EU Law:
3. Supremacy ('Primacy')

Last week's recap

Key EU institutions

Principles of EU lawmaking: conferral, subsidiarity, democracy

Types of EU legislation

The Ordinary Legislative Procedure

Is there a democratic deficit?

Today's Lecture:

- How does EU law apply in the Member States?
- The supremacy/primacy of EU law:
  - Why is EU law said to be supreme over domestic law?
  - The CJEU's reasoning
  - The reaction of the MS and their national courts
  - 'Constitutional pluralism'

Reminder: the types of EU law

Treaty Provisions

- 'Primary law'
- Mixture of legal obligations and organisational principles
- Agreed by Member States

Regulations

- Directly applicable in national law
- Usually passed via Ordinary Legislative Procedure

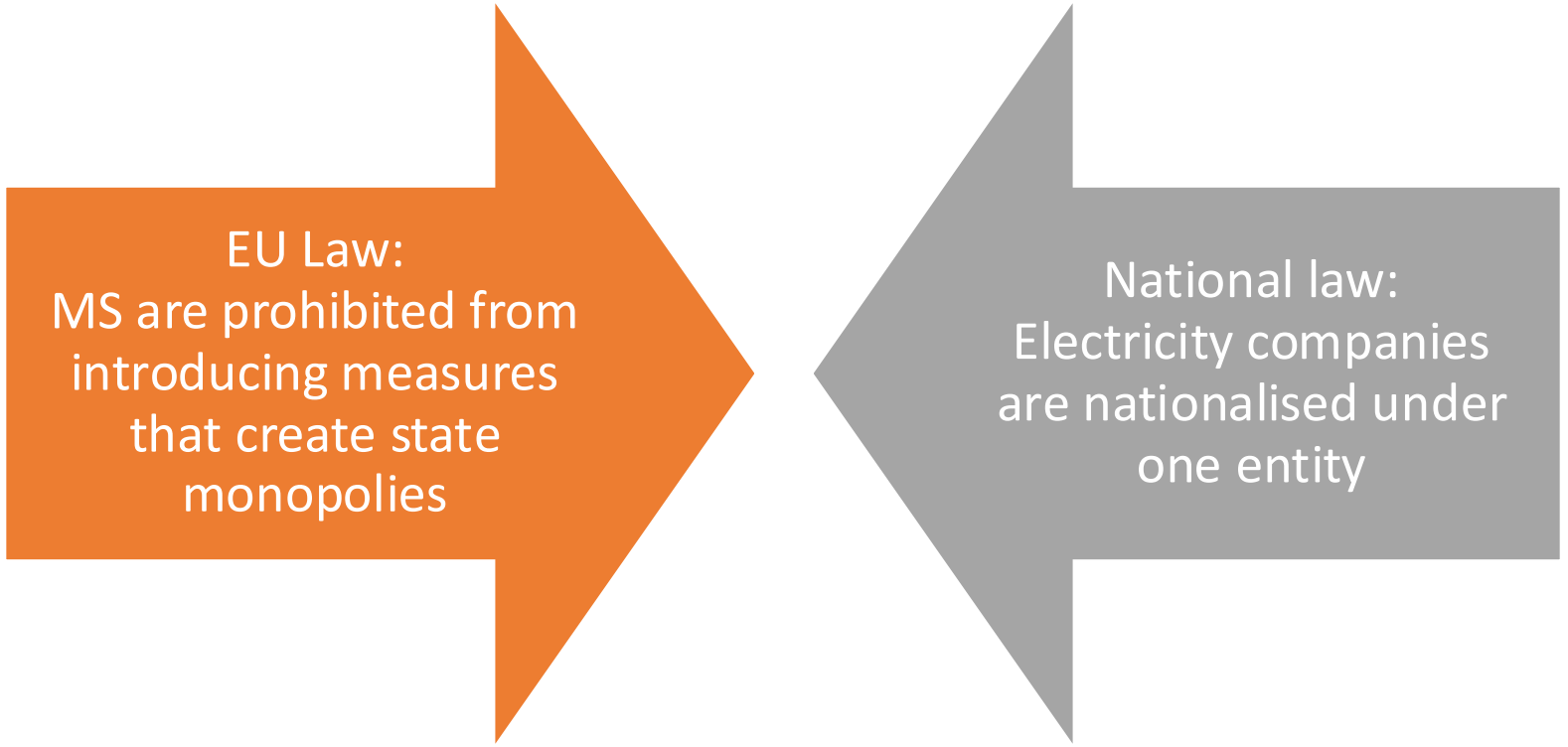
Directive

- Binding as to the result to be achieved
- Must be transposed
- Usually passed via Ordinary Legislative Procedure

Decision

- Binding on addressee only
- Not really relevant until we study competition law.

Consider this conflict:



Supremacy: Background

- Treaty of Rome → 1957
- Italy → Dualist state → Act ratifying the Treaty of Rome
- 1962 → Act nationalising electricity industry in Italy
- Mr Costa challenged the nationalisation Act as inconsistent with EU law invoking some provisions in the Treaty of Rome
- ENEL (nationalised electricity company) argued: nationalisation Act lex posterior (later law) to the Act ratifying the Treaty of Rome
- Italian Magistrate → preliminary reference to the CJEU (Article 267 TFEU)
- Does EU or later national law take priority?

How to resolve this conflict: Supremacy/ 'primacy' of EU law over domestic law

- This concept was not expressly stated in the Treaties, but the EEC/EU cannot develop properly without it.
- Seeds for this placed in ***Van Gend en Loos* [1963] ECR 1** (note: not technically a case about supremacy – it's about direct effect, which we look at next week):
- *'The Community constitutes **a new legal order of international law for the benefit of which the states have limited their sovereign rights**, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.*

Case 6/64 *Costa v ENEL* [1964] ECR 585: establishing the supremacy of EU law

- **"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the 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".**
- By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, **the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.**
- The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. **The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty** …
- **Law stemming from the Treaty, an independent source of law, could not, because of its special nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question"**

Supremacy/ Primacy

- EU Law takes precedence over conflicting provisions of national law
- Teleological reasoning of the CJEU → convincing?
- See now Declaration No 17 to the Treaty of Lisbon (NB. It doesn't have the same status as the Treaties): 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, **the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.**
- Basis continues to be CJEU case-law (Costa)

How far can supremacy go?

- According to the CJEU: unreserved and absolute
- Applies to national laws that pre-date and post-date EU law (Case 106/77 Simmenthal)
- What happens if the conflicting provision of national law is the Constitution?

Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125:

'…the validity of a Union measure or its effect within a MS cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure…'

→Consider the reaction of the German Constitutional Court in Solange I & II

Case C-399/11 Melloni:

'It is settled case-law that, by virtue of the principle of primacy of EU law […] rules of national law, even of constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that state…'

What is the effect of supremacy?

Case 106/77 Simmenthal [1978] ECR 629:
'It follows from the foregoing that every national court must, in a case within its jurisdiction, apply [Union] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [Union] rule.'

1. Conflicting provision of national law is set aside in this particular case of conflict, but remains valid in the domestic legal order

2. Any national court, no matter its level, must set aside conflicting provisions of national law

Supremacy: The CJEU View Recap

Stems from CJEU's teleological reasoning that considers EU law as a new legal order of International Law

EU law unconditionally supreme, even over constitutional provisions, or provisions that were enacted later. National courts must immediately set aside conflicting national law.

SUPREMACY: THE REACTION OF NATIONAL COURTS

- National courts also deal with EU law matters → their viewpoint counts
- Have national courts accepted the principle of supremacy?
  - Yes
  - But they do not accept the teleological reasoning of the CJEU
  - Their reasoning is based on conferral and their domestic constitutional arrangements
  - Most of the time, they do not accept unconditional supremacy
  - Limits: fundamental rights, exercise of competence, constitutional identity
  - Consider reaction of “courts” in MS with rule of law crisis

The approach of the Federal Constitutional Court of Germany (BVerfG)

- German Constitution allows for the transfer of powers to the EU
- Conditional acceptance

Limits in relation to fundamental rights' protection

- *Internationale Handelsgesellschaft* was a preliminary ruling case, meaning that the German courts had to implement it.
- Would the German Federal Constitutional Court (BVerfG) accept the ruling?
- *Solange I* [1974] CMLR 540*:* BVerfG accepts supremacy but only because of the fundamental rights guarantees, and will ultimately decide if the EU protection of fundamental rights matches their standards.

'so long as the competent organs of the Community have not removed the conflict, the guarantee of fundamental rights in the Constitutional prevails'

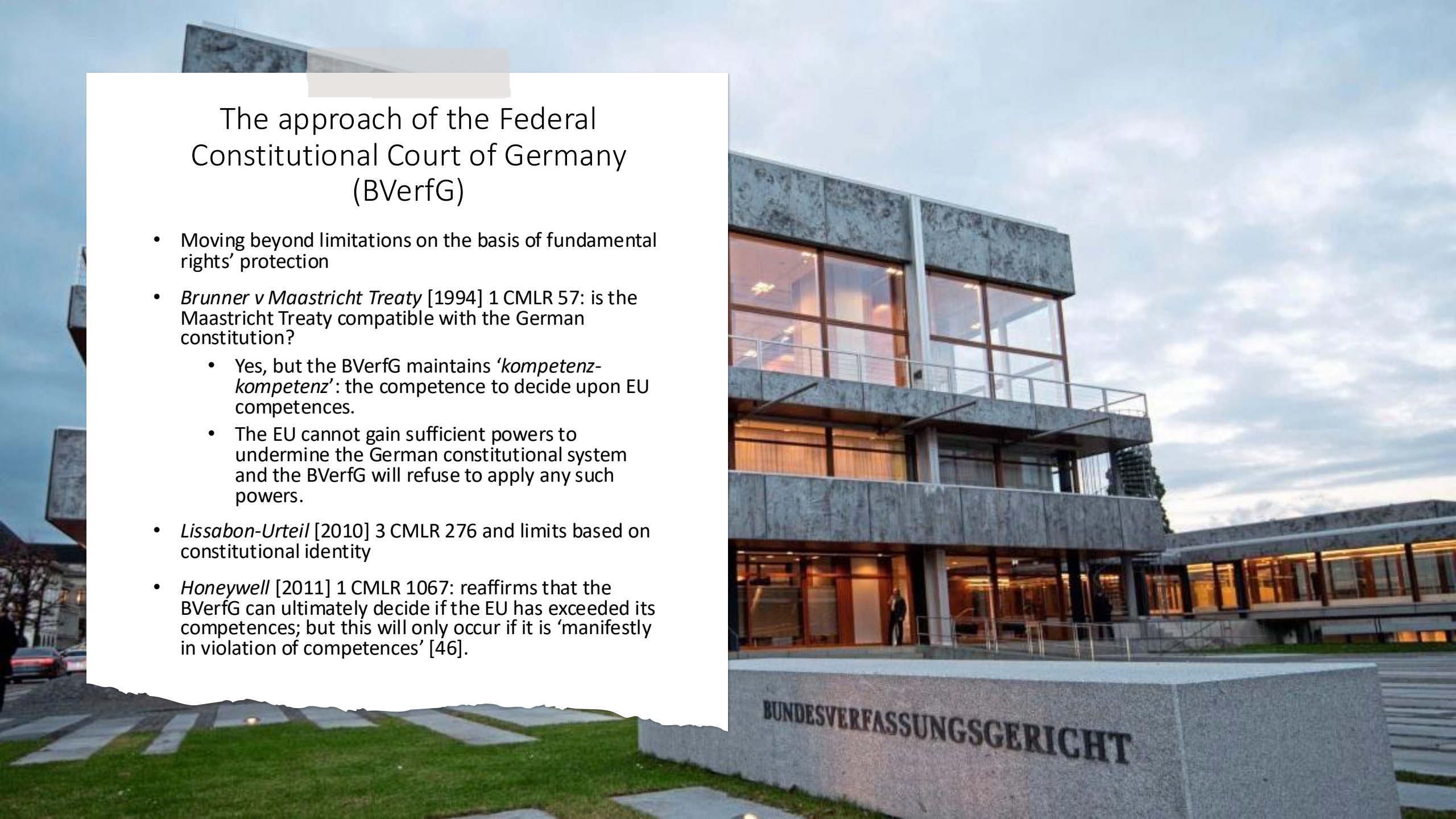
- *Solange II* (1986): BVerfG rules that the CJEU's protections are essentially the same as those in Germany

'so long as the EU generally ensures an effective protection of fundamental rights, the FCC will no longer exercise its jurisdiction to decide on the applicability of secondary EU legislation…and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution'

- But it maintains that it and only it gets to decide if rights are properly protected

The approach of the Federal Constitutional Court of Germany (BVerfG)

- Moving beyond limitations on the basis of fundamental rights' protection
- *Brunner v Maastricht Treaty* [1994] 1 CMLR 57: is the Maastricht Treaty compatible with the German constitution?
  - Yes, but the BVerfG maintains '*kompetenz-kompetenz*': the competence to decide upon EU competences.
  - The EU cannot gain sufficient powers to undermine the German constitutional system and the BVerfG will refuse to apply any such powers.
- *Lissabon-Urteil* [2010] 3 CMLR 276 and limits based on constitutional identity
- *Honeywell* [2011] 1 CMLR 1067: reaffirms that the BVerfG can ultimately decide if the EU has exceeded its competences; but this will only occur if it is 'manifestly in violation of competences' [46].



Weiss
2 BvR 859/15, 5 May 2020

- ***Weiss*: a very significant judgment from the BVerfG!**
- It asked the CJEU to decide whether the 'Public Sector Asset Purchase Programme' is outside the EU's competences and thus a void EU act.
- They CJEU said that it was within the EU's competences.
- The BVerfG disagreed and said that the CJEU decision was *ultra vires* ('simply not comprehensible … a manifest disregard' for the law).
- Why? The ECB breached 'proportionality'
- [NB. the BVerfG later backed down a bit]

It's not just a German approach!

Member State	Leading Case(s)
UK (historical example!)	*Factortame (No. 2)*: EU law is only valid insofar as Parliament says so in the European Communities Act 1972. *Thoburn*: ECA 1972 = constitutional statute = no implied repeal *HS2*: clash with constitutional norms → hands-off
France	The legal basis for the primacy of EU law is the French constitution. EU law cannot take precedence over the constitution.
Italy	*Frontini* (1974): accepts primacy on a *Solange/Maastricht* basis. Case 42/17 *MAS and MB*: (the '*Tarrico*' cases): dialogue between CJEU and Italian Constitutional Court leads to EU law on tax being interpreted with fundamental rights safeguards, consistently with Italian constitutional law ('a deep understanding of the indispensable dialogical imperative in the relationship between the highest courts of the European Union': Sarmiento and Weiler, 2020).
Poland	Decision K18/04: EU law cannot override the Polish constitution. *European Arrest Warrant* decision (2005): Poland's constitution required amendment before an EAW could apply in Poland. Rule of law crisis led to decision K3/21: Articles 1, 2, 4(3), and 19(1) TEU incompatible with Polish Constitution

Constitutional Pluralism

- The primacy of EU law rests on ‘interacting systems’ (MacCormick 1996):
  - An effective dialogue using the preliminary ruling system between Member States and CJEU on national standards and interpretations of EU law
  - Acknowledgement that the CJEU cannot impose EU law: only national courts can do this and only they can set aside or annul conflicting national law
  - Constructive exchanges between the CJEU and national Courts on the basis of tolerance and accommodation
- Is constitutional pluralism still relevant following Weiss?
  - See: Kelemen, R. Daniel, Eeckhout, Piet, Fabbrini, Federico, Pech, Laurent, Uitz, Renáta, National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order

Supremacy in the UK post-Brexit

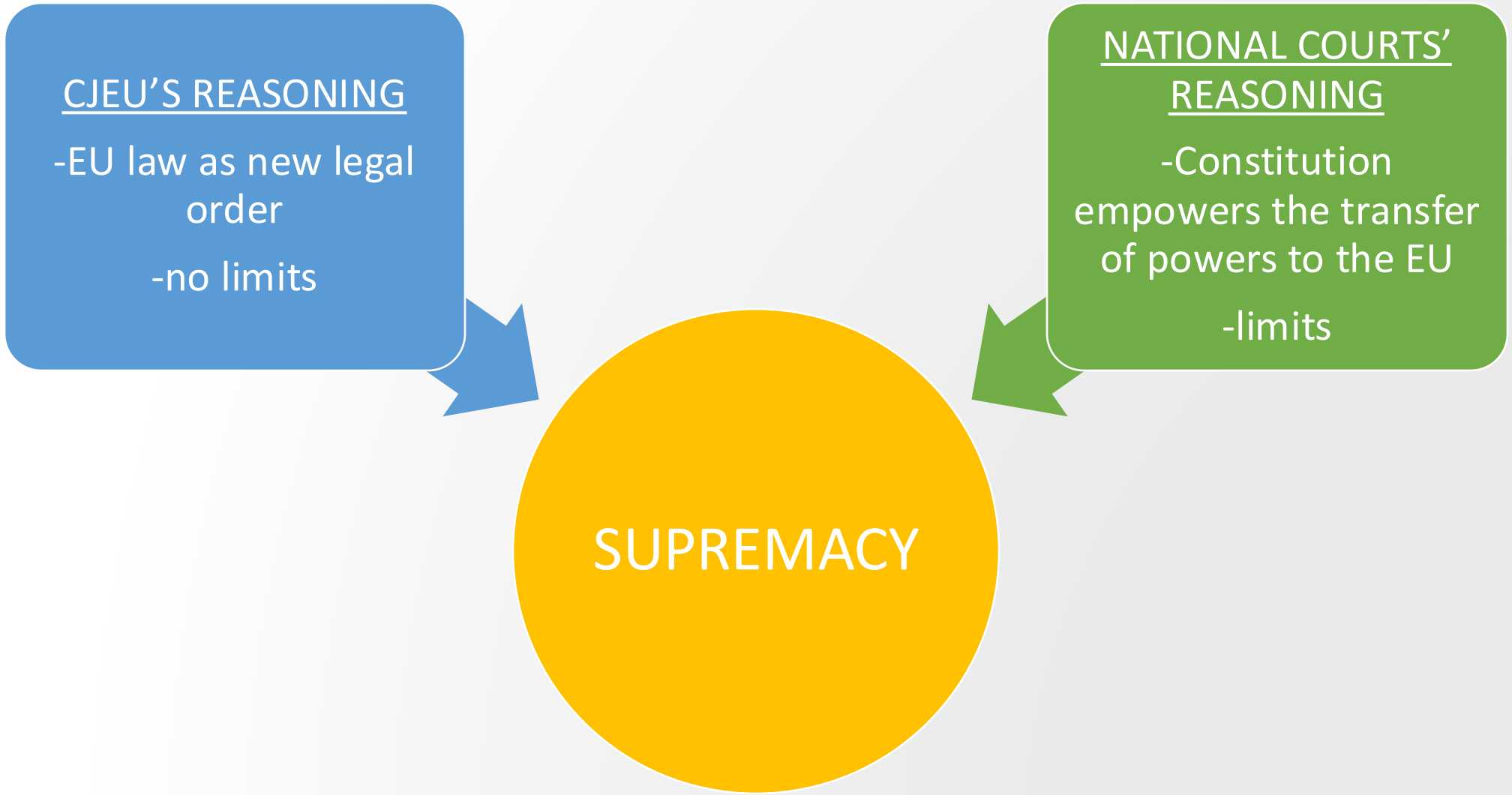
- S. 5 European Union (Withdrawal) Act 2018 as amended, most recently by section 3 Retained EU Law (Revocation and Reform) Act 2023

(A1)The principle of the supremacy of EU law is not part of domestic law.

This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made).

- Supremacy of EU law still relevant in relation to provisions of the Withdrawal Agreement (s5.(7) EUWA)

Summary


CJEU'S REASONING
-EU law as new legal order
-no limits
NATIONAL COURTS' REASONING
-Constitution empowers the transfer of powers to the EU
-limits
SUPREMACY

Any questions?

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What is meant by the 'supremacy' of EU law?

1. Union citizens bringing claims in national courts must rely on any relevant provisions of EU law, rather than on relevant provisions of national law
2. The Court of Justice operates as a supreme court of appeal, with the power to overturn decisions of national courts
3. Decisions of the European Parliament bind national courts
4. EU law takes precedence over conflicting provisions of national law

Where did the principle of supremacy originate?

1. The Treaty of Rome
2. The CJEU's reasoning and case-law
3. Declaration 17 annexed to the Treaty of Lisbon
4. The reasoning and case-law of the Federal Constitutional Court of Germany

Which CJEU judgment is considered the authority for the principle of supremacy?

- Case 6/64 Costa v ENEL
- Case 26/62 Van Gend en Loos
- Case 43/75 Defrenne v Sabena (No 2)
- Case C-6/90 Francovich v Italy

According to the CJEU, there are limitations on the operation of the doctrine of supremacy

- TRUE
- FALSE

Member States' national courts accept the CJEU's view on supremacy

- TRUE
- FALSE

In which judgment did the BVerfG declare that the EU had exceeded its competence?

- Solange II
- Honeywell
- Brunner
- Weiss/PSPP

Constitutional pluralism puts forward the need for a uniform take on supremacy

- TRUE
- FALSE