Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

Nigel Foster

4. The Supremacy of EU Law and its Reception in the Member States

Nigel Foster, LLM Degree Academic Director at Robert Kennedy College, Zurich, and Professor of EU Law Modules, South East European Law Schools' Network (SEELS); Visiting Professor at University of Saarland and The University College of Northern Borneo

https://doi.org/10.1093/he/9780198853190.003.0004

Published in print: 06 August 2020

Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about the supremacy of EU law and its reception in Member States. Both the legal arguments for supremacy and the political logic are often considered in establishing the reasoning for EU law supremacy. The first question concentrates on the reasons for EU law supremacy from the point of view of the Union and in the view of the Court of Justice of the European Union (CJEU (or also abbreviated CoJ)). A general question about the exit process of a state by a Member State in the light of Brexit is included.

Keywords: EU law, Member States, Brexit, EU law supremacy, CJEU

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

-

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

The relationship between the EU and the Member States, which will involve a consideration of the reasons for the supremacy of EU law before looking at the reception of EU law in some of the Member States. Some questions, however, may look at these two aspects independently as suggested in the next heading.

- The reception in one or two or more Member States may be undertaken and examined.
- The legal arguments for supremacy and the political and legal logic may both be considered in establishing the reasoning for EU law supremacy.
- In the topics noted above, the main cases encountered are very likely to be ***Van Gend en Loos, Costa v ENEL, Simmental, International Handelsgesellschaft, Factortame***, and then the principal cases of the particular Member States which may be considered in your course, as highlighted in the following answers.
- The topic of Brexit may now feature in some University courses but understandably, given the continuing high degree of uncertainty in the negotiations and outcomes, many may also avoid it at this stage until things are clearer. Whilst Brexit happened on the 31st January 2020, the future trade relationship has yet to be agreed. However, one of the Brexit topics is more clearly rooted in the legal arena and has been found to be justiciable before the Court of Justice.

Key Debates

Debate: the key debate in this area is one that, to a greater or less extent, concerns all of the Member States.

Simply and essentially, it is, the extent to which the Court of Justice view on the supremacy of EU law is accepted by the Member States.

p. 48

Question 1

Is it the case that 'the doctrine of the supremacy of EU law is a logical if not a necessary inference from EU Treaties'?

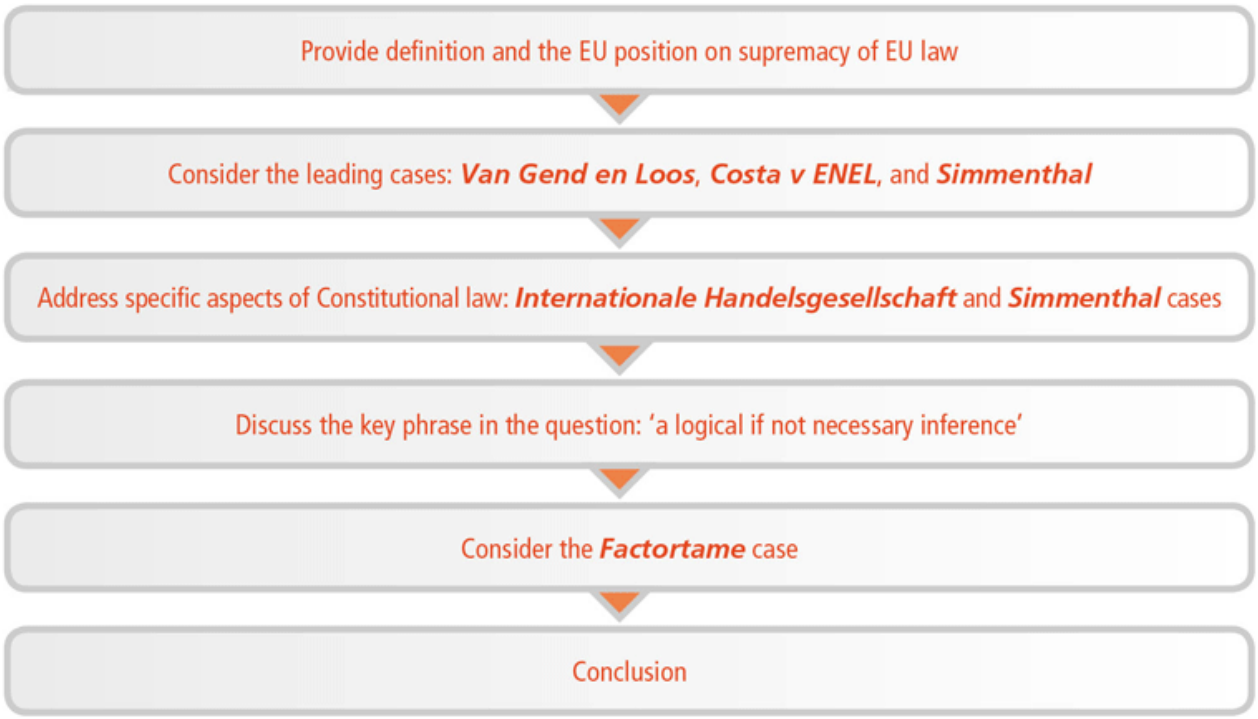
Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Caution!

■ This is a very cryptic question which may confuse you as to how you go about answering it. The crucial sentence is posed as a question which, of course, has to be answered. So you have to address that.

■ Do not then answer this as 'write all you know about the supremacy of the EU' and thus simply write the history or case law development of EU law supremacy. That would be to miss the more subtle aspects of the question. The annotated tips along the way will make everything clear.

Diagram Answer Plan



Suggested Answer[1]

[1] This clearly concerns the now well-established doctrine or principle of supremacy of EU law.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Definition[2] and Treaties' position on supremacy of EU law

[2] A definition of the subject matter of the question is required. You need to state what you understand by the phrase 'the doctrine of the supremacy of EU law'.

Supremacy of EU law means quite simply that when it comes to a clash between valid EU law and valid national law the EU takes priority. The question has suggested that the **EU Treaties** do not expressly provide for supremacy, i.e. there is at present no Treaty article which clearly states that EU law is supreme. If the **Constitutional Treaty** had entered into force, the supremacy of EU law would have been ↵ expressly stated (in **Art I-6**). However, it is still the case that by a direct reading of either of the **EU or TFEU Treaties** you might not necessarily infer that EU law is supreme. However, whilst there is no express statement of supremacy in the Treaties, it can be argued that some of the articles of the Treaties impliedly or logically require supremacy.[3] Thus, a conclusion as to whether EU law supremacy is to be inferred from the Treaties depends upon a consideration of some of their provisions.[4] For example, see: **Art 4(3) TEU**, the good faith or fidelity clause; **Art 18 TFEU**, the general prohibition of discrimination on the grounds of nationality; **Art 288 TFEU** in respect of the direct applicability of Regulations; **Art 344 TFEU**, the obligation of Member States to submit only to Treaty dispute resolution; and **Art 260 TFEU**, the requirement to comply with rulings of the Court of Justice. From these Treaty Articles, you could conclude that EU law infers supremacy but cannot state that the Treaty expressly or categorically imposes it.[5]

p. 49

[3] The question suggests that it 'is the case that it is a logical if not a necessary inference' and you have to determine exactly what this cryptic part of the question is demanding and must address both these contentions.

[4] Although the word 'logical' appears first I would address the part about the inference first, because this refers you to the Treaty provisions.

[5] Outline how the Treaties logically provide for supremacy, by reference to the Treaty and from the jurisprudence of the CJEU in which statements on supremacy are made.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

The position of the Court of Justice

It is more through the decisions and interpretation of the Court of Justice (CJEU) that the reasons and logic for the supremacy of EU law were developed. The CJEU's view on this is quite straightforward. From its case law, notably ***Van Gend en Loos*** **(26/62)**, ***Costa v ENEL*** **(6/64)**, and ***Simmenthal*** **(106/77)**, it is first of all clear that EU law is assumed to be an autonomous legal order which is related to international law and national law but nevertheless distinct from them.

The ***Van Gend en Loos*** case affirmed the Court's jurisdiction in interpreting EU legal provisions, the object of which is to ensure uniform interpretation in the Member States. The CJEU held that the Community (now Union) constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights.

Further elaboration of the new legal order in ***Van Gend en Loos*** was given in ***Costa v ENEL***. The case raised the issue of whether a national court should refer to the CJEU if it considers Community (now EU) law may be applicable or, as was the view of the Italian Government, simply apply the subsequent national law. The CJEU stressed the autonomous legal order of Community (now EU) law in contrast with ordinary international treaties. It held that the **EEC Treaty** has:

> created its own legal system which 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 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 and have created a body of law to bind their nationals and themselves.

p. 50 ↵ The Court also established that Community (now EU) law takes priority over all conflicting provisions of national law, whether passed before or after the Community (now Union) measure in question:

> The integration into the laws of each Member State of provisions which derive from the Community, and more generally, the terms and 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 the basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.

That is, a later national law does not overrule an earlier EU law. As additional justifications,[6] the CJEU also invoked some of the general provisions of the Treaty: **Art 5 EEC (now 4(3) TEU)**, the requirement to ensure the attainment of the objectives of the Treaty, and **Art 7 EEC (now 18 TFEU)**, regarding discrimination, both of which would be breached if subsequent national legislation was to have

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

precedence. Furthermore, the CJEU considered that **Art 189 (now 288 TFEU)**, regarding the binding and direct application of Regulations, would be meaningless if subsequent national legislation could prevail. The Court summed up its position:

> It follows ... that the law stemming from the treaty, an independent source of law, could not because of its special and original 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.

[6] These back up the argument that supremacy can be inferred by some Treaty Articles.

Therefore, EU law is to be supreme over subsequent national law.

In the ***Factortame (No 2)*** **(C-213/89)** case,[7] the CJEU, building on the principle laid down in ***Simmenthal*** **(106/77)**, i.e. that a provision of EC (now EU) law must be implemented as effectively as possible, held that a national court must suspend national legislation that may be incompatible with EC (now EU) law until a final determination on its compatibility has been made. In the case of doubt national law should be suspended. The ***Factortame (No 2)*** case represents another confirmation that national constitutional practices or rules, in this case the doctrine of parliamentary sovereignty in the UK, must not be allowed to stand in the way of a Community (now EU) law right. In the case, it was the clear understanding of the UK national courts that they had no power to set aside or not apply an Act of Parliament. The CJEU held that even if the Community (now EU) law rule was still in dispute, the national procedure should be changed so as not to possibly interfere with the full effectiveness of the Community (now EU) law right.

[7] Whilst not strictly required to answer the question, I would suggest adding a paragraph that EU supremacy applies even in the case of constitutional law.

Overall conclusions on supremacy

The CJEU in the cases of ***Van Gend en Loos***, ***Costa v ENEL***, and ***Simmenthal***, amongst others, has held that EU law supremacy is a ↵ logical conclusion. It can also be inferred from the EU law doctrine of direct effects that EU law should be supreme both because of the transfer of powers from the Member States and by having its own law-making machinery. It must, therefore, have precedence if the Union is going to work. The voluntary limitation of sovereignty and the need for an effective and uniform EU law requires supremacy. To give effect to subsequent national law over and above the Union legal system which Member States have accepted would be inconsistent and illogical.

p. 51

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Looking for Extra Marks?

■ Supremacy in the Constitutional Treaty was toned down for the **2007 Lisbon Reform Treaty** which added a **Declaration (No 17)** referring to the well-settled case law on primacy as confirmed by an **Opinion of the Legal Service of the Council (11197/07 of 22 June 2007)**. The declaration on primacy therefore is still not a bold express statement contained within the Treaties but tucked away in an oblique reference. The answer needs to reflect this.

■ It is worth mentioning the consequences of a Member State not giving primacy to EU law when it should have done. Liability on the part of the state will be incurred, as first established by the CJEU in the ***Francovich*** **(C-6/90)** case and later confirmed in ***Factortame III*** **(C46 and 48/93)**.

Question 2

How does the European Communities Act 1972 ensure that EU law which is directly effective or directly applicable has that status in the UK and prevails over conflicting UK law?

What problems, if any, have been experienced in practice in attaining the aims of the Act?

Caution!

■ Despite the fact that Brexit has now taken place, for this edition of this book, this question has not been removed because the European Union (Withdrawal Agreement) Act 2020 now preserves the ECA 1972 as 'saved Law'. This is because of the transition period, which at present will last until 31st December 2020, but may be extended further. In that time EU law will continue to prevail over UK law and provisions of the ECA 1972 are still required to preserve the direct effects and supremacy of EU law over national law in that time. Hence prudence, on my part, leads me to retain this until the UK's ultimate exit from the EU law is certain and accomplished. The 1972 will then, of course, be repealed.

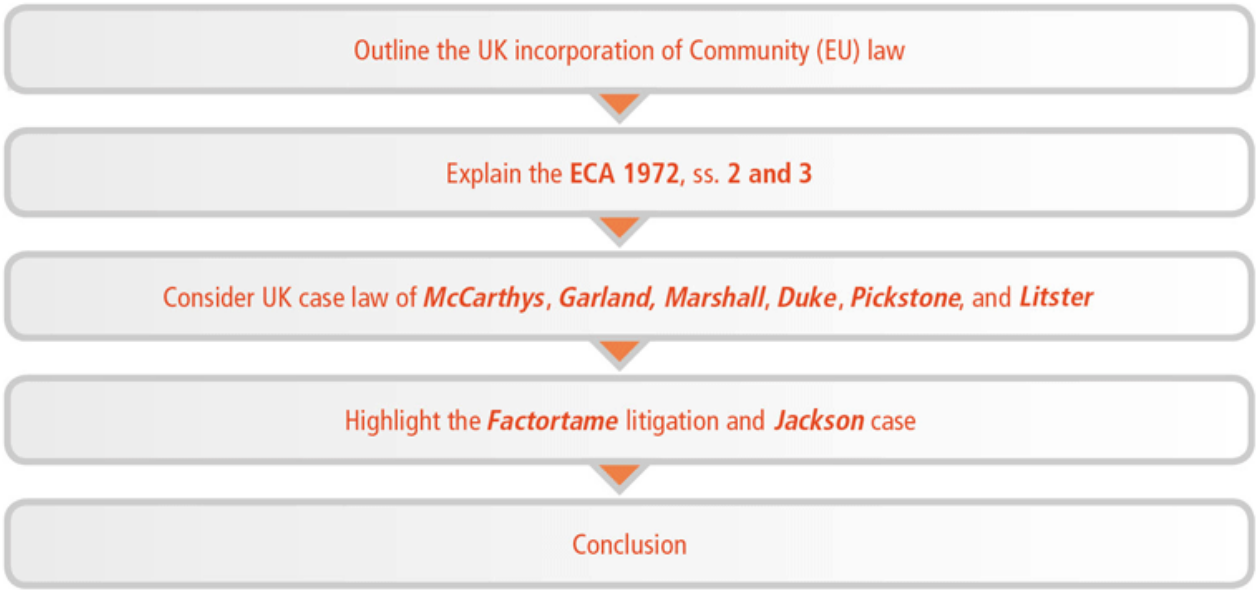
■ To return to preparing the answer, for the first part, make sure you do not write a general 'The UK in the EU' answer or wander into a discussion on current UK Brexit discussions. The question focuses on the legal technicalities.

■ The second part of the question actually requires you to focus on the judicial interpretation and application of the Act rather than any political discussion about the effects of EU membership on UK sovereignty, although in view of Brexit this has been toned down.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

p. 52

Diagram Answer Plan



Suggested Answer[1]

[1] This question requires you to consider the legal argument of how membership was accommodated in the UK legal system and the reception of Community (now EU) law in the UK courts.

EU law implementation in the UK is primarily concerned with how the **1972 Act** observes and takes account of such well-established EU law concepts or doctrines of direct effects and supremacy of EU law and the difficulties in respect of sovereignty.

How EU law was incorporated in UK law[2]

[2] First, you should look in detail at the Act and how it sets out to achieve its aims.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

In contrast to the earlier practice of incorporation of international law treaties which followed the dualist approach to international law, the **ECA 1972** did not reproduce the whole of the Community Treaties or subsequent secondary Community and now EU legislation as Acts of Parliament. If this was so, the words of any future UK Act could impliedly override and thus repeal the inconsistent part or parts of the Treaty, as it would simply have the status of any other UK Act of Parliament.

All prior Community (EU) legislation was adopted by a simple Act of Accession, except for those Directives which required national law implementation. The Act therefore impliedly recognised the unique new legal system and is now regarded as a very special form of UK legislation by its attempt to bind future Parliaments.

The ECA sections 2 and 3[3]

[3] This is the core of the answer to the first part: taking a detailed technical look at how the **ECA 1972** achieved its aims.

Section 2(1) recognises the direct applicability and thus validity of Community (EU) law Treaty provisions and Regulations and arguably the doctrine of direct effects. This is termed in the Act as 'enforceable Community right and similar expressions'. Thus those rights or duties which are, as a matter of Community (EU) law, directly applicable or effective are to be given legal effect in the UK. It also provides that all ↵ such future Community (EU) legal provisions shall also be given legal effect and enforced and followed in the UK.

p. 53

Section 2(4) recognises the supremacy of Community (EU) law and therefore concerns sovereignty. It states that any such provision and any enactment passed or to be passed (that refers to any Act of Parliament past or future) shall be construed and have effect subject to the foregoing provisions of this section. That is a reference back to the entire section, in particular **s 2(1)**, and means any future Act of Parliament must be construed in such a way as to give effect to the enforceable Community (EU) rights in existence. This is achieved by denying effectiveness to any national legislation passed later which is in conflict. This is further controlled by the directions to the UK courts. **Section 3(1)** instructs the courts to refer questions on the interpretation and hence the supremacy of Community (EU) Law to the CJEU if the UK courts cannot solve the problem themselves by reference to previous CJEU rulings. This follows the ***Costa v ENEL* (6/64)** ruling and is backed up by **s 3(2)** which requires the courts to follow decisions of the CJEU on any question of Community (EU) law. Therefore, it can be argued the combination of **s 2(1) and (4)** with the control **of s 3(1) and (2)** achieves the essential requirements of the recognition of direct effects and the supremacy of EU law for past and future UK legislation.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Case law on the ECA 1972[4]

[4] By looking at the UK case law on the Act, you can show how it works in practice, i.e. looking at how the UK courts have interpreted and applied it.

The views of the courts in decided case law are thus now paramount here because the application of EU law is dependent on the national judiciary.

The most important of the earlier cases[5] is ***McCarthys Ltd v Smith*** **([1979] ICR 785),** in which Lord Denning MR expressed the view that it was the court's bounden duty to give priority to Community law under **s 2(1) and (4)** of the **ECA 1972** in cases of deficient or inconsistent national law, i.e. unintentional inconsistency. Lord Denning thought that with regard to an express or intentional repudiation of the Treaty or expressly acting inconsistently, the courts would be bound to follow the express and clear intent of Parliament to repudiate the Treaty or a section of it by the subsequent Act. The Court of Appeal **([1981] QB 180 at 199)** later confirmed Community (EU) law is now part of UK law and whenever there is any inconsistency Community (EU) law has priority.

[5] Whilst it would be better to concentrate on the latest cases which provide a truer reflection of the present situation, a brief review of earlier case law demonstrates your more comprehensive knowledge.

In ***Garland v BREL*** **([1983] 2 AC 751)**, UK and Community (EU) law were regarded by the House of Lords as clearly inconsistent. A reference was made to the CJEU **(12/81)**, which ruled that Community law covered the situation in the case. The House of Lords considered themselves bound in view of the CJEU ruling and **ECA 1972** to interpret the national law in such a way as not to be inconsistent with the UK obligations under Community law. They concluded (obiter) that UK courts should interpret UK law consistently, no matter how wide a departure from the words of the UK Act the interpretation needed to be.

p. 54 ↵ In ***CR Smith Glaziers (Dunfermline) Limited v Commissioners of Customs and Excise*** **([2003] UKHL 7)**, the House of Lords held that 'It was the duty of a UK court to construe a statute, so far as possible, in conformity with European law.' The case considered the construction of provisions adopted by the Commissioners which did not conform with the terms of the **Sixth VAT Directive (77/388)**. Accordingly, the CJEU held that it was necessary to adopt an alternative interpretation which did conform to it.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Two cases known *as* ***R v Secretary of State for Transport, ex parte Factortame Ltd*** **(C-213/89 and C-221/89)** are particularly important cases in respect of the supremacy of Community (EU) law. A party seeking to rely on Community (EU) law sought an interim injunction against the crown not to apply a disputed national regulation issued under a UK Act whilst the merits of the case were being referred to the CJEU. This was something not previously acceptable as courts could not set aside UK law. The House of Lords considered that if Community law rights are to be found to be directly enforceable in favour of the appellants those rights will prevail over the inconsistent national legislation, even if it has been passed later. It was said (obiter) that:

> This [**s 2(4)**] has precisely the same effect as if a section were incorporated into [the national statute] which in terms enacted that the provisions [of an Act] were to be without prejudice to the directly enforceable Community rights of nationals of any Member State of the EEC.

Upon the return of the procedural aspect from the Court of Justice, the House of Lords held that, if a national rule precludes a court from granting an interim relief, in order to determine whether there is a conflict between national law and Community (EU) law, the court must set aside that rule: in effect, to ignore national law. Lord Bridge considered that if the supremacy of Community law over the national law of Member States was not always inherent in the **EEC Treaty**, it was certainly well established in the jurisprudence of the CJEU long before the UK joined the Community. He concluded that under the terms of the **1972 Act** it has always been clear that it was the duty of a UK court to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Therefore, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases because it is no more than a logical recognition of supremacy.

In a 2005 case, ***R (Jackson) v Attorney General*** **([2005] UKHL 56)**, Lord Hope suggested that even an intentional or express repudiation of EU law might not be followed by the new Supreme Court and expressed the view that whilst Parliament did not actually say that it could not enact legislation which was in conflict with Community law, in practice his opinion was that was the effect of **s 2(1)** when read with **s 2(4)** of the **ECA 1972**.

p. 55

Conclusions

The view now of **s 2(4) ECA 1972** is that it is a direct rule to give priority, rather than a rule of construction. As far as the House of Lords is now concerned **s 2(4)** of the **ECA 1972** has led to the modification of the doctrine of parliamentary sovereignty because implied repeal of previous Acts of Parliament, as far as EU law obligations are concerned, would not be heeded by the courts. Indeed, in the ***Metric Martyrs*** case ***(Thoburn v Sunderland City Council*** **([2002] 1 CMLR 50))**, the High Court expressed the view that the **ECA 1972** had acquired a constitutional quality which prevented implied repeal. Whether this overrides the *dictum* in ***McCarthys Ltd v Smith*** **([1979] ICR 785)** is open to

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

question. It remains open for Parliament to expressly repeal the Act. In such a case the courts would of course have to observe this faithfully. Thus far, the **EU Act 2011** merely appears to confirm supremacy of EU law over the UK, albeit by virtue of the **ECA 1972** itself or by any other act which confirms it.

Looking for Extra Marks?

■ Whilst actually not changing the answer in any significant way, mentioning newer case law such as ***R (HS2 Action Alliance Ltd) v Secretary of State for* Transport ([2014] UKSC 3)**, would demonstrate that you are keeping up to date with case law.

■ If time and space, you could briefly contrast the position of the UK with the courts of other Member States to show that, judicially, the UK through the **ECA 1972** and case law on it has been able to recognise both the direct effects and supremacy of EU law.

Question 3

How have the courts of Member States, other than the UK, reacted to the Court of Justice's view on the supremacy of EU law?

Caution!

■ To be capable of answering this question, you must have at least taken account of the position in other Member States in your course on EU law. This is not always the case, or the depth of treatment may vary considerably.

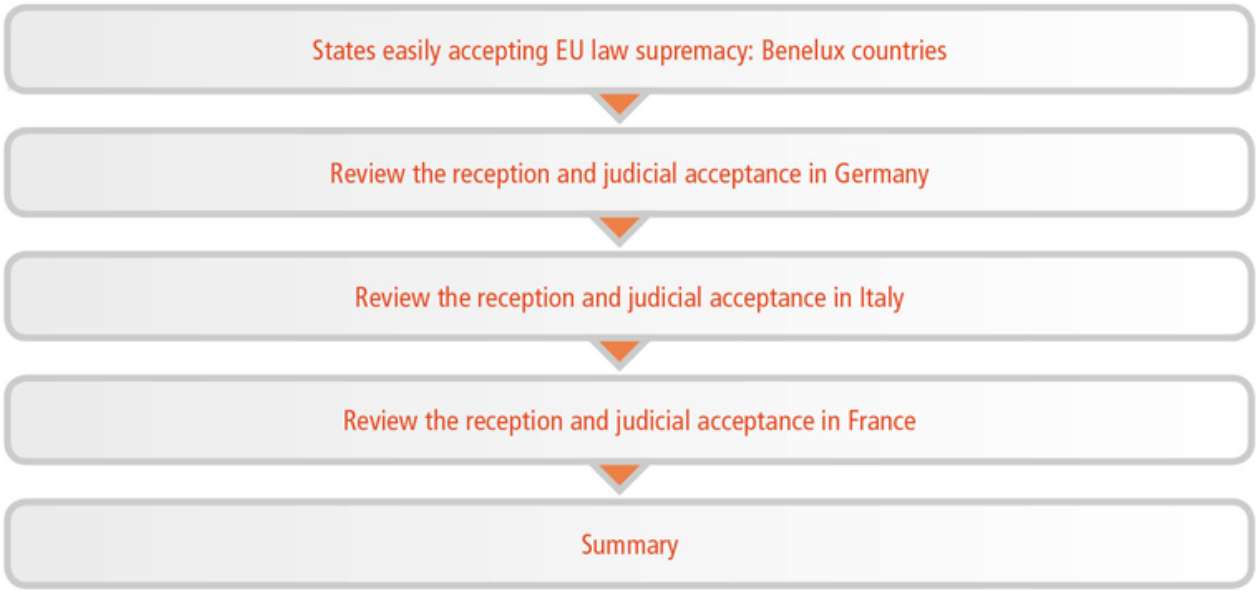
■ This is a dangerous question as it gives little guidance and allows free range so make sure you stick to answering the question.

■ Do not write just a small amount about a large number of states, better to do it the other way round.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

p. 56

Diagram Answer Plan



Suggested Answer[1]

[1] This question focuses on other Member States and how they have accommodated and accepted EU law.

EU law, of course, applies in all twenty-seven Member States and according to the CJEU is supreme over all laws in those states. EU law has not, though, been accepted on that understanding in all Member States.

States easily accepting EU law supremacy: Benelux countries[2]

[2] Choosing these countries is not dynamic but is a good way of setting the scene and contrasting with more controversial states if chosen.

A number of states have not experienced any problems so far; see e.g. Luxembourg, Netherlands, and Belgium.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

In Belgium, the constitution was amended to allow for the transfer of powers to institutions governed by international law (**Art 25a**). However, Belgium was a dualist country whereby later laws would prevail over earlier laws including international treaties if simply converted into national law. The courts in Belgium have no role in respect of judging the validity of international agreements but accepted Community (EU) law supremacy as if it were a monist country and not by dependence on a Belgium statute (see ***Minister for Economic Affairs v SA Fromagerie 'Le Ski'*** **([1972] CMLR 330)**). It was held that in the case of conflict between national law and the directly effective law of an international treaty, the latter would prevail, even if earlier in time.

Reception and judicial acceptance in Germany[3]

[3] The states which may have been chosen in EU law courses are often those whose courts may have been reluctant to accept EU law supremacy. Germany is a prime example.

In Germany, in contrast, some difficulties were experienced, especially in respect of the provision of fundamental rights in the German constitution (***Grundgesetz***) and in the Community (EU) legal order.

p. 57

Article 24 of the German constitution[4] allows for a transfer of powers and membership of international organisations and was used to establish membership of the European Communities. **Article 25** declares general rules of public international law to be an integral part of federal law and to take precedence over national law but it is silent as to the effect of international law on the German constitution.

[4] First, look at the Constitution to see how it regards non-domestic law.

The view of the Federal Constitutional Court (FCC)[5] is paramount because of its constitutional position in the German state.

[5] Then consider the judicial reaction, in particular of the Constitutional Courts in those countries which have such a body.

In the ***Wunsche Handelsgesellschaft decision*** **([1987] 3 CMLR 225)**, the Federal Constitutional Court accepted that Community recognition and safeguards of fundamental rights through the case law of the CJEU were sufficient and of a comparable nature to those provided for by the ***Grundgesetz***. Thus, as long as EU law ensures the effective provision of fundamental rights, the Federal Constitutional Court

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

will not review EU law. It also stated that it would not be prepared to accept constitutional complaints from lower courts on this basis. The basis for the decision is not, however, the inherent supremacy of EU law but the fact that **Art 24** of the ***Grundgesetz*** allowed a transfer of powers to the Union and the subsequent accession act obliges the German courts to accept the supremacy of EU law.

Following these cases there would seem to be no procedural difficulty in getting Union rights at least considered in the proper forum in Germany. Any court which refuses either to follow a previous ruling of the CJEU or make an **Art 267 TFEU** ruling may be subject to the review of the Federal Constitutional Court for an arbitrary breach of **Art 101(1)** of the ***Grundgesetz***.

The Federal Constitutional Court held in the ***Brunner*** case **([1994] 1 CMLR 57)** that the **German Accession Statute to the Treaty on European Union** was compatible with the German constitution and thus rejected claims that it was unconstitutional, although again there was a statement to the effect that a review function of the Constitutional Court would still be maintained to ensure Community (EU) law complied with the provision of fundamental rights. This was confirmed in **the *Lisbon Judgment* (2008)** by the same court. The 2010 ***Honeywell*** decision **(2 BvR 2661/06)** by the FCC, though, held that review could only be contemplated in the most obvious cases, and only after the CJEU had been given the chance to review the case by a reference from the Federal Constitutional Court only. The 2011 article by Pavendah and the 2013 article by Giegerich[6] give a very good overview of the mood swings by the Federal Constitutional Court and its attempt to play a review role over EU law.

[6] Cited in the 'Taking Things Further' section at the end of the chapter.

Reception and judicial acceptance in Italy[7]

[7] As with Germany, consider Italy in the same way as it is also a good state to choose.

In Italy the position both constitutionally and judicially was and is very similar to Germany. Both constitutions allowed a transfer of ↵ power to international organisations but were silent as to the effect on constitutional law (see **Art 11** of the **Italian Constitution**).

p. 58

As in Germany, the focus in Italy is on the Constitutional Court. Given that two of the leading cases on supremacy, ***Costa v ENEL* (6/64)** and ***Simmenthal* (92/78)**, arose from Italy, it should certainly have been clear to the Italian Constitutional Court what was expected of it. Again there has been a mixed reaction, also along the lines of the German Constitutional Court.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

In ***Granital SpA v Administrazione delle Finanze*** **((1984) 21 CML Rev 756–72)** the supremacy of Community (EU) law was accepted on the basis of an interpretation of **Art 11** of the **Italian Constitution** allowing for the limitation of sovereignty in favour of international organisations, and by reason of the case law of the CJEU. The case did, however, make the reservation that Italian law should only be cast aside where directly applicable Community (EU) law exists, similar in effect to the judgment of the House of Lords in the ***Duke*** case **([1988] AC 618)**.

A later decision in ***Fragd SpA v Amministrazione delle Finanze*** **((1990) 27 CML Rev 93–95)** suggests the Italian Constitutional Court is still prepared to review Community (EU) law in the light of the fundamental rights provision in the **Italian Constitution**. This stance was confirmed in ***Admenta v Federfarma*** **([2006] 2 CMLR 47)** in which the Italian State Council held that fundamental rights, as protected by Italian law, could not be reviewed in the light of EU law and were therefore to be reviewed exclusively in the light of Italian constitutional law.

Thus far, this remains the situation in Italy with the possibility for outright rejection of EU law supremacy.

Reception and judicial acceptance in France[8]

[8] And do the same for France which is also regarded as a problematic state.

The French courts are divided into two hierarchies with their own significantly different attitudes to EU law, despite the fact that both are subject to **Art 55** of the **French Constitution** which is monist and gives international law a rank above municipal law, but is silent as to the effect on the Constitution. This is the point that has led to discrepancies between hierarchies.

The courts of ordinary jurisdiction have felt no hesitation in making **Art 267 TFEU** references to the CJEU and giving supremacy to Community law on the basis of **Art 55** of the **Constitution**. The French Supreme Court of Ordinary Jurisdiction, the *Cour de Cassation*, has in fact gone further and found for the supremacy of Community (EU) law without direct reference to **Art 55** of the **Constitution** and more on the basis of the inherent supremacy and direct effects of Community (EU) law itself. See the ***Café Vabre*** case **([1975] 2 CMLR 336),** in which **Art 95 EEC (now 110 TFEU)** was ↵ held to prevail over a subsequent national statute. These rulings have been consistently followed by the lower courts and reference to either **Art 55** of the **Constitution** or even the decisions cited here is rarely made (see e.g. ***Garage Dehus Sarl v Bouche Distribution*** **([1984] 3 CMLR 452)**).

p. 59

The Supreme Administrative Court, the *Conseil d'État*, has from time to time completely denied the supremacy of Community (EU) law or the need to make reference to the CJEU, relying heavily on the French principle of law, known as the *acte clair* (see e.g. ***Minister of the Interior v Cohn-Bendit*** **([1980] 1 CMLR 543)**). The French court held individuals could not directly rely on Directives to challenge an administrative act. The court declined to follow previous CJEU rulings or make a reference itself.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

However, some cases have demonstrated a much more cooperative attitude on the part of the French administrative courts. In ***Nicolo* ([1990] 1 CMLR 173)**, the *Conseil d'État* reviewed the supremacy of international law including **EEC Treaty Articles** and held the latter to take precedence over subsequent national law, largely on the basis of **Art 55** of the **Constitution**. In ***Boisdet* ([1991] 1 CMLR 3)**, incompatible national law was declared invalid in the face of a Community (EU) Regulation. In doing so the *Conseil d'État* followed the case law of the CJEU. The ***Rothmans*** case **([1993] CMLR 253)** confirms the supremacy of Community (EU) Directives over subsequent national law and that public authorities cannot enforce the incompatible national law.

In ***Dangeville* ([1993] PL 535)**, the Paris Administrative Court of Appeal upheld the ruling of the CJEU in ***Francovich* (C-6 and 9/90)** and imposed a liability to pay damages for the failure to implement a Community (EU) Directive.

The **Treaty on European Union** has been declared compatible with the constitution after amendment to the constitution and has been ratified and thus takes priority over French national law (**Art 88**). As a result of that change the French Constitutional Court (**Decision 2004/496 of 10 June 2004**) has declared that it will no longer review Community (EU) law in the light of the Constitution, save in relation to express elements, which is taken to mean those protecting fundamental rights in a way similar to the German Constitutional Court.

However, despite the change to the Constitution and the rules more sympathetic to the supremacy of EU law, cases taking a less cooperative position are still being decided by the *Conseil d'État*. In ***Compagnie Generale des Eaux* (2009)**, the Court once again confirmed its earlier position of denying the direct effect of Directives when in conflict with a national administrative act.

p. 60

Summary

A consensus appears to be emerging from the national and constitutional courts that EU law supremacy is accepted only in so far as it does not infringe the individual rights protection of the national constitutions, in which case the Constitutional courts will exercise their reserved rights over national constitutions to uphold them over inconsistent EU law. The 2013 article by Komerek[9] takes a closer look at the position of some of the Constitutional courts in Member States. Only a few states appear to be accepting EU law unconditionally, such as Belgium. Whether this is a trend which will continue and lead to an outright rejection is, though, at this stage, unclear.

[9] Cited in the 'Taking Things Further' section at the end of the chapter.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Looking for Extra Marks?

■ Contrasting the position of the states chosen with the UK would be good, in particular by highlighting that a seemingly very reluctant state, the UK, despite having now left nevertheless had a good track record of acceptance, whereas Germany, an enthusiastic Member State, has had judicial difficulties with full acceptance.

■ Considering one or more of the later eastern European entrant states would be good, if covered in your course or module of EU law. Poland, Hungary, and the Czech Republic would be good candidates.

■ Considering one or more of the later Scandinavian states would be good, if covered in your course or module of EU law. Denmark, Finland, and Sweden would be good candidates.

Question 4

The transfer of power to the EU and control of competence in the EU is now firmly regulated by the Treaties following the Lisbon Treaty reforms.

Please discuss.

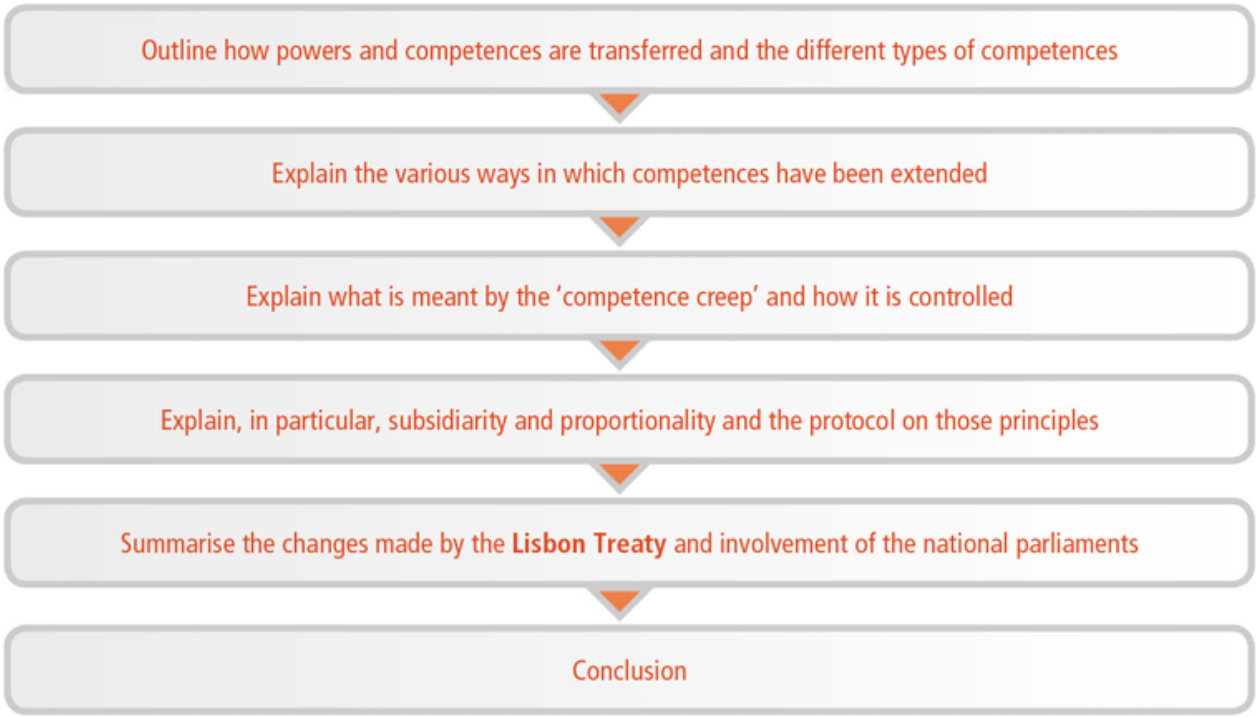
Caution!

■ There is a lot to this question so getting a good structure is key to getting a good mark.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

p. 61

Diagram Answer Plan



Suggested Answer[1]

[1] This question aims to get you to look at why and how powers and competences were transferred both before the **Lisbon Treaty** came into effect and following.

Introduction and the transfer of powers and competences

When the Union was first established,[2] to be able to achieve the goals set for it, the Member States had to pool their resources in the new entity and transfer some of their sovereign rights to the Union and its institutions. The Member States provided the competences for the Communities (Union) to make their own laws, a process as acknowledged by the CJEU in ***Van Gend en Loos***, but with the proviso that the power transfer or transfer of sovereignty was carried out only within limited fields. There was not a general transfer of power, which would include the ability to redefine competences without reference to any other body. The competences have grown hand in hand with the complexity of the Union and, whilst this transfer of competences should be a clear-cut process whereby any exercise of these powers by the institutions of the Union can only be within the terms granted by the Member

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

States, that has not been the case. Further, what is attributed to the Union by the Member States is necessarily removed from Member States' competence. In other words, the Member States no longer have competence in the fields transferred. Therefore, there has been growing concern about the extension of competences especially where these have not been express, hence the term 'competence creep'.

[2] You should start by looking at how powers were and are transferred from the Member States to the EU.

Division of competences[3]

[3] Then explain the meaning of competences and how they are divided into different types.

There is a division of the degree of competences transferred from exclusive to shared and complementary competences.

Exclusive

p. 62

The Union enjoys exclusive competences in a few areas only, such as commercial policy to third countries (as upheld by the CJEU in its ↵ **Opinion 1/75**), and parts of the Common Fishing Policy. These are now set out in **Art 3** of the **TFEU** and include customs union, competition policy for the internal market, monetary policy for the Eurozone, parts of the **Common Fisheries Policy**, and commercial policy.

Concurrent/shared

In other areas—that is, in most areas—the dividing line is not so clear and competence is shared or concurrent between the Member States and the Union. Following the Lisbon Treaty reforms, it is set out in **Art 4 TFEU**.

Complementary

Areas of law outside those exclusive and concurrent competences remain the competence of the Member States, although, following Lisbon, the Union may support or complement Member States' activities in these areas as sanctioned by a new **Art 6 TFEU**.

It is in the area of shared competences that most difficulties arise, where it can still be unclear whether the Union or the Member States have the competence for a particular action. Furthermore, the degree of sharing also alters according to the subject matter: e.g. in areas such as the internal

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

market, as soon as the Union acts under its competence, it assumes exclusive power to act and the Member States are then deprived of the power to act in conflict. If, however, the Union chooses not to act, the Member States retain the power to act. As a result, it is possible for there to be a genuine grey area between what is within the Union competence and what is still within the Member State competence.

This is a matter that has troubled the EU time and again, in particular as it became clear from the progressive judgments of the CJEU that the Community (and now Union) had taken over from the Member States even in areas to which the Member States were not sure they had agreed, or indeed to which they were of the conviction that they had not agreed, or even where they considered that they had excluded that particular matter from EU competence. As a result, there has been a reaction by some of the Member States.

The extension of competences: Treaty amendment[4]

[4] Next you should outline the ways in which competences have been extended (Treaty, reserve powers, and implied), and why they should be controlled.

The first of these ways, Treaty amendment, is deliberate and clear-cut. The areas of Union competence have expanded greatly as a result of the Member States assigning additional competences to the Union, with successive Treaties. The second and third ways are not express and have led to the use of the term 'competence creep' to describe the manner in which the institutions' competences have advanced incrementally.

Residual/general law-making powers

The second way by which competences have been expanded is via the residual or general law-making powers, which include both specific and general kinds.

p. 63 ↵ Specific residual powers are those that grant subsidiary law-making powers to complete goals in specific areas, in particular to complete the internal market. **Articles 114 and 115 TFEU** provide for the approximation of laws affecting the establishment or functioning of the internal market and measures for the completion of the internal market. **Article 114 TFEU** provides that to achieve the objectives of the internal market, set out in **Art 26 TFEU**, where powers are not otherwise provided by the Treaty, action can be taken by qualified majority voting (QMV). In other words, action can be taken outside of the express and exclusive granting of powers to the Union by a majority and not by the agreement of all of the Member States.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Article 115 TFEU is an exception to the powers granted in **Art 114**, which is a general power to enact harmonising legislation. It does, however, contain safety measures so that Member States and institutions do not go too far: the Council must act by unanimity and must consult only and not co-decide with the European Parliament (EP).

It has been held, though, by the CJEU that these Articles should not be used where other Articles are more appropriate.

The general kind of residual power is **Art 352 TFEU**, which provides that, where in furtherance of any of the objectives of the Treaty and where no specific power exists, the Union may act by means of the Council acting unanimously with the consent of the EP. Note that previously it was only necessary to consult the EP.

Implied

The exercise of implied powers is the third means of extending competences. This was recognised by the CJEU in cases dealing with both internal and external powers of the Commission, where, in the absence of express powers in the Treaty, powers are nevertheless required to achieve a Union goal and are thus implied. Furthermore, implied powers to carry out internal competences can also be used to support external powers, although no such external powers are provided in the Treaty. The CJEU confirmed the validity of implied powers in the Union legal order as early as in the ***Fedechar*** case **(8/55)** and in subsequent cases.

The ways the competence creep can be controlled[5]

[5] Particularly after the changes made by the **Lisbon Treaty**, the suggestion is that they are now firmly regulated, which suggests that they were not before.

The increase in the competences of the Union, without those not expressly sanctioned by the Treaties, has been increasingly criticised and challenged, including challenges before the Court of Justice[6] to some proposed and completed Community and Union actions, and more formally by amendments to the Treaties to try to curb this ↵ development. See the 2005 article by Weatherill[7] exactly on this dual topic of creep and control.

p. 64

[6] Cited in the ‘Taking Things Further’ section at the end of the chapter.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

[7] Address the control of the competence creep including the principles of subsidiarity and proportionality and the protocol to give guidance on how the principles should operate.

Restrictive drafting

Legal bases have been drafted restrictively so that the Commission cannot use the base for further legislative intervention. See e.g. **Art 168(5) TFEU**,[8] which provides for action to promote cooperation in public health matters, but 'excluding any harmonisation of the laws and regulations of the member states'.

[8] Providing a clear example is always good practice.

Subsidiarity and proportionality

The principle of subsidiarity requires that decisions be taken at the most appropriate level and, in the EU context, this focuses on whether a decision should be taken at the level of the Union or Member States. The wish to regulate activities within the Union should not insist on action at the Union level when it is not necessary. Essentially, it provides that the Union should take action only where objectives could be better attained at the Union level than at the level of individual Member States. It was subsequently introduced generally into the Union legal order by the TEU.

Article 1 of the **TEU** provides that decisions are to be taken as closely as possible to the citizen; **Art 5(1) TEU** provides that 'The use of Union competences is governed by the principles of subsidiarity and proportionality' and further provides in **Art 5(3) TEU** that:

> in areas which do not fall within its exclusive competence, the Union shall act, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Proportionality is also contained in **Art 5 TEU** and is linked to the subsidiarity principle, because both are concerned with the control and exercise of powers by the institutions.

Article 5(2) TEU provides: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

Like subsidiarity, it too is subject to **Protocol 2** and Union Acts are open to possible challenges if breaching proportionality.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Protocol on the principles and national parliaments' involvement[9]

[9] You should make clear what the revised Treaties actually provided in respect of the new division of powers including the involvement of national parliaments.

The Protocol requires the Commission to consult widely before formally proposing legislation and, in an amendment brought in by the **Lisbon Treaty**, its draft legislative Acts shall be forwarded to the national parliaments at the same time as to the EP and Council, and the Commission must accompany drafts with detailed statements as ↵ to how the proposal complies with the principles of subsidiarity and proportionality, and must provide evidential support to demonstrate that Union action is required and the general and financial impact of the proposed legislation.

p. 65

Articles 6 and **7 TEU** further outline the Council members' national parliaments' ability to object to the proposal and the procedure involving how those objections are further considered by the Union institutions in the legislative processes, and how the Commission must issue a reasoned opinion if it wishes to maintain the proposal for further consideration in the legislative process. All in all, it is quite a convoluted process. As a last resort under **Art 8** of the **Protocol**, legislative Acts may be challenged under **Art 263 TFEU** for infringing the principle.

Challenges for non-compliance with the principles[10]

[10] Most important is considering any case law which has visited these issues and in particular considered subsidiarity or proportionality.

In ***UK v Council (Working Time Directive)*** **(Case C-84/94)** and ***Netherlands v European Parliament and Council (Biotechnology Directive)*** **(Case C-377/98)**, arguments raised by the Member States in the cases that subsidiarity had not been observed were roundly rejected by the Court of Justice. In the ***Working Time Directive*** case, the CJEU dismissed this part of the action with little discussion, merely to confirm that the Council had a clear power to act on working hours as an issue of the health and safety of workers. In other words, if it had the competence to act, it could not be prevented from acting.

However, in ***Germany v Parliament and Council (Tobacco Advertising Ban Directive)*** **(Case C-376/98)**, the harmonising **Directive 98/43/EEC** banning most forms of tobacco advertising was enacted under what was then **Art 95 EC (now Art 114 TFEU)** as an internal market measure. This was challenged by Germany, who argued that the measure was more closely allied to a public health measure and, thus, should have been enacted under the then **Art 152 EC (now Art 168 TFEU)**, which expressly prohibited harmonising legislation. The CJEU held that measures under (the then) **Art 95** must have the primary

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

object of improving conditions for the establishment or functioning of the internal market and that other Articles of the Treaty may not be used as a legal basis in order to circumvent the express exclusion of harmonisation. It held further that to construe the internal market Article as meaning that it vests in the Union legislature a general power to regulate the internal market would be incompatible with the principle embodied in (the then) **Art 5 EC** that the powers of the Union are limited to those specifically conferred upon it. The CJEU thus held that, as a measure doing little to enhance the internal market, the use of the legal market Treaty base was inappropriate and it therefore annulled the measure entirely.

p. 66

↵ The judgments are not a clear endorsement that subsidiarity is a clearly justiciable issue; more that it is another confirmation that where an incorrect legal base is used, or where no powers have in fact been conferred, this provides grounds for the annulment of the measure. The tobacco judgment is regarded as a reply to national courts, in particular the German Constitutional Court, which might have been minded to take Union law into its own hands, by showing that the CJEU is prepared to police incursions into the Member States' competences by the EU's institutions. In the 2012 article by Horsley,[11] a closer look at how the CJEU viewed the attempt by Member States to challenge EU law on the grounds of a breach of subsidiarity is taken.

[11] Cited in the 'Taking Things Further' section at the end of the chapter.

Proportionality was raised in ***UK v Council (Working Time Directive)*** **(Case 84/94)** by the UK under the argument that the restrictions imposed on working time were not minimum requirements, but were excessive—that is, disproportionate. This view was rejected by the CJEU on the grounds that unless there had been a manifest error or misuse of powers, the Council must be allowed to exercise its discretion in law-making involving social policy choices.

Finally, in the attempt to counter the competence creep, the **Lisbon Treaty** has introduced a new requirement in **Art 296 TFEU** that relates to the competence and legal base issues, and states that: 'When considering draft legislative acts, the EP and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.'

Summary

The changes made by the **Lisbon Treaty** include a clearer division of competences, a revised Protocol on subsidiarity and proportionality, and involving the national parliaments in EU law-making. So whilst there is greater Treaty regulation, legal challenges for a breach of subsidiarity or proportionality will remain difficult to win in view of the complexity of those principles and the degree of discretion enjoyed by the EU institutions.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Looking for Extra Marks?

■ Better candidates will indicate that the case law has shown that legal challenges have actually not been very effective in trying to get to grips with the protocol on subsidiarity and proportionality.

■ Discussing the involvement of national parliaments and whether their participation is helpful would be beneficial. You could note that they have intervened only rarely, and with limited success; for example, the Commission proposal for a Posted Workers Directive was objected to by two national parliaments. The Commission subsequently amended the proposal and a watered-down version (Directive 2014/67) was adopted. The Commission Proposal to establish a European Prosecutor's Office was opposed by fourteen national parliaments, yet the Commission elected to proceed.

p. 67

Question 5

Article 50 TEU is the Treaty article which facilitates the withdrawal of a member state from the EU but does little to clarify exactly how this should be done, nor indeed the timescale, or possible revocation.

Analyse Art 50 in the light of these comments and with the experience of 'Brexit'.

Caution!

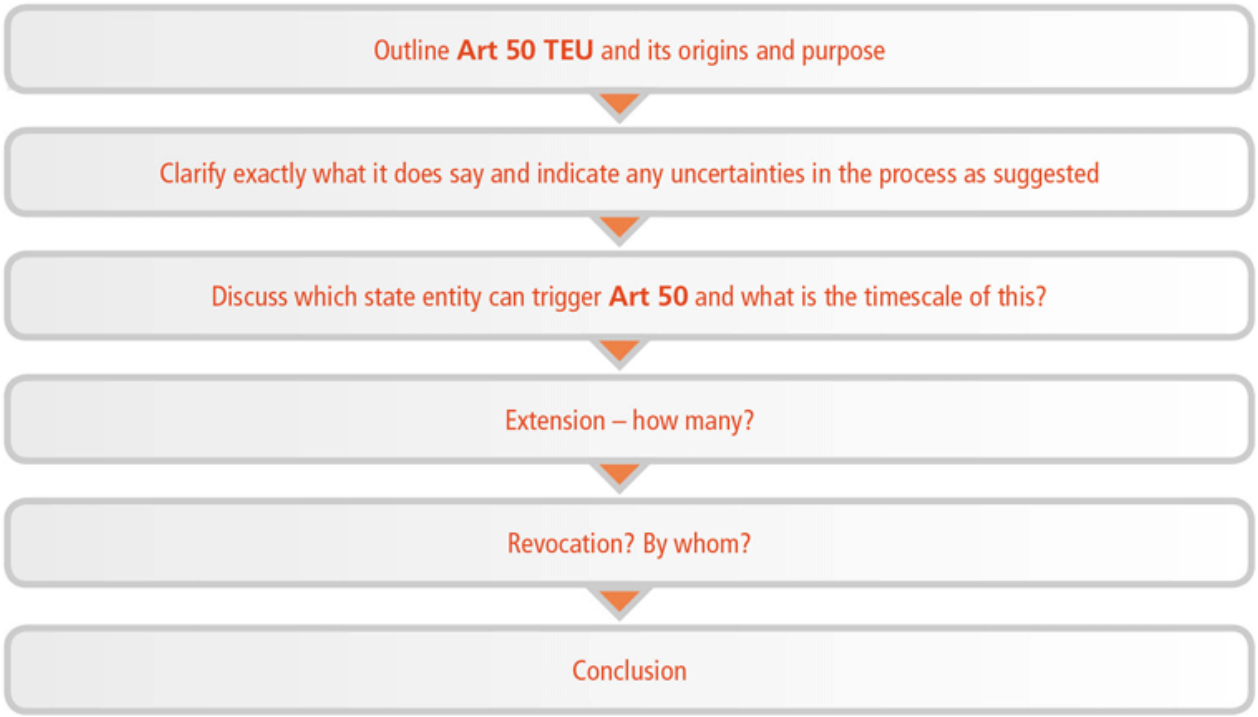
■ Avoid a distinctly political discussion of this question.

■ This question is not about the Referendum in 2016 nor the result of that, which, although it was the catalyst for the decision to trigger **Art 50 TEU**, it is not the focus of the question.

■ Try to achieve a balance of coverage of the various elements in your answer and do not stray into the political events which surrounded the reasons why the UK chose to trigger **Art 50 TEU**.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Diagram Answer Plan



Suggested Answer

Article 50 TEU[1]

[1] The obvious starting point is to explain what **Article 50** is all about.

Article 50 TEU provides for a formal process by which a Member State is able to leave the EU. Prior to 2009, there was no EU Treaty Article facilitating the exit of a Member State. However, **Art 50 TEU** now provides that following a two-year negotiation period to agree ↵ the terms of withdrawal, the Member State will exit. **Article 50 TEU** is thus a procedural device as to how the withdrawal be conducted.

p. 68

Prior comments attached to the **Constitutional Treaty** about **Art 1-59**, as the exit clause was then numbered, indicate that the inclusion of an exit clause was a political compromise demonstrating that the EU was not an inescapable and rigid entity. The **Constitutional Treaty** was abandoned but the exit clause was carried forward, unaltered, to the **2009 Lisbon Treaty** as **Art 50 TEU**.[2]

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

[2] I do not always advocate re-producing the text of Treaty Articles, but Art 50 extracts can be quite short so you could do so. It makes it easier to refer to but is not crucial to the answer. This assumes you are permitted to take a copy of EU law legislation into the exam.

> Article 50
>
> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention ...
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

With regard to paragraph one of **Art 50**, the constitutional process in the UK was that a referendum was held in June 2016 and the UK government committed itself to honour the result although it was not constitutionally bound to do that.[3]

[3] There is no need to go into any further detail on this point.

There are a couple of things to mention about **Art 50** itself before moving on to discuss the process and the complications in the light of the UK triggering **Art 50**. The first is that the Article merely sets out the procedurally requirement to start the withdrawal from the EU. This is achieved by the Member State formally notifying the European Council of its intention to withdraw from the EU. So whilst **Art 50 (2)** provides that the state shall notify the European Council it makes no mention of the timing, so that lies entirely in the hands of the withdrawing Member State. So that is the first uncertainty created by the lack of clarity in the Article itself. This was not clarified in the UK exit process. The UK took about nine months to give that notification after being delayed by a court case.

After a state notifies its intention to exit, a two-year period starts in which the arrangements to withdrawal are negotiated and agreed, although in the UK a dispute arose as to which part of the state was empowered to decide and trigger **Art 50**.

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

Whose right was it in the UK to trigger Article 50?

Initially it was the clear intention and claimed right that the Government as represented by the Prime Minister was the most appropriate constitutional body to notify the European Council under **Art 50**. This was challenged by a number of individuals before the High Court, which was appealed up to the Supreme Court in the case ↵ of ***Miller v Secretary of State for Exiting the European Union*** **([2017] UKSC 5)**. They argued that it was for Parliament to sanction this and not just for the Prime Minister, Cabinet, or Government alone. The Supreme Court was asked to determine which part of the UK constitutional machinery should lead the way in starting the formal exit process with the EU: whether the Government, led, of course, by the Prime Minister and other Ministers involved in the withdrawal process, had the right to invoke **Article 50 TEU**, or, alternatively, whether that right belonged to the UK Parliament.

p. 69

The Government argued that the ministers of the Government had the right under the Royal Prerogative[4] to withdraw from the international Treaties including the treaties providing for membership of the EU and that the **European Communities Act of 1972 (ECA 1972)** did nothing to undermine this right to withdraw. It could therefore trigger **Art 50 TEU** without the need to consult Parliament or obtain Parliament's prior approval.

[4] It would be best here to outline what the Royal Prerogative is to understand why that was claimed by the Prime Minister and Government ministers.

The Royal Prerogative refers to the vestigial powers of the Crown relating to the conduct of foreign relations and which are exercised by Government ministers on behalf of the Crown. Typical of such foreign relations would be the negotiation, conclusion, and termination of international agreements with other countries or withdrawal from them. However, this has to be tempered or subject to the understanding that where such relations impact on the internal law of the UK or alter or impinge on the rights of the citizens of the UK, the matter is no longer purely a matter of foreign relations and thus falls outside the ambit of the Royal Prerogative. The consequence is that the right falls squarely within the powers and rights of Parliament. The Government further argued that the result of the decisive referendum committed the Government to withdraw and thus it was not required to defer to the House of Commons or Parliament, for approval, permission or even opinion before taking the decision and actually triggering **Art 50**.

The counterarguments of Miller and others were that denying the UK Parliament a vote was undemocratic and a breach of long-standing constitutional principles, because of the well-established rule that prerogative powers may not extend to acts which result in a change to UK domestic law. They argued that withdrawal from the EU Treaties would change domestic law and therefore the Government could not serve notice under **Art 50 TEU** unless first authorised to do so by an Act of Parliament. The Supreme Court agreed that the Royal Prerogative could not apply to allow

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

the Government or the Prime Minister or other ministers to trigger **Art 50** alone because of the profound effects on UK domestic law and UK citizens' rights that withdrawal from the EU will have. Therefore it held the Government cannot trigger **Art 50** without an Act of Parliament authorising it

p. 70 ↵ to do so. The Government accepted the judgment and immediately brought the matter to Parliament, which passed the **European Union (Notification of Withdrawal) Act 2017** which gave the Prime Minister the power necessary to notify the European Council of the UK's intention to withdraw from the European Union, which was done on 29th March 2017.

Whilst the decision in the case applies only to the UK, other countries can take note that it is for each state to decide this in conformity with their own constitutional requirements.

Article 50 (3) states that following notification, the Treaties will no longer apply after a maximum two-year period. This brings in the next point about which **Art 50** is not fully explicit.

The possible extensions of the Article 50 Period

The negotiation period for withdrawal can, however, be extended as **Art 50 (3)** states that the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. Article 50 TEU is silent as to the number of requests that can be made or indeed as to how long each extension may be. Even from the start of UK negotiations, it was speculated whether the two years would prove long enough. This proved to be accurate as on two occasions the UK asked for an extension.[5]

[5] Whilst the difficulties that were experienced in getting Parliamentary approval in the UK for the withdrawal agreement dominated news for many months and were the reason for extension applications, to include discussion here would be to lose focus on answering the question set.

The granting of these proved not to be controversial and both requests were agreed with the European Council with little fuss. The final and perhaps most controversial unclear aspect of Art 50 is the next to be covered here.

Is revocation of Article 50 TEU possible?

In fact this question was dual faceted. Article 50 itself is silent on this, hence there was considerable speculation, not only on whether Art 50 could be withdrawn or revoked, but also by whom? Is this just the Member State alone which invoked it in the first place but for whatever reason has changed its mind, in other words a unilateral revocation, or can it be revoked only by the Member State with the agreement of all other Member States and the EU institutions? A lot of opinion considered that the latter was the correct conclusion. There was a CJEU ruling on these very questions which might be of very important general future interest. ***Wightman and Others v Secretary of State for Exiting the European Union* (Case C-621/18)** decided both these matters. The Commission argued revocation was

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

possible but not unilaterally, which would be an abuse of Art 50. Thus the unanimous consent of the European Council would be required. The CJEU held that a Member State which decides to withdraw notifies the European Council of its 'intention' and went on to clarify that an intention is, by its nature, neither definitive nor irrevocable. ↵ Thus it concluded that any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. It follows that the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. Thus prior to the expiry of the Art 50 period or periods a Member State can revoke its notification, and, indeed, unilaterally.

p. 71

Concluding remarks[6]

[6] Here simply address the question and do not introduce or discuss peripheral or general issues relating to the topic.

Article 50, on the face of it, is short, sharp, and to the point. It tells us how a Member State may initiate the process of exiting the EU. It does not though tell us much detail about this, particularly with regard to which part of a state may sanction notification, whether more than one period of extension under Art 50 may be agreed, and most importantly, whether an Art 50 notification to withdraw could be withrdrawn and if so, by whom: just the exiting state alone or only with the agreement of the remaining states in the European Council? If nothing else, the experience of the Brexit withdrawal has clarified these points.

Looking for Extra Marks?

■ If you have enough time, you could briefly clarify that the Art 50 periods concern only withdrawal terms and not the possible future relationship.

■ Again if you have time, you could consider the issue of admissibility in the Wightman case.

Taking Things Further

■Avbelj, M, 'Supremacy or Primacy of EU Law—(Why) Does it Matter?' (2011) 17 ELJ 744.

A general view on the supremacy of EU law.

■Craig, P, 'Britain in the European Union' in Jowell, J and Oliver, D (eds), *The Changing Constitution*, 6th edn (Oxford: Oxford University Press, 2007).

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

A view on the UK acceptance of EU law.

■Dashwood, A, 'The Relationship between the Member States and the European Union/European Community' (2004) 41 CML Rev 355–81.

Although a bit dated now, this article does discuss the overall picture rather than concentrate on one Member State and its relationship with EU law.

■Gaja, G, 'New Developments in a Continuing Story: The Relationship between EC Law and Italian Law' (1990) 27 CML Rev 83.

A view on Italian acceptance of EU law.

p. 72 ↵ ■Giegerich, T, 'The German Federal Constitutional Court's Misguided Attempts to Guard the European Guardians in Luxembourg and Strasbourg' (2013) 1232 Der Staat im Recht, 49.

Looking at the attempts by the FCC to conduct an oversight over EU legislation.

■Horsley, T, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Puzzle' (2012) 50 JCMS 267.

A closer look at how the CJEU viewed the attempt by Member States to challenge EU law on the grounds of a breach of subsidiarity.

■Komerek, J, 'The Place of Constitutional Courts in the EU' (2013) 9 ECL Rev 420.

Looking at the trend of Constitutional courts to take a closer interest in EU law supremacy.

■Manin, P, 'The *Nicolo* Case of the *Conseil d'État*: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute Law' (1991) 28 CML Rev 499.

A view on French acceptance of EU law.

■Payandeh, M, 'Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 CML Rev 9.

A view on German acceptance of EU law.

■Weatherill, S. 'Competence Creep and Competence Control' (2005) 24 YEL 1.

Doing exactly what it says on the tin.

Online Resources

www.oup.com/uk/qanda/ *<http://www.oup.com/uk/qanda/>*

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025

For extra essay and problem questions *<https://iws.oupsupport.com/ebook/access/content/eu-qanda3e-resources/eu-qanda3e-chapter-4-extra-questions?options=name>* on this topic and guidance on how to approach them, as well as further reading suggestions on Brexit, please visit the online resources.

© Oxford University Press 2020

Related Books

View the Essential Cases in EU law

Related Links

Visit the online resources for this title *<https://oup-arc.com/access/eu-qanda3e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198853190>*

Printed from Oxford Law Trove. Under the terms of the licence agreement, an individual user may print out a single article for personal use (for details see Privacy Policy and Legal Notice).
Subscriber: University of Durham; date: 29 May 2025