. Currently, there appears to be little room for returning to a Dicey-an constitutional position.

The UK has some existing constitutional limitations on EU law, albeit weak ones, in both statute and common law. These have some resemblance to the German model.<sup>138</sup> Therefore another reason for believing that Cameron's so-called domestic reforms are just 'spin' is that any set of measures which supposedly emulate the 'German model' would likely be a re-hash of the existing law.

However, the current common and statute law 'checks' on EU law do very little to protect the UK including having no ability to reduce or over-turn the stock of powers currently exercised by the EU or the accumulated jurisprudence of the CJEU.

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<sup>138</sup> Some might argue that the so-called UK similarities are not that 'similar' because there is no protection for 'fundamental rights' in cases where the EU may breach them, as there is in the German model. This is not the case. The German Constitutional Court said in its *Wunsche Handelsgesellschaft* [1987] ruling that it would no longer have a role in guarding against breaches of fundamental rights by the EU as it was considered that the EU now offered sufficient protection of such rights. Therefore, there is in effect no such protection in Germany while the EU claims to protect 'fundamental rights', as it has done since *Case C-29/69 Stauder* [1969]. The UK has some protection for fundamental rights through its incorporation of the European Convention on Human Rights into domestic law through the Human Rights Act 1998. There is however, no fundamental rights protections embedded in a domestic constitutional document that is superior to Parliament. In Germany the Basic Law is that document.

Serious reform, which did protect the constitution, sovereignty and uphold essential constitutional freedoms would have to grasp the nettle of EU legal supremacy and likely leave the UK in breach of EU law and subject to legal action by the EU. It is clear that this is not part of Cameron's plans, thus providing further reasons to believe that Cameron is not serious about his own stated aims.

It is for the above reasons that observers can be certain that the Prime Minister does not intend to bring forward effective domestic legal reforms that will achieve the aims of: protecting the UK's constitution, sovereignty and upholding essential constitutional freedoms. And that any proposals that do come forward are likely to be nothing but a smokescreen, while real authority and power remains where it currently is, in the institutions of the EU.

For speculative purposes, it is interesting to muse over what might a genuine set of policies that truly attempted to uphold the UK's constitution and sovereignty and protect essential constitutional freedoms look like. It would have to, at a minimum, include reforms along the following lines:

- Empower the domestic courts to become defenders of the UK's democracy, through:<sup>139</sup>
  - Giving the courts the authority to routinely disagree with and challenge the decisions of the CJEU, especially where they are contentious and prevent the CJEU being the final arbiter of the extent of their own authority within the UK's jurisdiction, Preliminary references would be advisory only and not binding. Together these would dilute the 'Primacy' element of EU legal supremacy and tackle the 'Autonomy' element of supremacy;
  - Reduce the obligation on the domestic courts to contort domestic laws to fit EU laws, including removing the obligation to disregard UK laws where they contradict EU law to deal, in-part, with the 'Pre-emption' and 'Fidelity' aspects of the supremacy doctrine;
- Allow the courts and Parliament to prohibit or limit the exercise – by the EU – of broad Treaty powers such as those in areas of 'shared competence', thereby further neutering the doctrine of 'the occupied field' i.e. the 'Pre-emption' element of supremacy, in the UK. Competence
- Oblige Parliament to legislate to ensure that not only will it not automatically accept new EU laws and CJEU judgments but that it considers all previous laws and CJEU jurisprudence as contingent on continuing consent by Parliament. In other words, all EU law is advisory only, until specifically passed into domestic law. Further, all EU law would be subject to normal constitutional rules relating to amend-ability and repeal-ability through future Acts of Parliament;
- Pass legislation setting out a list of key policy areas that will never be subject to EU law i.e. a reserve set of powers.

Implementing any, never mind all, of the above suggestions would be a direct challenge to the supremacy and coherence of the corpus of EU law. There is zero chance of Cameron coming forward with anything remotely as radical as that described above. It would be the starting gun for the UK leaving the EU.

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<sup>139</sup> See Table 1 in Annex II for a list of most of the main cases, which have established EU legal supremacy and propelled forward EU integration. These could and would be need to be challenged by UK courts.

# Annex I: The Cameron renegotiation

This Annex sets out some of the reasons why Cameron's so-called deal establishing a new 'special position' for the UK within the EU in fact changes very little and is more PR than reality.<sup>140 141</sup> The pattern is similar in many ways to the expected domestic reforms, which Cameron has suggested he may propose in relation to the issue of legal supremacy and sovereignty. The Prime Minister has claimed changes can be made that will make a difference to the supremacy of EU law. However, this is nothing more than marketing.

In a searing indictment of the re-negotiation, Lawyers for Britain have highlighted that:

*...the summit 'deal' on 'ever closer union' and 'sovereignty' are almost totally devoid of substance. For the most part, they make no alteration of any kind to the existing legal rights and obligations of the UK but are simply reiterating the existing legal situation for purposes of political effect and not substance. Where they attempt to make a nuanced (and non-binding) interpretation of the concept of 'ever closer union', they miss the real target, do not contradict or limit any existing ECJ case law, and it is not possible to see how they would actually affect the outcome of a real case in a real situation'.<sup>142</sup>*

## Legally binding

The Government has claimed that its agreement with the other 27 Heads of Government of the EU member states is legally binding. This is at best a partial truth. There are a number of reasons to doubt the extent to which it will be binding. These include:

- The priorities of different states change, especially when new Governments are elected; and
- The agreement does not bind the EU in any way. As Lawyers for Britain state:

*'The summit "deal" is in the form of a "decision" or agreement of the heads of government of the member states meeting within the European Council... it is not a decision of the European Council itself, which includes the President of the European Commission and the President of the Council as well as the heads of government. The heads of government have no power actually to alter the treaties without going through the whole treaty amendment process, which involves ratification by each member state in accordance with its constitutional requirements. Such constitutional requirements can include referenda in some member states and the heads of government cannot bypass these requirements and amend the treaties themselves without going through the required formalities... what the heads of government can do is much more limited - they can agree on a particular "interpretation" of the treaties within the range of their possible meanings. This is what the summit claims to have done - it does not claim to have actually altered the treaties'.<sup>143</sup>*

The institutions of the EU and in particular the CJEU will be free (as it is free in every other respect) to interpret this agreement between the Member States how they see fit. Again, as Lawyers for Britain point out, there is precedent for thinking that the CJEU will be less than keen to follow it. Indeed, the existing precedents suggests that the EU will not feel obligated to follow the agreement at all. What Cameron might, at best, hope for is for the agreement to be 'considered' as part of a range of relevant

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140 The author is greatly indebted to the forensic analysis of Lawyers for Britain, which this Annex borrows heavily on.

141 A copy of the text of the re-negotiation agreement can be accessed here: <http://www.lawyersforbritain.org/files/european-council-conclusions-feb-2016.pdf>

142 LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

143 LfB (2016). 'The Re-negotiation: 'Ever Closer Union'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

factors in the deliberations of the CJEU.<sup>144</sup> As Lawyers for Britain have observed:

*'It is...clear beyond doubt that the...[CJEU]...will retain the ability to arrive at decisions which depart from the clear language of the summit deal as and when it chooses to do so.'*<sup>145</sup>

A final consequence of Cameron making this agreement among the Heads of State is, as the former Lord Chancellor and Secretary of State for Justice (and currently Leader of the House) Chris Grayling MP has pointed out, the extent to which the deal binds the Heads of States, then it also binds the UK. In the deal the UK:

*'...agreed that Britain 'shall not impede the implementation of legal acts directly linked to the functioning of the euro area'. This is a significant - and underappreciated - loss of leverage," he said... 'We now lack a key tool in preventing further EU integration - which we might be dragged along into. In fact we may be in a worse situation than we were before.'*<sup>146 147</sup>

## Ever-closer union

The phrase 'ever closer union' features in the pre-amble to both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It serves little legal purpose.<sup>148 149</sup>

The agreement states that it 'recognises' the UK is exempt from the phrase 'ever-closer union'. There is no evidence that the agreement changes the existing legal position. In fact, the agreement affirms what is already the position:

*'...all that is promised is to write into the treaty an acknowledgement of the existing legal position. There is no promise at all to make a change to the treaty, which actually changes the legal position.*

*The summit decision does not spell out the precise wording of the treaty changes which would be made (another point of weakness), and the precise wording could be important. But assuming that the wording in some way declares that the references to 'ever closer union' do not apply to the UK so that the UK is not committed to agreeing to further treaty changes which deepen political integration, the words 'ever closer union' would still remain there in the Treaty on European Union and in the preambles, still influencing the mindset of the integration-minded ECJ.'*<sup>150</sup>

*'It is hard to see how, when the ECJ comes to interpret EU legislation or treaty articles which apply to all Member States including the UK, it could put out of its mind the references to ever closer union. Certainly, there is nothing in the decision, which could possibly authorise the same piece of EU legislation being*

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144 The Edinburgh agreement, where the Heads of Government in a way similar to the recent Cameron re-negotiation, agreed that EU citizenship would not be prioritised over Member State citizenship and "...questions of citizenship would be settled 'solely by reference to the national law of the Member State concerned'. However: 'In *Case C-135/08 Rottmann* (Grand Chamber, 2 March 2010) the...[CJEU]...paid lip service to the summit decision by saying it should be 'taken into consideration', but then departed from it by holding that EU law governed the circumstances in which a person could be entitled to German citizenship because this would also affect his EU citizenship, which was now his 'fundamental' status'. As was noted by Lord Mance in the recent case of *Pham v Home Secretary* [2015] UKSC 19: '...the...[CJEU's]...decision in *Rottmann* had been taken 'in the face of the clear language' of the Edinburgh decision, as well as other declarations and indeed of the underlying treaties...'. Source: LfB (2016). 'The Re-negotiation: 'Ever Closer Union'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

145 LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

146 BBC (2016). 'Chris Grayling says Cameron's EU deal 'may make things worse'', can be accessed at: <http://www.bbc.co.uk/news/uk-politics-eu-referendum-35771805>

147 'In 2011, David Cameron vetoed the proposed Eurozone Treaty on Fiscal Union, because it failed to resolve the relationship between the Eurozone 'ins' and the Eurozone 'outs'. Nothing has changed since then. But in February, the UK agreed the following text: 'Member States whose currency is not the euro shall not impede the implementation of legal acts directly linked to the functioning of the euro area and shall refrain from measures which could jeopardise the attainment of the objectives of economic and monetary union'. Source: Jenkin, B (2016). 'Why Brexit would be good for the UK', can be accessed at: <http://ukandeu.ac.uk/why-brexite-would-be-good-for-the-uk/>

148 It would therefore not be possible, for example, for the UK to be hauled before the European Court (CJEU) for having breached a Treaty obligation to work towards 'ever closer union'. Source: LfB (2016). 'The Re-negotiation: 'Ever Closer Union'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

149 'Ever closer union' is dealt with in Section C, paragraph 1, page 16 of the agreement. Source: LfB (2016). 'The Re-negotiation: 'Ever Closer Union'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

150 LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

*given two different meanings, a narrower one for the UK and a wider one for all other Member States.*<sup>151</sup>

At best the agreement appears capable of 'being taken into account' by the EU's institutions. There is no clear commitment to a plan or timetable for changing the Treaties to bring any Treaty change into effect.

Further, by focussing on an exemption to 'ever-closer union' the agreement fails to understand how the phrase 'ever-closer union' has been used by the CJEU. It has rarely been used as a basis for legal judgments and certainly not the most significant 'integrationist' decisions. Rather, it is:

*'...a concept which operates at a very deep level in supporting its conception of the nature of European Union law. It is not used as a crude tool to extend the scope of individual Treaty articles or regulations or directives, or to extend EU competences or powers of the EU institutions.'*<sup>152</sup>

Lawyers for Britain could not find any example of a case using the phrase as the basis of a judgment or for promoting integration. As they noted in their analysis of the agreement, even in the foundational case *Van Gend en Loos* [1963], which did use the preamble to the then Treaty of Rome to help establish the principle of direct effect, the CJEU referred to the fact that the Treaty referred to the 'peoples of Europe'. This enabled the CJEU to claim that provisions in the Treaty could apply and bind individuals and organisations directly and not just Governments i.e. go 'behind-the-border'.<sup>153</sup> Curiously, this somewhat undercuts the Prime Minister's claim in his Bloomberg speech that 'ever-closer union' has been:

*'...consistently interpreted as applying not to the peoples but rather to the states and institutions compounded by a European Court of Justice that has consistently supported greater centralisation.'*<sup>154</sup>

In other words, with regards to 'ever closer union', the agreement is '...knocking down an Aunt Sally'.<sup>155</sup>

## **The 'Red Card' proposal**

The proposed 'red card' system is so feeble that it is barely worth describing in any detail. Lawyers for Britain describe it as '*...pure window-dressing, and has no actual content, which makes a difference in the real world.*'<sup>156</sup>

The agreement states that:

*'...the Council of Ministers will cease consideration of draft EU legislative acts when parliaments representing a 55% weighted vote of Member States send in a 'reasoned opinion' stating that the proposed measure breaches the principle of 'subsidiarity'.*<sup>157</sup>

The problems with this proposal are numerous:

- There is no right of veto over any legislation but merely a mechanism for creating grounds on which an objection to a draft legislative proposal can be raised. These cannot be raised because '... the EU has gone too far or that the measures are unnecessary, stupid or damaging: it is limited to

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151 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

152 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

153 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

154 Cameron, D (2013). *Prime Minister David Cameron discussed the future of the European Union at Bloomberg*, can be accessed at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>

155 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

156 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

157 LfB (2016). *The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal''*, can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

the narrow... issue of whether the measure breaches the principle of 'subsidiarity'.<sup>158</sup>

- The circumstances for the exercise of the 'red card' seem remote. As Lawyers for Britain explain:  
*'In the rare case of measures which require unanimity for adoption, the UK would be able to block the measure and the UK government is obliged to block it by Parliamentary convention if the measure does not pass Parliamentary scrutiny.'*

*In the more common case where a measure is to be passed under qualified majority voting, it will only be passed in the first place if it is supported by 55% of the weighted votes of the Member States who represent 65% of the EU population. So a measure could only be passed on this hurdle, and then blocked under the proposed red card, if enough national parliaments were to 'rebel' against their governments to convert a 55% weighted vote/65% population majority into a 55% weighted vote the other way, with only 12 weeks to organise these negative opinions.*

*While national parliaments can theoretically disagree with the views of the national government, by and large national governments are supported by a working majority in the national parliament so such departures are rare. In order for the "red card" system to make a difference even in theory, it would be necessary to convert a majority in favour of a measure of 55% (or more usually much greater) of national governments into a 55% majority of national parliaments against, within the space of 12 weeks'.<sup>159</sup>*

## Other elements of the deal

Finally, Lawyers for Britain point out that the deal reiterates some other existing legal positions, which the deal has not enhanced or changed in anyway. The only plausible explanation for the inclusion of these existing positions is to give the impression of a comprehensive package of reforms. For example, it re-affirms:

- The UK has a legally binding opt-out on the Euro.<sup>160</sup>
- The UK is outside the Schengen acquis and will remain so.<sup>161</sup>
- The UK has an opt-in arrangement on a range of the Justice and Home Affairs issues and that this will remain the position.<sup>162</sup>

These, as can be seen, are already legally guaranteed in the Treaties. Therefore, this aspect of the agreement, like many of the other elements:

*'...achieve[s]... nothing: if the other Member States are willing to observe the...[current]... law they are unnecessary, and if they are willing to breach it then the mouthing of such platitudes... will not cure the situation'.<sup>163</sup>*

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158 'Subsidiarity', according to the legal scholars Gabriel Moens and John Trone, is a meaningless platitude '...as far as judicial enforcement is concerned... in the case of subsidiarity an express guarantee in the Treaties has been emptied of content by judicial interpretation'. Source: Moen G A and Trone J (2015). 'The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?', *Journal of Legislation*, Vol 41, Issue 1, pg 65.

159 LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

160 Protocol 15 of the Treaties.

161 Protocols 19 and 20 of the Treaties.

162 'Under Protocol No 21 to choose whether or not to participate in new measures under the EU's so-called 'area of freedom, security and justice' and that under the Lisbon Treaty Protocol No 36, it has chosen to opt out of a number of such measures'. Source: LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

163 LfB (2016). 'The Re-negotiation: 'Ever Closer Union' and 'The Renegotiation - the weak legal status of the summit 'deal'', can be accessed at: <http://www.lawyersforbritain.org/renegotiation.shtml>

# Annex II: key CJEU case law establishing and consolidating supremacy of EU law

This Annex gives an overview of some of the most seminal CJEU cases, which have played a vital role in establishing and consolidating in place the supremacy of EU law and in turn confirms the supranational, rather than the international, status of the EU.

The table sets out:

- The name of the case.
- The legal principle(s) that case established
- Which of the four elements, that are required to be in place for there to be complete supremacy of EU law (see section 2.1), the particular case is an example of/ set the precedent for.

Case	Legal principle established	Element of supremacy
Case C-26/62 Van Gen den Loos v Nederlandse Administratie der Belastingen [1963] ECR I	Established the principle of direct effect of EU Treaty provisions i.e. they created rights and obligations that individuals and organisations within the Member States are bound by and which they could use and rely upon.	Autonomy
Case C-6/64 Costa v ENEL [1964] ECR 585	The primacy of EU law over Member State law.	Primacy
Case C-29/69 Stauder v City of Ulm [1969] ECR 419.	The CJEU would interpret EU law in light of fundamental rights i.e. EU measures could not 'prejudice' fundamental rights.	Autonomy
Case 11/70 Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide un Futtermittel [1970] ECR 1125	National law, even the constitutional law of Member States, cannot override EU law.	Primacy, Autonomy, Pre-emption
Case 43/71 Politi s.a.s v Ministry of Finance of the Italian Republic [1971]	Regulations have direct effect and create individual justiciable rights, which national courts have to protect.	Autonomy and Fidelity
Case 41/74 von Duyn v Home office [1974] ECR 1337	Established that some Directives could be directly effective, similar to Regulations and Treaty rights. This was in direct contradiction to the established view at the time, which was that because Directives required implementation by the Member States they were not directly effective. Member States required to adapt national laws to give effect to EU Directives, even if the Member State has failed to implement the Directive properly. <sup>1</sup>	Primacy and Autonomy
Case-3/76 Kramer [1976] ECR 1279	Set out that where EU competence was 'exclusive' the <i>'...taking of measures by the Community deprives national authorities of their powers to act independently'</i> <sup>2</sup>	Autonomy and Pre-emption
Case C-43/75 Defrenne v Sabena [1976] ECR 455	'Horizontal' and 'Vertical Direct Effect' of Treaty provisions. These principles allow the provisions in the Treaties to be used in national courts by litigants against both Member State Governments and other private individuals and organisations.	Autonomy and Primacy
Case 92/78 Simmenthal v Commission [1978] ECR 629	National courts required to dis-apply domestic legislation when there is a conflict with EU law, whether that relevant law was passed before or after the relevant EU legislation.	Primacy and Fidelity

1 Story, T and Turner, C (2011). 'Unlocking EU Law: 3rd Edition', pg 140-141.

2 Stone Sweet, A (2004). 'The Judicial Construction of Europe', pg 69.

Case C-14/83 Von Colson and Kamann v Land Nordrhein-westfalen [1984] ECR 1891	Established the general duty to give effect to EU rules and so to interpret national laws in line with EU law in order to give effect to EU law, even where that law was not a directly effective measure, such as a Directive. A Member State <i>'...is bound to do so in every way possible in the light of the text and the aims of the directive to achieve the results envisaged by it'</i> . <sup>3</sup>	Pre-emption and Fidelity
Case C-294/83 Parti Ecologist 'Les Vert' v European Parliament [1986]	Neither Members States nor Member State institutions can avoid reviewing measures they may have implemented in order to ensure they are consistent with the 'constitutional charter' i.e. the Treaty of Rome.	Autonomy and Primacy
C-213/89 Factortame I [1990] ECR I-2433	Duty on national courts to secure the full effectiveness of EU law. This may require the creation of a legal remedy in domestic law where none existed at the time in domestic law.	Pre-emption and Fidelity
Cases C-6 and 9/90 Francovich and Bonifaci v Republic of Italy [1991] ECR I-5357	Established the principle of state liability. The state will have to compensate any individual who suffers as a result of a failure to implement a Directive either at all or improperly.	Primacy and Pre-emption
Case C-106/89 Marsealing SA v La Comercial Internacional de Alimentacion SA [1992] 1 CMLR 305	Where the Member State had not legislated to introduce the requirements of a particular Directive, a party could still rely on the content of the Directive. This principle was to apply to any national law, even those not introduced to give effect to EU law. <sup>4</sup>	Primacy and Pre-emption
Case C-114/44 Mangold [2005] ECR I-9981	Fundamental rights upheld by the EU can be relied upon in legal disputes between private parties i.e. they 'horizontal direct effect'.	Primacy and Autonomy
Case C-176/03 Commission of the European Communities v Council of the European Union [2005] ECR I-7879	In 2005 criminal measures were not a competence of the European Community i.e. the First Pillar of the three pillar structure that constituted the European Union and Community prior to the Lisbon Treaty. They were inter-governmental i.e. Third Pillar. Despite this, the CJEU decided that the European Community could in-fact, at least in relation to environmental issues, should have competency over criminal law issues.	Autonomy and Primacy
Case C-266/03 Commission v Luxembourg [2005] ECR I-4805.	Member States are under a duty to refrain from measures which undermine an EU objective. This applies both to internal measures as well as external activities i.e. international treaties.	Fidelity
Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351	Primacy of EU law (i.e. the Treaties) over international law. In Kadi the CJEU: <i>'...considered the general principles of Community law hierarchically superior to international legal rules, denounced the unquestionable overriding authority of the UN Charter and UN Security Council Resolutions, and discarded the convoluted and double-hearted approach the CFI had earlier adhered to. In so doing, it daringly went where no national or international court has gone before...and underscored the unprecedented nature of European law once and for all'</i> . <sup>5</sup>	Primacy and Autonomy

- 3 Story, T and Turner, C (2011). 'Unlocking EU Law: 3rd Edition', pg 145.  
Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135. Source: Chalmers, D et al (2011). 'European Union Law: 2nd Edition', pub: Cambridge University Press, Cambridge, pg 296.  
Case C-334/92 Wagner-Miret v Fondo de Garantia Salarial [1993] I-16911. Source D Chalmers, G Davies and G Monti, 'European Union Law: 2nd Edition', pub: Cambridge University Press, Cambridge, 2011, pp 296-297.
- 4 Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 and Case C-334/92 Wagner-Miret v Fondo de Garantia Salarial [1993] I-16911. Source: Chalmers, D et al (2011). 'European Union Law: 2nd Edition', pub: Cambridge University Press, Cambridge, pg 296-297.
- 5 de Waele, H (2010). 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', Hanse Law Review, Vol 6, No 1, pgs 8-9.



<p>Case C-370/12 Pringle v Government of Ireland [2012]</p>	<p>The CJEU decided that the European Stability Mechanism (ESM) Treaty was an economic policy instrument and not a monetary policy instrument. According to the CJEU, the ESM Treaty did not involve Eurozone members taking on the debts of other Eurozone members, consequently '<i>...the ESM did not violate the so-called 'no bail-out' clause (Article 125 TFEU) of the EU Treaties</i>'.<sup>6</sup></p> <p>However: '<i>...the Court's interpretation is impossible to square with the literal meaning of Article 125 which states that neither the Union nor a member state should 'be liable for or assume...the commitments...of another Member State.'</i> Remarkably, the ECJ ruled that this prohibition was not intended to stop loans or financial guarantees to member states in trouble, on the grounds that this would be technically distinct from 'assuming' their debts'.<sup>7</sup></p>	<p>Autonomy</p>
<p>Case C-399/11 Stefano Melloni v Ministerio Fiscal [2013]</p>	<p>Re-asserted that EU law takes precedence over Member State constitutions, including human rights provisions.</p>	<p>Primacy, Autonomy and Fidelity</p>

6 Beck, G (No date given). 'ECJ legal rulings designed to help the Eurozone are threatening the accountability of European governance', can be accessed at: <http://blogs.lse.ac.uk/europpblog/2014/12/10/ecj-legal-rulings-designed-to-help-the-eurozone-are-threatening-the-accountability-of-european-governance/>

7 Beck, G (No date given). 'ECJ legal rulings designed to help the Eurozone are threatening the accountability of European governance', can be accessed at: <http://blogs.lse.ac.uk/europpblog/2014/12/10/ecj-legal-rulings-designed-to-help-the-eurozone-are-threatening-the-accountability-of-european-governance/>

# Annex III: the relationship between other Member States law and EU legal supremacy

This Annex describes briefly the position of EU legal supremacy in a number of other prominent EU Member States.

## France

France has a patchwork of senior courts. Their willingness to accept supremacy was uneven - but all have come into line now. The court of appeal in France accepted supremacy in the mid-70s in a case called: *Von Kempis v Geldof* (Cour de Cassation) [1976] 2 CMLR 462.<sup>164</sup> In contrast after some resistance by the Administrative Court (the Conseil d'Etat) in a case called *Minister for the Interior v Cohn-Bendit* [1980] 1 CMLR 543 the Conseil d'Etat has accepted supremacy.<sup>165</sup>

## Belgium

In Belgium, the constitution is 'monist'. This means that international treaties automatically become part of the national law. Treaties do not require implementing legislation in Belgium. With this as the starting position the issue of supremacy was confirmed in a case called: *Ministere des Affaires Economiques v SA Fromagerie Franco-Suisse (Le Ski)* [1972] CLMR 330. This case established that EU was superior to other Belgium law.<sup>166</sup>

## Czech Republic

The Czech Constitutional Court is the only court who has seemingly defied an EU law in recent years. In a case called *Pl. US 5/12: Slovak Pensions* [2012] the court defied a CJEU judgment in a case entitled *Case C-399/09 Landtova* [2011] ECR I-5573 which said that the constitutional right of Czechs to a supplement to their pension (which they received from their former Slovakian employer – part of the Agreement which saw the dissolution of the old Czechoslovakia) but wasn't paid to Slovaks was unlawful under EU Social Security non-discrimination rules. The Czech Constitutional Court, like the German Constitutional Court, having established its 'right of review and reservation', declared the CJEU's preliminary ruling in *Landtova* as *ultra vires*.

However, the Czech Court goes out of its way to suggest why the CJEU came to the wrong conclusion:

- Key evidence was left out of the arguments presented to the CJEU which had it been, the CJEU would have come to the same conclusion as the Czech Court;
- EU social security non-discrimination rules do not apply to the separation agreement;
- It was a purely internal matter (the Czech Republic and Slovakia having been once the same country) consequently, treating Slovaks and Czechs in this case as if they were foreign nationals and thus the pension payments potentially discriminatory was like comparing apples and oranges. As the scholar Georgios Anagnostaras recounts:

*'...professional occupation with an employer registered in Slovakia at the time of the existence of Czechoslovakia cannot be retroactively considered as a period of employment abroad. Failure to acknowledge this idiosyncratic reality is synonymous to comparing things that are not actually comparable...'*<sup>167</sup>

As the legal scholar Georgios Anagnostaras has concluded, this case is likely to be a one-off. The unique nature of the issue means that it fails to provide a model for other constitutional courts to

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<sup>164</sup> Storey T and Turner C (2011). *'Unlocking EU Law: 3rd Edition'*, pg 127.

<sup>165</sup> Storey T and Turner C (2011). *'Unlocking EU Law: 3rd Edition'*, pg 127.

<sup>166</sup> Storey T and Turner C (2011). *'Unlocking EU Law: 3rd Edition'*, pg 127.

<sup>167</sup> Anagnostaras, G (2013). *'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court'*, German Law Journal, Vol 14, No 7, pg 963.

follow:

*'This case seems accordingly to lack the necessary legitimacy to serve as a reliable legal precedent, which could be validly invoked in the future by other constitutional courts. It is rather more likely that the Czech Constitutional Court will reassess at some point its position on the matter, sensing this was not the proper occasion to activate the ultra vires review.'*<sup>168</sup>

## **Italy**

In Italy there was an initial reluctance to accept the supremacy of EU law. It refused to accept the decision in *Costa v ENAL* [1964] which established the primacy of EU law principle.<sup>169</sup> However, in a case called *Frontini* [1974] 3 CMLR 381, the Italian Constitutional Court did a vault face and accepted the supremacy of EU law.<sup>170</sup>

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168 Anagnostaras, G (2013). '*Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*', German Law Journal, Vol 14, No 7, pg 972.

169 Storey T and Turner C (2011). '*Unlocking EU Law: 3<sup>rd</sup> Edition*', pg 128.

170 Storey T and Turner C (2011). '*Unlocking EU Law: 3<sup>rd</sup> Edition*', pg 128.

# Annex IV: EU competences<sup>171</sup>

This Annex briefly sets out the very wide range of competences that the EU has accrued over its decades of existence.

## Exclusive competences

Article 3 of the Treaty on the Functioning of the European Union — TFEU) sets out areas where only the EU is the competent legislative institution and can adopt legally binding laws and regulations. These policy areas are:

- Customs union;
- The establishing of competition rules necessary for the functioning of the internal market;
- Monetary policy for euro area countries;
- Conservation of marine biological resources under the common fisheries policy;
- Common commercial policy;
- Conclusion of international agreements under certain conditions.

## Shared competences

Article 4 of the TFEU describes the policy areas where the EU and Member States have so-called 'shared competence'. In these policy 'shared competency' areas both the EU and the Member States can legislate. However, for Member States this is a residual competence as they can only 'act' where the EU chooses not to or allows the Member States to do so. The areas covered by 'shared competence' are:

- Internal market (most EU legislation is introduced under the internal market articles of the Treaties, even where there is a tenuous link to 'facilitating' cross-border trade);
- Social policy, but only for aspects specifically defined in the Treaty;
- Economic, social and territorial cohesion (regional policy);
- Agriculture and fisheries (except conservation of marine biological resources);
- Environment;
- Consumer protection;
- Transport;
- Trans-European networks;
- Energy;
- Area of freedom, security and justice (i.e. criminal and civil law and so-called police and judicial 'co-operation');
- Shared safety concerns in public health matters, limited to the aspects defined in the TFEU;
- Research, technological development, space;
- Development co-operation and humanitarian aid.

## Supporting competences

Article 6 of the TFEU sets out the 'supporting competences', where by the EU only has a role in supporting and helping co-ordinate the action of Member States. Legal acts in these areas must not require the harmonisation of EU countries' laws or regulations. The areas that fall into the category of 'support-

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<sup>171</sup> Information on the EU's competences set out in this Annex are taken from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0020>

ing competency' are:

- Protection and improvement of human health;
- Industry;
- Culture;
- Tourism;
- Education, vocational training, youth and sport;
- Civil protection;
- Administrative cooperation.

### **Special competences**

The EU is also able to ensure that Member States '...co-ordinate their economic, social and employment policies at EU level'.<sup>172</sup>

In addition to economic, social and employment policies, also falling under the heading of 'special competences' is the Common Foreign and Security Policy. This policy area has its own special features. It is not subject to co-decision with the Parliament and the Commission can only jointly propose initiatives, whereas in other areas it is the Commission that has the sole right of initiative. As Article 22.1 of the TEU sets out:

*'Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it, respectively, initiatives or proposals.'*<sup>173</sup>

Policy in this area is largely driven by:

- The European Council i.e. the Heads of States or Governments of the Member States;
- The Council i.e. the representative of each Member State at ministerial level;
- The President of the European Council; and
- The High Representative of the Union for Foreign and Security Policy.

The latter two often represent a 'collective' EU voice in matters of common foreign and security policy in many international forums.

Finally, the EU Treaties contain an open-ended Article which allows the EU to take measures and make new laws on issues which are not specifically set out (albeit vaguely) in the Treaties but where such measures will further the aims of the EU. The Article is often referred to as the 'Flexibility clause'. It is Article 352 of the TFEU. It was widened considerably by the Lisbon Treaty. The Article can now be applied to any objective of the EU rather than just the economic objectives, which was the previous case.<sup>174</sup>

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172 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0020>

173 <http://hum.port.ac.uk/europeanstudieshub/learning/module-2-understanding-eu-policy-making/decision-making-in-common-foreign-and-security-policy/>

174 euABC.com (No date given). 'Flexibility clause', can be accessed at: <http://en.euabc.com/word/499>